

Environmental
CRIMINAL
LIABILITY
in the United States

A HANDBOOK FOR THE MARINE INDUSTRY

**Chamber of Shipping of America
1730 M Street, NW, Suite 407
Washington, DC 20036-4517**

**Prepared by:
Venable, Baetjier, Howard & Civiletti, LLP**

Acknowledgment

The Chamber of Shipping of America wishes to thank the attorneys at Venable, Baetjier, Howard & Civiletti, LLP, Washington, DC for their work on this handbook. We especially want to recognize the efforts of David G. Dickman and Judson W. Starr of Venable for their dedication to this project from its inception. Their background and experience representing clients, particularly those in the marine industry, on all issues involving environmental criminal law in the United States is evident in the information found in this handbook. We would also like to thank the attorneys with Burke & Parsons, New York for providing their expertise on environmental, maritime and admiralty law for this project. Finally, we also want to thank the members of the Chamber's project team and the attorneys at Preston Gates Ellis & Rouvelas Meeds who reviewed the final draft.

Library of Congress Card Number: 00-106049

ISBN: 0-9702752-0-X

Published: September 2000

All Rights Reserved
Copyright © 2000

Published in the United States of America

FORWARD

The Chamber of Shipping of America is an organization of owners, operators and charterers of U.S. and foreign-flag sea-going vessels. Among its representational duties, the Chamber recognizes the obligation to seek the highest levels of safety and protection of the environment.

When the members of the Chamber of Shipping of America undertook this project to develop a marine environmental criminal liability handbook, it was with both reluctance and resolve. Reluctance stemmed from the belief that normal practices in our industry, many mandated by international agreement and domestic rules and regulations, should not lead to concerns with criminal liability; resolve because actions by some government agencies, including federal, state and local, dictate that the ship owners, mariners, charterers, brokers and others involved in our industry have some guidance. Any industry has individuals who, if not deliberately breaking laws, take questionable actions so that a criminal violation is probable at some time. Government action and resources, directed at those individuals, are applauded. The criminal net should not be so constructed, however, as to criminally involve those in our industry engaged in normal practices.

Those involved in shoreside management, including Board members, CEO's, upper management, operational staff and in-house counsel, will benefit from this handbook. It is important to recognize that employees directly involved in running the fleet are in a position to affect a company's corporate criminal liability. Careful thought should be given to including aspects addressed in this handbook in training programs for those employees.

Senior management afloat, including Masters, Chief Engineers and Chief Mates, will also benefit from a review of this handbook. The senior personnel aboard the vessel may be the first to experience the effects of a criminal investigation.

Knowing your civil and criminal rights is a prudent and necessary precaution in our industry today. Be assured those referred to above who knowingly violate laws are aware of their rights! If you have any comments or suggestions about this handbook, we would be pleased to hear from you. If any parts of the handbook or the whole of it cause you concern about the conduct of your business, we strongly urge you to contact your counsel. Preparation and knowledge are your protections.

Joseph J. Cox
President
Chamber of Shipping of America

DETAILED TABLE OF CONTENTS

HOW TO USE THIS MANUAL	1
THE INTENDED AUDIENCE	1
This Manual	1
Quick-Reference Cards	1
TIPS ON USING THIS MANUAL	2
CUSTOMIZING THESE MATERIALS FOR YOUR COMPANY	2
INTRODUCTION: THE STAKES ARE HIGH	3
PENALTIES AND COLLATERAL CONSEQUENCES CAN BE DEVASTATING	3
FINES	3
Jail Time	4
Plea Agreement and Probation Conditions	4
Loss of Government Contracts and Subsidies	4
Permit Revocation	5
Securities and Exchange Commission Disclosures	6
Impacts on Oil Spill Limits of Liability	6
Impacts on Insurance Coverage	7
Tax Liabilities	8
WHO IS LIABLE	8
Corporation Liability	8
Corporate Officer and Individual Liability	8
Inferred Knowledge	9
Willful Blindness	9
Responsible Corporate Officer	9
THE GOVERNMENT HAS A DISTINCT ADVANTAGE IF YOU ARE NOT PREPARED	10
CHAPTER 1: ENFORCEMENT OF ENVIRONMENTAL LAWS IN THE UNITED STATES	11
ENFORCEMENT AGENCIES AND PROSECUTORS HAVE SUBSTANTIAL DISCRETION IN DETERMINING WHETHER POLLUTION INCIDENTS WILL BE CRIMINALLY PROSECUTED	11
Intent Standard	12
Negligence	13
Strict Liability	13
ENVIRONMENTAL ENFORCEMENT EFFORTS CONTINUE TO INCREASE	14
Increasing Emphasis	14
Coast Guard	14
Environmental Protection Agency (EPA)	14
Department of Justice (DOJ)	14
State and Local Resources	15
Better Coordination	15
Task Forces	15
Government Databases	15
Enforcement Trends	16
Agency Criminal Case Selection Guidelines	16
EPA	17
Coast Guard	17
Department of Justice	18
Enforcement of Environmental Violations Is Based on Ambiguous Standards	19
Joint Criminal and Civil Enforcement	20
UNITED STATES MARITIME JURISDICTION	20
Territorial Sea	20
Contiguous Zone	22
Exclusive Economic Zone (EEZ)	23

Navigable Waters of the United States.....	24
MARINE CASUALTY AND OTHER ADMINISTRATIVE INVESTIGATIONS	25
Coast Guard Investigations.....	25
National Transportation Safety Board Investigation.....	26
Pollution Investigations	26
Natural Resource Damage Assessments.....	27
CRIMINAL INVESTIGATIONS	28
Unannounced Government Interviews.....	28
Grand Jury Investigations.....	28
GOVERNMENT SEARCHES AND VESSEL BOARDINGS	29
Constitutional Requirements for Searches.....	29
Search Warrants.....	30
Warrant Myths and Facts.....	30
Some Basics on Searches	32
Agencies Involved	32
Administrative Inspections or Searches.....	33
Consent to Search	34
Vessel Boardings.....	34
Coast Guard Authority.....	35
Exigent Circumstances.....	35
Consent to Search	36
Plain View.....	36
Regulatory Compliance Boardings	37
International Law.....	37
The United Nations Convention on the Law of the Sea	37
Flag State Consent	38
Hot Pursuit.....	38
Port State Control Boardings.....	38
CHAPTER 2: PREPARING FOR THE WORST CASE SCENARIO	41
PLANNING FOR THE FIRST CRITICAL HOURS.....	41
Reporting of Pollution Incidents and Marine Casualties.....	42
Clean Water Act	42
MARPOL.....	42
Marine Casualties	43
Hazardous Conditions.....	43
Company Reporting Procedures.....	43
Legal Representation During an Investigation	44
In-House vs. Outside Counsel	44
Getting Criminal Counsel Involved Early	45
Criminal and Civil Attorneys.....	45
Specific Civil Litigation Issues.....	46
Representation of Employees	47
When Separate Counsel Is Needed	47
Arranging for and Paying Separate Counsel	47
Advantages of Separate Counsel.....	48
Insurance	49
Response Issues.....	50
Media Relations	51
EMPLOYEE TRAINING.....	52
Preparing Employees for Government Contacts	53
Disseminate Written Advice.....	53
Take Time to Train.....	54
Incorporate Investigation Scenarios Into Spill Drills and/or Hold Mock Inspection or Searches.....	55
CHAPTER 3: HANDLING A GOVERNMENT INVESTIGATION ON-SCENE.....	57
DEALING WITH THE ON-SCENE GOVERNMENT INVESTIGATION OF AN OIL SPILL OR OTHER MARINE	
POLLUTION INCIDENT	57
Searches of Vessels.....	57

Rights of Parties/Witnesses	59
General.....	60
Fifth Amendment Rights.....	60
Marine Casualty Investigations.....	61
Subpoenas and Government Requests for Vessel Documents.....	63

CHAPTER 4: PROTECTING THE COMPANY DURING THE GOVERNMENT INVESTIGATION 65

SEARCHES OF COMPANY FACILITIES OR OFFICES UNDER A SEARCH WARRANT	65
Protecting Rights	65
Prepare for the Prospect.....	66
Be Professional at All Times.....	66
Contact Company Attorney(s).....	66
Obtain, Copy, and Review the Warrant.....	66
Marshal Your Resources.....	67
Instruct Employees Carefully.....	67
Accompany the Government During the Search.....	67
Exercise Specific Rights during the Search As Needed.....	68
Ask to Meet with Investigators at the End of the Search.....	69
Tracking Evidence	69
Gather Basic Information at the Outset.....	69
Obtain Samples as Needed.....	70
Obtain an Inventory of Seized Items.....	70
Preventing "Add-On" Allegations	71
GOVERNMENT INTERVIEWS	72
Some Basics on Interviews	72
Protecting Rights	72
Employee Rights vis-a-vis the Government.....	72
Employee Rights vis-a-vis the Company.....	74
Tracking Evidence	77
Identifying Persons Interviewed.....	77
Debriefing Persons Interviewed.....	77
Dealing with Union Employees.....	78
Preventing "Add-On" Allegations	78
SUBPOENAS FOR DOCUMENTS	80
Some Basics on Document Subpoenas	80
Who Can Issue Subpoenas.....	80
Receiving Service.....	81
Timing of Production.....	81
Contacting the Issuing Authority.....	82
Administrative Information Demands.....	82
Protecting Rights	83
Motions to Quash.....	83
Custodian of Records.....	83
Written Search Protocols.....	84
Scope of Subpoena Requests.....	84
Privileged Materials.....	84
Tracking Evidence	85
Identify <u>All</u> Sources of Responsive Documents.....	85
Circulate the Subpoena with Clarifying Instructions.....	85
Follow up with Individuals in Person.....	85
Require Individuals to Certify Their Efforts.....	86
Track the Source of Documents Produced.....	86
Bates Stamp Responsive Documents and Create a Thorough Index of Documents Produced.....	86
Consider a Document Management Software Package.....	86
Reproduce Extra Sets of Documents.....	87
Re-circulate the Subpoena with Clarifying Instructions.....	87
Keep a Complete Record of Your Production.....	87
Preventing "Add-On" Allegations	88

CHAPTER 5: ONGOING ISSUES IN A CRIMINAL INVESTIGATION	89
STRUCTURING AN INTERNAL INVESTIGATION	90
Initial Stages	90
Scope of Investigation	90
Protecting Investigation Results	91
Establish Attorney Supervision	91
Limit Circulation	91
Label Communications Clearly	92
Handle Witness Interviews Carefully	93
Assume the Worst	93
GATHERING ALL OF THE PERTINENT EVIDENCE	94
Procedural Suggestions	94
Document Collection	94
Interviewing Witnesses	96
Sampling and Testing	97
Substantive Tips	98
Level of Culpability	98
Potential Statutory and Regulatory Defenses	99
Company Response to Compliance Problems	99
Gravity of Harm	100
TAKING CORRECTIVE ACTION	101
Improving Compliance Measures	101
Implement Realistic Measures	101
Interpret Legal Requirements Carefully	102
Consider Involving the Prosecutor	102
Disciplining Employees	102
DEALING WITH PERSONS REPRESENTED BY SEPARATE COUNSEL	103
Handling a Joint Defense	103
Pros and Cons of a Joint Defense Agreement	103
Elements of a Joint Defense Agreement	103
ANTICIPATING ISSUES PRESENTED BY PARALLEL PROCEEDINGS AND OTHER COLLATERAL CONSEQUENCES	104
Simultaneous Parallel Proceedings	104
Civil Discovery in Criminal Cases	105
Fifth Amendment Privilege	105
Potential Solutions	106
Successive Proceedings	106
Double Jeopardy	107
Federal Overfiling	107
Claim/Issue Preclusion	108
Global Settlements	108
CHAPTER 6: AN EFFECTIVE COMPLIANCE PROGRAM IS A COMPANY'S BEST DEFENSE	111
THE IMPORTANCE OF HAVING AN EFFECTIVE COMPLIANCE PROGRAM UNDER U.S. CRIMINAL ENFORCEMENT PROGRAMS	111
The 1999 Deputy Attorney General's Memorandum	112
Environmental Compliance Programs and the Federal Sentencing Guidelines	113
GENERAL BENEFITS OF AN EFFECTIVE ENVIRONMENTAL COMPLIANCE PROGRAM	114
WHAT CONSTITUTES AN EFFECTIVE ENVIRONMENTAL COMPLIANCE PROGRAM	115
ISM Code	115
ISO 14001	117
The Sentencing Guidelines for Organizations	117
EPA's Environmental Management System (EMS) Guidance	118
Is Your Compliance Program "Effective"	118
ENVIRONMENTAL AUDITS AND VOLUNTARY DISCLOSURE	119
Issues Involving Environmental Auditing	120
ISM Code	120
State Audit Privileges	121
EPA's Voluntary Disclosure Program	122

DOJ's Voluntary Disclosure Program	124
Related State Programs	125
Penalty Reductions	125
EPA Leverage	125
TIPS FOR KEEPING CORPORATE COMPLIANCE COMMUNICATIONS PRIVILEGED	126
Protections Available.....	126
Attorney-Client Privilege	126
Work Product Doctrine	127
Self-Evaluative Privilege	127
How to Maximize Protection of Documents.....	128
Establish Attorney Supervision	128
Limit Circulation	129
Label Communications Clearly	130
Segregate Discrete Projects	130
Assume All Documents Will Ultimately Be Disclosed.....	130
APPENDIX I: QUICK-REFERENCE CARDS (SAMPLES)	131
RESPONDING TO GOVERNMENT INTERVIEWS (RIGHTS OF SHIP'S OFFICERS AND CREWMEMBERS)	132
RESPONDING TO GOVERNMENT INTERVIEWS (EMPLOYEE RIGHTS)	133
RESPONDING TO GOVERNMENT INSPECTIONS AND SEARCHES OF COMPANY OFFICES, TERMINALS OR FACILITIES (PROCEDURES FOR SECURITY AND RECEPTION PERSONNEL)	134
RESPONDING TO GOVERNMENT INSPECTIONS AND SEARCHES OF COMPANY OFFICES, TERMINALS OR FACILITIES (PROCEDURES FOR DESIGNATED ESCORTS)	135
RESPONDING TO GOVERNMENT INSPECTIONS AND SEARCHES (PROCEDURES FOR VESSEL OFFICERS)	137
APPENDIX II: GOVERNMENT CONTACTS.....	139
U.S. COAST GUARD	139
U.S. Coast Guard Headquarters	139
U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA).....	141
EPA Voluntary Disclosure Board.....	141
Office of Enforcement and Compliance Assurance (OECA).....	141
EPA Regulatory Program Offices	143
U.S. DEPARTMENT OF JUSTICE	144
Environmental Crimes Section (ECS).....	144
Environmental Enforcement Section	144
U.S. Attorneys' Offices	144
OTHER FEDERAL AGENCIES INVOLVED IN ENVIRONMENTAL ENFORCEMENT	145
Federal Bureau of Investigation (FBI)	145
U.S. Army Corps of Engineers	145
U.S. Department of Transportation	145
U.S. Department of Interior	146
U.S. Department of Defense, Environmental Security.....	146
STATE ENVIRONMENTAL AGENCIES	146
APPENDIX III – EXAMINING ENVIRONMENTAL COMPLIANCE AND MANAGEMENT PROGRAMS	155
ESTABLISHING AND MANAGING THE PROGRAM	155
PERSONNEL AND TRAINING	156
AUDITING AND REPORTING	157
DEALING WITH DISCREPANCIES	157
REEVALUATING THE PROGRAM.....	158
APPENDIX IV - LISTING OF STATE ENVIRONMENTAL AUDIT PRIVILEGES OR IMMUNITIES LAWS.....	159

HOW TO USE THIS MANUAL

This manual is a primer on how a company can prepare for, and protect its legal rights during, a government investigation into possible violations of environmental law as a result of oil spills or other incidents involving the marine industry. Federal, state and/or local government enforcement agents may conduct such an investigation. This manual is not intended to be an exhaustive legal treatise and does not provide simple solutions for what generally are very complex problems. However, it does identify important issues and addresses practical considerations that must be faced when the government investigates your company. By doing so, it should assist you in taking action to protect the company and its employees from self-inflicted harm that may occur if you are not informed about these issues and prepared to deal with them.

CAUTION: This manual is not meant to replace the advice of corporate counsel or criminal defense counsel.

The Intended Audience

This Manual	This manual is directed to corporate officers, operations managers and corporate counsel. It is intended to provide guidance for those in the company who may be involved in the company's response to searches, interviews of employees, subpoenas for corporate records, and other activities during a government criminal investigation of maritime oil spills and violations of environmental laws. Others, such as agents, charterers, and brokers who may be peripherally involved with an investigation, also may find it useful.
--------------------	--

Quick-Reference Cards	Appendix I contains samples of quick-reference cards for use by the company and its employees: <ul style="list-style-type: none">• There are three cards entitled “Responding to Government Inspections and Searches.” These contain procedures to prepare your company to respond to an inspection or search of its vessels, facilities and offices. One card provides procedures for employees (such as receptionists or security personnel) who might be <i>initial points of contact</i> for government agents or investigators at company offices, terminals or facilities. Another card provides procedures and reminders for those who serve as <i>escorts</i> for the government agents or investigators during their inspection or search of these shore-based
------------------------------	--

facilities. The third card addresses this issue for vessel masters and officers.

- There are two cards entitled “**Responding to Government Interviews.**” One card informs employees of their rights should government agents approach them directly with questions. The second informs vessel officers and crewmembers. It is recommended that a copy ultimately be given to all company employees and vessel crewmembers so that they can easily refer to this important information when necessary.

Tips on Using This Manual

We recommend that you first review the entire manual when you receive it. However, we encourage you to read Chapter 2 (Preparing for the Worst) and Chapter 3 (Initial Response to a Criminal Investigation) with particular care now, as these two chapters provide advice to best prepare your company to deal with a government investigation from its onset.

If you are not familiar with the liability that can result from violations of environmental laws in the United States, we recommend you carefully read the Introduction, which discusses the stakes involved for you and your company. The manual includes a detailed table of contents and numerous bold-faced headings to enable you to quickly find any specific information you may need.

Finally, you will find references to helpful Internet websites throughout this manual that will help you in finding information with regard to particular issues addressed in this manual. For example, the website address for U.S. Coast Guard Marine Safety and Environmental Protection Program is shown as follows:

<http://www.uscg.mil/hq/g-m/>

Customizing These Materials for Your Company

It is highly recommended that you customize information in the manual and on the quick-reference cards to best meet your company’s needs. You should even consider placing pertinent materials on a company website to allow company employees to refer to (and obtain) the materials that way. Once you customize the quick-reference cards, we highly recommend that you print them on heavy, durable paper stock and/or laminate them before circulating them to employees or vessel crewmembers. This will help to ensure their long and useful life. We also recommend that you date the versions of the card so that they can be periodically reviewed and revised, if necessary.

INTRODUCTION: THE STAKES ARE HIGH

Penalties resulting from violations of federal, state or local environmental laws in the United States come in many forms – criminal (such as fines and jail time), civil (such as civil and judicial penalties) and administrative (such as loss of government contracts or permits). Additionally, there can be adverse collateral consequences resulting from environmental violations, such as bad public relations or insurance problems. Individually, any of the penalties may have a severe effect on the company. In combination, they can be devastating. Environmental enforcement remains one of the few areas in which government resources continue to grow rapidly. The applicability of strict liability criminal statutes to a large number of oil spills and other vessel source pollution incidents greatly increases the risk of potential criminal liability for these incidents. Even when environmental statutes require that the government prove intent or negligence in criminal prosecutions, the standard of intent or negligence is minimal. (See Chapter 1.) Thus, the possibility of a criminal prosecution of companies and individuals for environmental violations is a more significant risk than ever before.

In addition, there are many other types of violations that the government will investigate in addition to environmental violations that may result in criminal prosecutions in which a company may find itself involved. More and more, criminal investigations of environmental violations result in “add-on” violations under more traditional criminal statutes. For instance, a company may find itself being investigated and prosecuted for false statements to the government, conspiracy and other similar criminal violations. Similarly, there are other statutes, not historically thought of as environmental in nature, which carry criminal sanctions. An example would be the Ports and Waterways Safety Act. This Act authorizes the Coast Guard to issue orders to vessels in situations in which the vessel may present a hazard to safety or threat to the environment. Willful violations of such orders may be prosecuted criminally. Much of the guidance in this Manual is also useful to companies whenever they are the subject of criminal investigations, no matter the underlying issues involved.

Penalties and Collateral Consequences Can Be Devastating

Fines

Most federal and many state environmental laws establish criminal fines for individuals of \$50,000 per violation, and \$500,000 per violation for corporations. Additionally, the statutes treat each day of continuing noncompliance as a separate violation. As an alternative, under United States federal law, an individual or corporation may be fined up to twice the gross monetary gain or loss resulting from a violation. Thus, fines can add up quickly. As a result, the average criminal fine for an environmental violation was nearly \$2 million in 1997. In Fiscal Year 1998,

environmental cases resulted in \$92.3 million in criminal fines. The figure for Fiscal Year 1999 was \$61.6 million. These figures do not include civil penalties, which also set records in Fiscal Year 1999.

Jail Time

As recently as 1990, about 75% of all environmental criminal charges were brought against companies. Since that time, the focus of environmental investigations has changed dramatically, with charges against individuals now making up nearly 75% of all environmental criminal enforcement actions. Additionally, jail time is now imposed under the United States Federal Sentencing Guidelines, which attempt to impose uniform (and harsh) sentences for all federal crimes by removing discretion from judges and prosecutors.

Under the Sentencing Guidelines, the statutory maximum prison term for most felony violations ranges from two to five years, and even misdemeanors, such as negligent discharges under the Clean Water Act, can result in sentences of up to a year in prison. Additionally, multiple violations can be stacked (aggregated) for purposes of sentencing, meaning that even misdemeanor violations may result in jail terms of over one year. This has resulted in record levels for years of prison time, with criminal defendants sentenced to 208 years of prison for environmental crimes in Fiscal Year 1999.

**Plea Agreement
And Probation
Conditions**

In many cases, the conditions imposed on companies or individuals as a result of plea agreements or probation are extremely expensive and burdensome. More and more, the conditions require major changes to corporate structures and impose mandatory compliance programs with government or court oversight. This oversight may last several years, depending upon the terms of the plea agreement or probation, but can be, and usually are, for a period of five years.

**Loss of
Government
Contracts and
Subsidies**

Federal, and some state, agencies have authority to suspend and debar a company (*i.e.* prevent a company from qualifying for government contracts for a set period of time) from receiving future government contracts, grants, subsidies, or loans when the contractor's responsibility is deemed compromised. This can occur even if the investigation does not result in a criminal prosecution. Thus, environmental violations can have significant adverse economic effects on government contractors or vessel owners, primarily those of United States flag vessels, who may be eligible for government subsidies.

If a company is indicted, it will likely be "suspended" from receiving future government contracts or subsidies until the indictment is resolved.

If a company is convicted or pleads guilty to an environmental crime, the company will almost certainly be debarred from receiving future government contracts or subsidies. The Clean Water Act requires mandatory debarment of any facility (including a vessel) whose owner, operator, or supervisor has been convicted of even a misdemeanor violation.

**Permit
Revocation**

One area in which both federal and state governments have become more active is in investigating and enforcing laws that apply to discharges of pollutants into United States waters from vessels. Under United States law, all discharges of pollutants from point sources into the navigable waters of the United States are prohibited unless they are permitted. The term point source is defined to include vessels, and the courts have interpreted the term pollutant very broadly, such that just about any discharge of other than clean water from a vessel would likely require a permit. In most cases, these permits are issued by states instead of by the federal government.

Recognizing the significant administrative burden that permitting discharges from vessels would cause to both the federal and state government and the marine industry, regulations issued by the United States Environmental Protection Agency (EPA) except “discharges incidental to the normal operation of a vessel” from these requirements. Unfortunately, there is no clear guidance on what types of vessel discharges EPA considers “discharges incidental to the normal operation of a vessel.” This leaves considerable discretion in the hands of EPA as to whether a particular discharge will be excepted under this provision or not.

Compounding the problem is the fact that, under United States federal law, states may impose more stringent requirements on discharges into waters under their jurisdiction than the federal government may have in place. This means that even if the federal government recognizes a particular discharge as a “discharge incidental to the normal operation of a vessel,” some states may still require the discharge to be permitted. Thus, vessel owners and operators, particularly those that own terminals or docks in the United States, may find themselves in the position of requiring a permit for discharges from vessels or facilities in some states, while a permit is not required in other states for the same type of discharge.

As the federal and state governments focus more on discharges of pollutants from vessels, including such discharges as ballast water to control the introduction of alien species into waters of the United States, there is a strong possibility that vessel discharges may require permits in the future. Vessel owners may be unable to obtain permits for vessel

discharges or for disposal of wastes ashore, when necessary, due to criminal convictions or even the assessment of civil penalties for violations of environmental laws. This is because many states have enacted “bad actor” laws that allow state environmental regulators to deny, revoke, or refuse to renew environmental permits based upon the poor environmental compliance history of the company, related entities, or key individuals.

**Securities and
Exchange
Commission
Disclosures**

Any company, whether a United States or foreign corporation, that is publicly traded in the United States is required to disclose to its shareholders information about any material environmental liabilities. Companies are required to disclose pending administrative or judicial enforcement actions and proceedings for environmental violations, or actions that are known to be contemplated by the federal or a state government, unless the company reasonably believes that any resulting sanctions will not exceed \$100,000 or become material to the company’s business or financial condition.

**Impacts on
Oil Spill
Limits
Of Liability**

The Oil Pollution Act of 1990 (OPA) established limits of liability for clean up costs and damages to be paid by responsible parties in oil spills. However, these limits do not apply if the incident was the result of the gross negligence or willful misconduct of, or was the result of a violation of an applicable Federal safety, construction or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting under contract to a responsible party.

For an oil spill, the focus of a criminal investigation may well be on proving gross negligence or willful misconduct. An investigation could determine that the spill was the result of a failure on the part of a vessel owner, operator or crewmember to comply with applicable safety or operational regulations, which could be sufficient evidence of negligence necessary to prove a criminal violation under the Clean Water Act. Even if the case does not wind up being prosecuted criminally, the government may use any evidence of misconduct or violation of regulations that is produced during a criminal investigation in a subsequent civil case in an attempt to break the statutory limits of liability.

Similarly, because of the availability of strict liability criminal sanctions as well as criminal sanctions for simple negligence under United States laws for spills in United States navigable waters, vessel crewmembers and corporate officers in corporations that own or operate vessels face potential criminal liability for practically any oil spill. This is true even when the spill is small or the resulting environmental damage is minor. In light of this risk, individuals may choose to exercise their right under the Fifth Amendment of the United States Constitution to refuse to answer

questions of Coast Guard or other government investigators at the scene of the oil spill if such answers may tend to incriminate them. This may also have an impact on the ability of vessel owners and operators that are responsible parties to rely on the statutory limits of liability.

This is because the responsible party for an oil spill under the Oil Pollution Act of 1990 is also required to provide all reasonable cooperation and assistance requested by federal on-scene coordinators in connection with removal of the oil spill, or risk breaking their legal limits of liability. Often, the same agencies that are the on-scene coordinators for response, usually the Coast Guard or the Environmental Protection Agency, are also responsible for investigating the cause of the spill and can refer the case for criminal prosecution. In this situation, it is possible that some crewmembers or company representatives, in trying to ensure that they do not inadvertently respond to potentially incriminating questions, may refuse to answer any questions at the scene of the spill. Some in the marine industry have expressed concerns that any refusal to answer questions regarding the spill may be viewed by the Federal On-Scene Coordinator as a failure to provide reasonable cooperation or assistance in removal of the spill. This has led to fears that the government could seek to break the limits of liability under the Oil Pollution Act in these circumstances.

**Impacts on
Insurance
Coverage**

The Oil Pollution Act of 1990 provides for direct action liability against the guarantor of the oil spill response costs (i.e. the provider of the vessel's Certificate of Financial Responsibility). A statutory defense to the direct action liability of the insurer guarantor is if the incident was caused by the willful misconduct of the responsible party. Once again, evidence produced as a result of the government's criminal investigation may later be used by the third-party guarantor in an effort to defend against its direct liability on the basis that the cause of the spill was the responsible party's willful misconduct. In some cases, any criminal conduct, and not just willful misconduct, can void pollution insurance policies, depending upon the terms of the policy.

Also, company officers and directors may incur significant costs during criminal investigations, such as attorney fees, judgments, fines and other expenses, that may not be covered by traditional insurance policies. Many Directors and Officers (D&O) insurance policies exclude coverage of claims by directors and officers arising out of oil and hazardous substance discharges. Likewise, Protection and Indemnity (P&I) insurance may only be available to a company as the owner of a vessel, and will not cover individual officers, directors, or employees for criminal investigations or prosecutions arising out of pollution incidents. Directors and officers

should carefully check insurance policies and corporate bylaws to determine potential personal exposure for these costs.

Tax Liabilities Companies that pay United States income tax and that have received criminal fines for environmental violations may not deduct such fines from gross income as an ordinary and necessary business expense on their federal income tax returns, although “compensatory damages” paid to the government may be deductible.

Who Is Liable

Corporation Liability Under United States law and many state laws, a corporation may be held criminally liable for the actions of an employee or an agent that violate environmental laws if the acts were done for the benefit of the company and were within the scope of the employee’s or agent’s authority. In these cases, a company may be criminally liable even if the company has an explicit policy prohibiting the employee or agent’s actions.

Further, courts have allowed the aggregate knowledge of all employees to be used by government prosecutors to prove the required corporate knowledge in prosecutions of companies under environmental laws. This means a company may be found to have knowingly engaged in criminal conduct based on proof that one employee knew facts relating to one element of a criminal offense and other employees had knowledge relating to other essential elements. Thus, even though no one employee or corporate officer had knowledge of all facts necessary to prove all elements of a criminal violation, the corporation can still be held criminally liable for violations of environmental laws.

Corporate Officer And Individual Liability The Department of Justice has long had a policy - not committed to formal guidance documents – of prosecuting the highest-ranking individual in a company responsible for the violation of environmental laws. This is based on the stated belief that the risk of imprisonment for these individuals is the strongest deterrent to corporate wrongdoing.

There are several theories that assist the government in proving knowledge or negligence in prosecuting corporate officers and individual employees for environmental violations. These theories allow the government to prosecute an individual or corporate officer without having to prove that the defendant had direct knowledge of wrongdoing.

Inferred Knowledge: This theory allows prosecutors to prove individuals had knowledge by showing that the defendant had an affirmative duty to know the facts or to investigate the situation and failed to do so. For example, if an individual is responsible under a company compliance program to do periodic environmental compliance inspections and fails to do so, thereby failing to discover readily apparent environmental violations, the government could rely on inferred knowledge to prosecute the individual.

Willful Blindness: The government can use this theory to prove criminal knowledge by showing the defendant intentionally avoided learning, or was willfully blind to, the facts. The government may also attempt to obtain a conviction by showing that the defendant consciously avoided learning the truth after receiving substantial warnings and, therefore, had the equivalent of knowledge.

Responsible Corporate Officer: Under this doctrine, corporate officers have been held criminally liable for acts committed by their subordinates. Historically, courts have allowed prosecutions of responsible corporate officers when the statute involved is found to be a public health and welfare statute. Most courts have held that environmental statutes are public health and welfare statutes, and that prosecutions of responsible corporate officers are therefore appropriate. The Clean Water Act, as amended by the Oil Pollution Act, and the Clean Air Act both specifically provide that responsible corporate officers may be subject to criminal sanctions for violations of those acts.

Problems may potentially arise for any corporate officer because the environmental statutes do not define the class of individuals who may be considered responsible corporate officers. Also, the proof of knowledge required under environmental statutes is minimal. Taken together, this means that government prosecutors have a great deal of discretion in determining which corporate officers may be deemed “responsible corporate officers” for purposes of criminal prosecutions of environmental violations. (See section entitled “Enforcement Agencies and Prosecutors Have Substantial Discretion in Determining Whether Pollution Incidents Will Be Criminally Prosecuted” in Chapter 1.)

A corporate officer may be criminally liable as a “responsible corporate officer” when an environmental violation is committed, the corporate officer had the authority to stop or prevent the violation, and the corporate officer failed to do so. Recently, one court stated that a person is liable as a responsible corporate officer if the person had authority to exercise

control over the corporation's activity that caused the violation or discharge. Additionally, the court held that, to be held criminally liable under the theory, there is no requirement that the officer in fact had exercised such authority, or even that the corporation had expressly told the officer that he or she could exercise the authority.

The Government Has a Distinct Advantage If You Are Not Prepared

The government has significant discretion in determining whether and who to prosecute, and significant benefits in terms of minimal criminal knowledge requirements and means of proof, in pursuing companies and corporate officers and employees for criminal violations of environmental laws. The government is further aided when a company is not prepared to deal with the realities of a criminal investigation. At a minimum, unprepared company representatives may exhibit the kind of confusion that breeds unnecessary suspicion on the part of government investigators or prosecutors. Company representatives who do not understand the basics of government investigations may consent to otherwise improper searches, waive privileges to confidential information, or fail to track evidence. In a worst case scenario, employees may falsify, conceal, or destroy evidence in a misguided panic, turning what in most instances will be a civil enforcement case into a criminal case. This means that companies that do not prepare their employees for dealing with government investigations are assuming significant risk in light of the potentially devastating penalties and collateral consequences that could result from these investigations.

CHAPTER 1: ENFORCEMENT OF ENVIRONMENTAL LAWS IN THE UNITED STATES

This chapter discusses how environmental laws in the United States are enforced and how government agencies investigate possible violations of these laws. There are many federal and state enforcement agencies that could become involved in investigating an oil spill or other pollution incident. Many environmental statutes provide specific authorities for the investigation of pollution incidents, and many agencies have independent investigation authority not dependent on the statutes that they enforce. Finally, there are different types of investigation forums, such as grand jury investigations or safety hearings, that various government agencies may use to investigate pollution incidents and environmental violations involving the marine industry. Violations may become apparent during administrative investigations, such as marine casualty investigations. Violations may also come to the attention of the government as a result of a regulatory compliance boarding. A whistleblower may allege violations by company vessels, in which case the investigation may be a criminal grand jury investigation. A company with offices in the United States may first become aware that an investigation has been initiated when government investigators serve a search warrant on its corporate headquarters. A foreign shipping company may have a search warrant served on the offices of port agents or other of its representatives or agents in the United States. This chapter provides an overview of issues related to the enforcement of environmental laws in the United States, and information related to the practices of federal agencies charged with enforcement of environmental laws, such as the Department of Justice, the Coast Guard and the Environmental Protection Agency.

Enforcement Agencies and Prosecutors Have Substantial Discretion In Determining Whether Pollution Incidents Will Be Criminally Prosecuted

It is important for you as a vessel owner or operator to understand that there is little, if any, difference among the essential elements of proof required for administrative, civil or criminal sanctions under most United States environmental laws. In many vessel-source pollution cases, strict liability criminal sanctions may be available, meaning that the mere act of spilling oil is sufficient to incur criminal sanctions, regardless of one's innocent mistake. In other cases, prosecutors must prove knowledge or negligence in addition to proof of the substantive elements of a violation that is required for a civil penalty. However, even when knowledge or negligence must be proven, only simple negligence and only minimal knowledge (general intent) need be shown because environmental laws are considered public welfare

statutes. In short, nearly any case could be brought as a criminal case solely at the discretion of the government officials involved.

It is also very important to note that U.S. government agents investigating a pollution incident will not necessarily know whether the case will ultimately result in criminal or civil sanctions, and will therefore investigate cases in a way that will keep all enforcement options open. Use of evidence initially collected by government investigators or inspectors in anticipation of civil or administrative enforcement action is not prohibited in criminal prosecutions, as long as the government investigators acted in good faith in gathering the evidence. Additionally, government investigators and inspectors cannot promise immunity against criminal prosecution or guarantee that information provided to them will not be used later in a criminal prosecution -- only the federal or state prosecutors can do so. It is not unusual for an investigation that begins as civil or administrative enforcement case to later be investigated as a criminal case, and the company or individuals involved may not necessarily be advised of such a change in focus.

Ultimately, the decision regarding whether a case merits criminal prosecution rests with the government prosecutor. Under the federal system, this is normally the responsibility of the U.S. Attorney for the area where the violation occurred. It may also be a prosecutor with the Department of Justice in Washington, D.C., who for maritime environmental violations will most likely be associated with the Environmental Crimes Section. Under local or state law, the district attorney or state attorney general ultimately makes the decision whether criminal prosecution is appropriate. While most federal, state and local government prosecutors consider agency guidelines outlining appropriate factors to take into account in making the decision whether a particular case should be criminally prosecuted, consideration and application of these guidelines are not mandatory. Government prosecutors have enormous discretion in deciding whether to proceed criminally or civilly, or to decline to act altogether. (See discussion below under section entitled "Agency Criminal Case Selection Guidelines.")

**Intent
Standard**

Historically, criminal laws in the United States require a showing of "specific intent" in order to convict. This means that the prosecutor must prove that the defendant understood that his or her actions violated the law and that the defendant intended to violate the law.

However, most federal and many state environmental laws require only a showing of "knowing" behavior or "general intent." This means that the prosecutor need not prove that the defendant understood that his or her behavior violated the law, but only that the defendant understood the general nature of his or her activities.

For example, the government need not prove that a defendant knew that certain discharges required a permit under the Clean Water Act, but must prove only that the defendant knew that the discharges involved something that is ultimately found to be pollutant (i.e. something other than clean water).

Recently, this minimal knowledge requirement for environmental statutes has become a more important concern to the marine industry. United States Department of Justice and federal agencies in addition to the United States Coast Guard have begun to focus their enforcement efforts on vessel-source pollution, utilizing federal environmental laws that have not historically been used to address this type of pollution. For example, shipping companies and their employees have recently been prosecuted for discharges of ship-generated garbage. Instead of being charged with violations of the Act to Prevent Pollution from Ships (APPS), which specifically prohibits discharges of garbage into the navigable waters of the United States, companies and individuals have been charged with criminal violations of the Clean Water Act based on the failure to obtain a permit for the discharge of pollutants. Other shipping companies and employees have been prosecuted under the waste generation and storage provisions of the Resource Conservation and Recovery Act for failure to correctly dispose of ship-generated hazardous wastes, such as paints.

Negligence

Oil spill cases are often prosecuted as violations of the Clean Water Act if the spill occurs in the navigable waters of the United States. The Clean Water Act provides misdemeanor criminal sanctions for violations, including oil spills, resulting from a company or individual's negligence.

Historically, only gross negligence or recklessness has been a basis for criminal sanctions. However, because the Clean Water Act is considered a public welfare statute, the government contends, and courts have held, that only simple negligence need be shown in a criminal prosecution. This means that, for prosecutions under the Clean Water Act, the government must only show that the spill was caused by a failure to exercise due care on the part of an individual or company.

What constitutes due care for this purpose is an issue that is decided by a judge or jury. In a recent case, proof that equipment that had been placed on the vessel by the owner failed or was not present, even though that equipment was not required by law or regulation, was cited by prosecutors as proof of negligence for purposes of Clean Water Act criminal sanctions.

Strict Liability

The risk of criminal liability for oil spills is greatly increased because of the potential applicability of two federal strict liability criminal statutes – the Refuse Act and the Migratory Bird Treaty Act – to a large number of oil spill and other vessel-source pollution incidents. Strict liability crimes do not require the government to prove intent or negligence. Instead, the government merely has to prove that the prohibited act occurred. It does not matter that the oil spill or pollution incident was accidental.

Under the Refuse Act, proof that a vessel discharged or placed refuse into navigable waters of the United States is sufficient to prove guilt. The courts have broadly construed the term “refuse” under the Act to include oil, or any other foreign substance or pollutant, such that just about anything placed in a navigable waterway from a ship or other vessel could be considered refuse for purposes of the Refuse Act.

Similarly, under the Migratory Bird Treaty Act, the government need only prove that a migratory bird, which includes most of the bird species in the United States, was harmed or killed by the spilled oil or other pollutant.

Environmental Enforcement Efforts Continue to Increase

Increasing Emphasis

While enforcement efforts and resources in many United States government agencies are declining, environmental enforcement, particularly criminal enforcement, continues to increase.

Coast Guard. The United States Coast Guard is the primary federal enforcement agency for laws and treaties affecting waters subject to the jurisdiction of the United States, including all environmental laws. In 1997, the Coast Guard issued guidelines focusing specifically on the criminal enforcement of environmental laws. Despite a long-standing role in enforcing environmental laws involving the marine industry, issuance of this policy was the first time that the Coast Guard specifically addressed the criminal enforcement provisions of these laws.

Environmental Protection Agency (EPA). Between 1992 and 1998, the EPA increased the number of its criminal investigators nearly three-fold (from 72 to 200). Because the EPA has separate authority to enforce the Clean Water Act and many other environmental laws that impact the marine environment, these agents are more frequently becoming involved in investigating vessel-source and marine industry pollution incidents. In addition, these agents will often work with the Coast Guard and other federal or state enforcement agencies in conducting criminal investigations of pollution incidents.

Department of Justice (DOJ). DOJ has also increased its environmental crime prosecution resources. The number of prosecutors in the Environmental Crimes Section, which specifically focuses on environmental crimes, currently totals 37. The section began with three prosecutors in 1986. Additionally, the U.S. Attorney General revised DOJ

policy to allow Assistant United States Attorneys in the 94 United States Attorneys offices across the country to initiate many environmental criminal actions independent of the Environmental Crimes Section. The DOJ has made environmental criminal enforcement of maritime pollution, including vessel-source pollution, a top priority.

The Federal Bureau of Investigation (FBI) has in the last decade become much more involved in conducting criminal investigations of pollution incidents. If FBI special agents are involved in the investigation of an oil spill or other environmental violation, this indicates that the investigation is being conducted as a criminal investigation.

State and Local Resources. Many coastal states now have environmental crimes units in place, and the U.S. Environmental Protection Agency (EPA) has established effective programs for training state and local officials to identify, investigate, and prosecute environmental violations. States have also begun to enact their own laws to deal with vessel-source pollution, which provide criminal sanctions for violations.

**Better
Coordination**

Coordination among federal enforcement agencies, as well as between federal and state enforcement agencies, continues to improve. Many times, enforcement agencies will work together in investigating a discharge of pollutants or other violations of environmental laws. In such a situation, it is not always clear which is the lead agency for purposes of enforcement, and it is difficult for a company or its attorneys to know which agency to address in dealing with a particular case.

Task Forces. Federal prosecutors now often form task forces that include enforcement agents from multiple federal agencies as well as state and local government agencies. This means that an oil spill or other marine pollution incident is likely to be investigated by agents from many agencies, and that the information developed will be shared by all.

Government Databases. The United States Environmental Protection Agency (EPA) has recently developed (and is continually expanding) a database that enables it to determine the status of any criminal investigation to which any company is subject nationwide, and to discover all enforcement actions going forward in any jurisdiction, even at the local level. The United States Coast Guard has had the Marine Safety Information System (MSIS) in place since the 1970's. The MSIS allows the Coast Guard to track the violation history of particular vessel owners and particular vessels. More recently, the Coast Guard, as part of its Port

State Control Program, has begun to share information on marine safety and environmental violations with the Port State Control Programs of other countries, greatly increasing the information available on vessels worldwide. This assists the Coast Guard in focusing its regulatory compliance boarding program on vessels with a history of violations and environmental compliance problems.

Enforcement Trends

Traditionally, federal maritime environmental cases were initiated through a formal referral by the United States Coast Guard to the appropriate United States Attorney or to the Department of Justice (DOJ) after the Coast Guard conducted a pollution or marine casualty investigation. However, the DOJ can bring criminal or civil cases on its own without Coast Guard approval. Also, individual United States Attorneys now bring many environmental crimes cases without the approval of the DOJ Environmental Crimes Section, or coordination with the Coast Guard.

Over approximately the last half of the 1990's, the DOJ has identified vessel-source pollution as a top priority for its environmental crimes program. This is known as the "Vessel Initiative." As of May 2000, there had been 36 pollution cases brought under the "Vessel Initiative," with 26 individuals sentenced and \$115 million in criminal fines awarded. Several prosecutors in the Environmental Crimes Section of the DOJ in Washington focus primarily on vessel-source pollution cases. In addition, as part of the "Vessel Initiative," the DOJ, in conjunction with the Coast Guard and the EPA, has conducted enforcement training sessions around the United States. This effort is intended to train federal, state and local agents in these locations in the investigation of vessel-source pollution incidents and on coordinating enforcement efforts for this purpose.

Vessel owners and operators must understand that, more and more, the Coast Guard is not the only federal environmental enforcement agency that the marine industry must deal with in vessel-source pollution cases. Agencies such as the EPA and the FBI have independent authority to conduct criminal investigations concerning violations of federal environmental laws. In addition, state governments and local authorities may conduct criminal investigations independent of any federal government investigation.

Agency Criminal Case Selection Guidelines

The Coast Guard, the EPA and the Department of Justice have all issued guidelines to assist investigators and prosecutors in determining when criminal prosecution may be an appropriate option in dealing with violations of environmental laws. There are problems in relying on these guidelines, however, primarily because they are guidelines and are, therefore, not binding on the agencies, investigators or prosecutors.

However, the principles stated in these guidelines are useful to vessel owners and operators in determining what type of environmental violations may be the most likely to generate criminal investigations and prosecutions. The guidelines may also serve to establish a basis for a corporation or individual to argue to investigators or prosecutors that criminal prosecution is not appropriate, based on the facts of the particular case when compared to the guidelines.

EPA. The EPA originally issued guidelines on criminal enforcement in 1982, which have been considerably revised since, to assist its criminal investigators. The latest EPA guidance was issued in 1994, in which the EPA's Office of Criminal Enforcement attempted to distinguish the most significant and egregious cases, for which investigation for criminal referral was deemed appropriate, from those in which civil or administrative enforcement was the most appropriate option. The two principal criteria to be examined in making a decision on whether criminal investigation may be warranted are the presence of significant environmental harm and culpable conduct.

“Significant environmental harm” may be either actual or threatened harm to human health or the environment. The EPA guidance states that a failure to report, when coupled with significant actual or threatened harm, is an additional factor favoring criminal prosecution. Further, criminal investigation would be appropriate if the illegal conduct represents a trend or common attitude in the regulated community, and a single criminal case could have a substantial deterrent effect on many companies similarly situated.

“Culpable conduct” may be inferred from several factors, including a history of repeated violations, deliberate misconduct, concealment of misconduct or falsification of required records, tampering with monitoring or control equipment, and operating without required permits. The guidance further notes that, although federal environmental statutes do not require proof of specific intent, evidence of deliberate violations will be a major factor in determining that criminal investigation is warranted.

Coast Guard. In 1997, the Coast Guard issued a Commandant Instruction entitled “Criminal Enforcement of Environmental Laws.” The criteria that the Coast Guard stated should be used by its field offices in determining when a criminal investigation of environmental violations was appropriate was the same as the criteria established by the EPA. At a minimum, vessel owners and operators should be familiar with the Coast Guard guidance because it is oriented toward the marine industry, and

contains examples of the types of conduct in a marine setting that could warrant criminal investigation and prosecution.

Department of Justice. The DOJ bases its decisions regarding whether criminal prosecution is warranted on the “Federal Principles of Prosecution.” These principles apply to cases involving violations of all laws, not just violations of environmental laws. These principles are relatively conservative, and provide that the government will decline to prosecute if the evidence does not support a reasonable possibility of conviction. Even if there is sufficient evidence to convict, a prosecutor may decide not to bring a case if no substantial federal interest would be served, or if civil or administrative enforcement would provide an adequate alternative to prosecution.

In 1999, the Deputy Attorney General issued guidelines specifically addressing the federal prosecution of corporations. The guidance addresses what factors a prosecutor should generally consider in making the decision whether to charge a corporation in a particular case. The guidance notes that vigorous enforcement of the criminal laws, including environmental laws, against corporations, when appropriate, results in great benefits for law enforcement and the public, particularly in preventing, discovering and punishing white collar crime (which is what environmental violations are generally considered to be). The factors that the guidelines indicate should be considered are:

- The nature and seriousness of the offense, including the risk of harm to the public.
- The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management.
- The corporation’s history of similar conduct, including prior criminal, civil and administrative enforcement actions.
- The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its employees and agents, including if necessary the waiver of corporate attorney-client and work product privileges.
- The existence and adequacy of the corporation’s compliance program.
- The corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace management responsible for the violations, to

discipline or terminate wrongdoers, to pay restitution, and to cooperate with relevant government agencies.

- Collateral consequences, including disproportionate harm to shareholders and employees not personally culpable.
- The adequacy of non-criminal remedies, such as civil or administrative and regulatory enforcement actions.

Enforcement of Environmental Violations Is Based on Ambiguous Standards. Environmental cases that agency investigators and DOJ prosecutors must deal with frequently involve allegations of departures from complicated regulatory schemes. These regulatory schemes were not written with an eye toward criminal prosecution. In many cases, it is difficult for even experts to determine the rules because the regulatory writers frequently use open-ended and flexible terms in order to address as much of the targeted area as possible. This is particularly true when the regulations are based on international conventions, such as MARPOL, which tend to be very broadly focused.

Thus, the agency guidelines that address criminal enforcement are laid over a system of complicated and ambiguous regulations and laws that require a significant amount of interpretation. In addition, defining investigative and prosecutorial guidelines is difficult, and law enforcers tend to be wary of statements and policies that may signal to the regulated community what they can “get away with.” The guidelines, therefore, clearly state that they are outcome determinative and are only guidelines. Federal prosecutors and investigators are not required to reference the factors, and are not required to indicate the weight that they give to any of the enumerated factors in making their decisions.

Finally, as criminal enforcement resources continue to grow, the decision-making process becomes more decentralized. This is particularly true now that United States Attorney offices around the country have become more involved in prosecuting environmental cases. Local prosecutors are more sensitive to the sentiment in the local community, and less focused on an abstract set of guidelines in exercising their discretion. This leads to less uniformity in enforcement throughout the country. These difficulties are compounded by the fact that, with environmental cases, the criminal intent requirement is minimal, meaning that the intent of the defendant receives less emphasis in determining whether criminal prosecution is warranted. This raises the importance that environmental harm, or threat of harm, has as the basis for prosecution (i.e. the more significant the spill or natural resource damage, the more likely that the case will be criminally prosecuted, whether or not the spill was the result of intentional conduct).

Joint Criminal and Civil Enforcement. As is apparent, even with the existence of agency guidelines, it is difficult to predict whether violations will be pursued administratively, civilly, or criminally. In fact, the government often pursues a case both civilly and criminally. Additionally, the states are separate sovereigns, and may pursue their own criminal and/or civil remedies for environmental violations over and above those sought by the federal government.

Recently, the Environment and Natural Resources Division of the Department of Justice issued a policy on integrated enforcement. This replaced the former policy on parallel (civil and criminal) proceedings. The change in terminology is important.

The original policy on parallel proceedings had encouraged parallel proceedings only when there were compelling reasons that justified the imposition of both civil and criminal sanctions. The new policy on integrated enforcement encourages early and ongoing consultation between civil and criminal attorneys when the facts indicate that the violations may be subject to both civil and criminal sanctions. Also, the new policy encourages and facilitates the consultation and sharing of information between civil and criminal attorneys in DOJ, advocating that joint investigations of environmental violations occur early, before grand jury proceedings begin that may limit the ability of criminal prosecutors to share information. Notably absent, however, is any clear guidance on when it is appropriate to pursue both criminal and civil sanctions. This is left to the sole discretion of the attorneys involved, making it more likely that both sanctions will be sought in a case.

United States Maritime Jurisdiction

Also important to prosecution of environmental laws is the issue of jurisdiction on the part of federal and state governments to initiate enforcement proceedings against vessels, particularly foreign flag vessels. The United States is not a party to the United Nations Convention on the Law of the Sea of 1982 (UNCLOS). However, it does treat the jurisdictional principles of UNCLOS as an accurate codification of customary international law. These have led to several recent actions on the part of the United States to increase the extent of various United States maritime territorial claims relating to the territorial sea and the contiguous zone. The impact of these actions regarding the criminal enforcement of environmental laws of the United States cannot yet be fully determined.

Territorial Sea The United States claimed on a consistent basis since 1789 a territorial sea that extended three nautical miles from the baseline (typically this is the

low water mark along the shoreline). This all began to change in 1988 when President Reagan issued a Presidential Proclamation declaring a 12 nautical mile territorial sea for international purposes, thereby adopting the maximum territorial sea as recognized by UNCLOS.

The impact of this declaration on the enforcement of United States laws of any kind, including environmental laws, was never fully understood. The proclamation stated that it was not meant to extend or otherwise alter existing federal or state law or any jurisdiction, rights, legal interests or obligations. Then in 1996, the Congress of the United States enacted a law, the Antiterrorism and Effective Death Penalty Act, that did two things that could have a bearing on the enforcement of criminal laws, including environmental laws, in the United States territorial sea. First, Congress declared that the territorial sea of the United States, as it was defined by President Reagan's proclamation, was part of the United States for purposes of federal criminal jurisdiction. Second, they amended federal law so that state crimes could be assimilated into federal law in the newly extended twelve nautical mile territorial sea.

How the first provision extending the territorial sea for criminal law jurisdiction purposes will bear on the ability of the United States to enforce environmental laws is unclear. Potentially, the legislation extends jurisdiction for all criminal statutes. On the other hand, it may extend jurisdiction only to enforce traditional common law crimes, crimes in the Federal Criminal Code, otherwise known as Title 18 of the United States Code. Finally, the law may extend criminal jurisdiction only with regard to the special maritime and territorial jurisdiction of the United States. The language of the statute is ambiguous and there is no legislative history to assist in gleaning the intent of the United States Congress in this regard.

The special maritime and territorial jurisdiction of the United States specifically defines areas where the Federal Government of the United States exercises exclusive jurisdiction. It includes all United States flag vessels wherever located, and the high seas when extraterritorial enforcement of laws is authorized. Laws applicable in the special maritime and territorial jurisdiction of the United States are specifically enumerated in Title 18, and do not include environmental laws unless the specific environmental laws so state. Thus, the Act could either have a significant, or very little, impact on the criminal enforcement of the environmental laws on the marine industry. The impact will depend upon legal determinations in the future as to what criminal statutes may be enforced in the twelve nautical mile territorial sea after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996.

The only case that has been decided by a federal court regarding the interpretation of this legislation does not specifically address the issue of

which criminal laws are affected. Instead, the case establishes that the legislation does not automatically amend the definition of the territorial sea for the application of laws for which that term is specifically defined. This means that for enforcement of laws such as the Clean Water Act, which defines the territorial sea as three nautical miles, the territorial sea would continue to be three nautical miles until specifically amended by Congress. What is not clear is how this will affect the enforcement of statutes such as the Refuse Act or the Act to Prevent Pollution from Ships, which do not specifically define the term “territorial sea,” but are enforceable in the territorial sea. (See section entitled “Navigable Waters of the United States” below.)

The second provision of the Antiterrorism and Effective Death Penalty Act, which extends the assimilative crime provision of Federal law into the newly established twelve nautical mile territorial sea, is potentially even more troublesome for vessel owners, operators and crewmembers. The federal assimilative crime provision authorizes the federal government to prosecute violations of state criminal laws for which there is no corresponding federal law in areas that are under federal jurisdiction and outside the jurisdiction of the various states. Historically, this provision has been used by the federal government to prosecute individuals on federal enclaves, such as military posts, in federal court for violations of the laws of the state where the enclave is located. The Antiterrorism and Effective Death Penalty Act states that the laws that would apply in waters outside of state jurisdiction are the laws of the state the waters would be in if the boundaries of the state were extended to the outer limits of the twelve nautical mile territorial sea. Most state waters extend three miles from the baseline.

Based on this provision, it now appears that the federal government may criminally prosecute ship owners, operators and crewmembers under state criminal laws, including state environmental laws, in the twelve nautical mile territorial sea. There are many questions as to how, and whether, this will occur. But the potential for more criminal prosecutions of environmental laws under this provision certainly exists.

**Contiguous
Zone**

In 1999, President Clinton issued a Presidential Proclamation that extended the contiguous zone of the United States from twelve nautical miles to twenty-four nautical miles from the baseline. Twenty-four nautical miles is the maximum limit authorized for a nation’s contiguous zone under the United Nations Convention on the Law of the Sea (UNCLOS). The proclamation specifically states that it does not amend existing federal or state law. Therefore, this proclamation will likely not affect United States environmental laws, such as the Clean Water Act, that

specifically define the contiguous zone as being twelve nautical miles unless Congress amends the specific law.

The impact of this proclamation in extending the ability of the United States to enforce other of its environmental laws is likely negligible. Under UNCLOS, a nation may exercise control over vessels in its contiguous zone necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations in its territory or territorial sea. There is some question as to whether sanitary laws for these purposes include pollution laws. However, UNCLOS also contains provisions specifically applicable to the enforcement of environmental laws by nations. Under these provisions, the contiguous zone is considered part of a nation's exclusive economic zone (EEZ). As such, under UNCLOS, a nation may enforce environmental laws in its contiguous zone to the same extent it can enforce those laws in its EEZ.

**Exclusive
Economic
Zone (EEZ)**

The United States has adopted a 200 nautical mile exclusive economic zone (EEZ), which is the maximum limit authorized by UNCLOS. Some federal environmental laws are specifically applicable in the EEZ of the United States.

The Clean Water Act prohibits the discharge of oil and hazardous substances in connection with activities that may affect the natural resources belonging to, or under the exclusive management authority of, the United States in quantities that may be harmful. For all intents and purposes, this has been interpreted to mean that discharges of oil that create a sheen are prohibited into the waters of the EEZ of the United States. Similarly, the Act to Prevent Pollution from Ships prohibits the discharge of garbage, as defined in Annex V of MARPOL, into the EEZ of the United States.

However, unlike most other areas subject to the jurisdiction of the United States, the ability of the United States to enforce its environmental laws in the EEZ may be limited by UNCLOS. Under UNCLOS, only monetary penalties may be imposed for violations of environmental laws that are committed by foreign vessels beyond the territorial sea of the United States. Likewise, UNCLOS provides that a coastal state such as the United States may institute enforcement proceedings against a vessel that violates environmental laws in its EEZ if the vessel is voluntarily in port in that coastal state. If the vessel is not voluntarily in port, UNCLOS limits the enforcement authority of the coastal state for violations that occur in its EEZ. If such a violation causes major damage or threat of major damage to the coastline, then the vessel may be detained by the coastal state and enforcement proceedings instituted. On the other hand, if the discharge is substantial and causes significant pollution of, or threatens

significant pollution of, the marine environment, then the coastal state may undertake physical inspection of the vessel in its EEZ if the vessel fails to provide appropriate information regarding the incident. The coastal state may then provide information discovered regarding the discharge to the vessel's flag state or the next port state for further investigation and proceedings as appropriate. Because the United States has stated that it recognizes and will abide by the provisions of UNCLOS, this would appear to place limits on the United States to criminally prosecute environmental violations by foreign flag vessels occurring in the United States EEZ. However, no such limits apply to enforcement against United States flag vessels.

**Navigable
Waters of the
United States**

The applicability of many environmental statutes is limited to the “navigable waters of the United States.” The navigable waters of the United States historically include the internal navigable waters of the United States and the territorial sea. However, the meaning of the term may vary from statute to statute, and in some cases may not even be based on whether the waters are truly navigable by vessels or not. For the most part, however, these issues do not have any real impact on vessels engaged in interstate or foreign commerce as any waters on which such vessels operate would be “navigable waters of the United States” no matter the specific environmental statute involved.

One issue that may have an impact on vessels, however, concerns the fact that the term includes the territorial sea of the United States. As stated above (see section entitled “Territorial Sea”), the territorial sea was recently extended to twelve nautical miles for purposes of criminal jurisdiction by the Antiterrorism and Effective Death Penalty Act of 1996. This is a concern because some statutes that apply in the navigable waters of the United States do not define the extent of the territorial sea for purposes of enforcing the statute. For instance, the oil (Annex I) and noxious liquid substance (Annex II) provisions of MARPOL are implemented in the United States through the Act to Prevent Pollution from Ships (APPS). Under the APPS, these annexes apply to foreign flag vessels for purposes of enforcement by the United States only when these vessels are operating in the navigable waters of the United States. The APPS establishes criminal sanctions for knowing violations of MARPOL, the APPS or Coast Guard regulations implementing these laws. There is an issue as to whether the territorial sea for purposes of the enforcement of the criminal provisions of the APPS after the enactment of the Antiterrorism and Effective Death Penalty Act is three nautical miles, as it was when the statute was originally enacted, or twelve nautical miles. This is because the APPS does not specifically define the extent of the territorial sea for purposes of its enforcement.

Marine Casualty and Other Administrative Investigations

If the United States has jurisdiction over a violation of one of its environmental laws or a discharge of a pollutant by a vessel, there are many means and forums authorized under various United States laws by which such violation or discharge can be investigated. To most effectively deal with government investigations and investigators, vessel owners and operators must understand the authorities and forums that government agencies and investigators have available to investigate pollution incidents and other environmental violations. For instance, a vessel grounding, collision or similar marine casualty may cause an oil spill. When this happens, the Coast Guard or National Transportation Safety Board likely will be on scene to conduct a marine casualty investigation. Other federal, state or local enforcement agencies may also be present, particularly if the spill was a major spill or occurred in an environmentally sensitive area. Sometimes, the investigation will be coordinated among several agencies, with a lead agency identified. At other times, these agencies will conduct independent investigations under their individual enforcement authorities. For this reason, individuals and companies should identify the agencies involved and, if possible, under what legal authority they are conducting their investigation.

These investigations can pose immediate problems for owners, operators and crews of vessels involved in oil spills and other marine casualties that result in vessel-source pollution. Therefore, it is important to understand the various types of investigations that may be initiated by the United States government in order to most effectively prepare the company and its employees to deal with these proceedings.

Coast Guard Investigations

The United States Coast Guard enforces all United States laws and treaties on the high seas and on waters over which the United States exercises jurisdiction, and regulates both United States and foreign flag vessels for marine safety and environmental protection purposes.

The Coast Guard is responsible for investigating all marine casualties that occur in the navigable waters of the United States, and all casualties involving United States flag vessels regardless of geographic location. With regard to foreign flag vessels, the Coast Guard also has authority to investigate marine casualties that occur beyond the navigable waters of the United States under certain circumstances. One of these circumstances is if there is a marine casualty in the Exclusive Economic Zone (EEZ) of the United States involving a foreign flag tank vessel in which there was material damage affecting the seaworthiness or efficiency of the vessel or there was significant harm to the environment.

The purpose of these investigations is to promote safety of life and property at sea. They are officially not intended to fix civil or criminal responsibility. However, the law that authorizes the Coast Guard to

conduct these investigations also requires that the investigation determine whether there is evidence that a criminal act has been committed. Coast Guard regulations require such evidence to be provided to the appropriate United States Attorney for prosecution. In conducting these investigations, the Coast Guard has the authority to subpoena documents and witnesses, and may take some testimony under oath.

The Coast Guard also has responsibility to conduct investigations into possible negligence or misconduct by licensed or documented United States merchant mariners. These investigations may lead to hearings before administrative law judges in which the Coast Guard seeks the suspension or revocation of the license or document. The elements of proof for these hearings are in many cases the same or similar to those required to pursue criminal prosecutions under environmental laws, so the evidence gathered by the Coast Guard during these investigations may later be used to pursue criminal sanctions.

Finally, the Coast Guard has authority under the Ports and Waterways Safety Act (PWSA) to investigate accidents or incidents that occur outside the navigable waters of the United States, including those involving foreign flag vessels. An investigation may be conducted if the accident or incident affects, or may affect, the environmental quality of the ports, harbors or navigable waters of the United States. Similar to marine casualty investigations, the Coast Guard has the authority under the PWSA to issue subpoenas for the attendance of witnesses and the production of documents to assist in the investigation of the incident.

**National
Transportation
Safety Board
Investigations**

The National Transportation Safety Board (NTSB) has authority that is independent of the Coast Guard marine casualty investigation authority to investigate major marine casualties involving United States or foreign flag vessels that occur in the navigable waters of the United States, although the two agencies often conduct joint investigations.

Once again, although the primary purpose of a NTSB investigation is not to determine civil or criminal liability, the evidence that is gathered during the course of the investigation could later be used as evidence in a criminal prosecution. In order to conduct investigations, the NTSB has the authority to hold hearings, take sworn testimony and issue subpoenas for witnesses and other evidence.

**Pollution
Investigations**

The Coast Guard and the Environmental Protection Agency (EPA) have administrative authority under the Clean Water Act, as it was amended by the Oil Pollution Act, to investigate the cause of any pollution involving oil or hazardous substances into the navigable waters of the United States.

Notably with regard to vessels, these agencies are authorized to board and inspect any vessel upon the navigable waters of the United States or the contiguous zone to enforce the provisions of these laws.

Similar investigation authorities exist under the Act to Prevent Pollution from Ships (APPS). Under the authority in the APPS, the Coast Guard may investigate violations of the oil, noxious liquid substances or garbage provisions of MARPOL or Coast Guard regulations that implement these provisions. In order to conduct the investigation, the Coast Guard has the authority to issue subpoenas requiring the attendance of witnesses and the production of documents and other evidence. The Coast Guard may also inspect ships to determine if discharges of hazardous substances have occurred in violation of MARPOL. Foreign ships may be boarded to conduct investigations of MARPOL violations while they are at a port or terminal subject to the jurisdiction of the United States.

**Natural
Resource
Damage
Assessments**

A primary factor considered by the government in determining whether an oil spill or other environmental violation will be prosecuted criminally is whether the spill or violation resulted in substantial harm to the environment. Natural resource damage assessments are conducted by federal and state natural resource trustees, who are designated for particular natural resources under the National Contingency Plan of the United States, which is the primary plan to respond to discharges of oil and hazardous substances in the United States. After a spill, federal and state trustees will coordinate their investigations to determine the extent of natural resource damages that may have occurred due to a discharge of oil or hazardous substances. At the state level, it is not uncommon for the same state agency that conducts these assessments to also be the agency responsible for determining the cause of the spill.

Conclusions reached by the trustees regarding the extent of natural resource damages will have a significant bearing on whether a case will be prosecuted criminally, or will be handled through civil or administrative sanctions. Individuals and companies who are responsible parties in oil spills should attempt to work out an agreement with the appropriate federal and state trustees regarding cooperation in conducting the natural resource damage assessment. Without an appropriate agreement for cooperation, the responsible party may be put in a position of having to conduct its own independent assessment of natural resource damages in order to rebut trustee findings of extensive damages that could influence enforcement and prosecution decisions. Likewise, findings by government trustees that no significant environmental damages resulted from a spill may be helpful in convincing federal or state prosecutors that criminal prosecution is not an appropriate enforcement action.

Criminal Investigations

Unannounced Government Interviews

A company may first learn that it is the subject of a government investigation when an officer, employee, or former employee of the company reports to company management that a law enforcement agent seeking an interview has contacted him or her. This is an increasingly common technique, as investigators understand the advantages inherent in surprise. Once such a contact has been brought to the company's attention, the response must be swift, as additional interviews are likely to follow. See the section entitled "Government Interviews" in Chapter 4.

Grand Jury Investigations

A grand jury is a panel of 16 to 23 citizens from a community that is impaneled, typically by the federal government, to investigate whether evidence exists to bring criminal charges in a particular case. For government prosecutors, it serves as a tremendous information gathering resource.

A grand jury has the power to issue subpoenas for documents and for witnesses. The subpoena power allows prosecutors to obtain company records, financial documents, and internal memoranda, with little if any limitations placed on the ability of the government to review the materials. Especially in the early stages of an investigation, a subpoena for documents is important to prosecutors. Often, service of a grand jury subpoena by government agents is the first indication that the company is under criminal investigation.

In addition to documents, the grand jury may subpoena witnesses. These witnesses may be fact witnesses, or may be targets or subjects of the investigation. A "target" is someone that the prosecutor or grand jury has substantial evidence linking that person to the commission of a crime, and who in the judgment of the prosecutor is a presumed defendant. A "subject" is someone whose conduct is within the scope of the grand jury's investigation. If an individual is a target or subject of an investigation, it is DOJ policy to notify the individual of that status. In such situations, the individual may seek immunity so that the testimony to the grand jury will not be used to incriminate him or her, or may invoke his or her Fifth Amendment right to refuse to testify. In this instance, the company should consider whether to provide separate counsel for these individuals. See section entitled "Representation of Employees" in Chapter 2.

Government Searches and Vessel Boardings

A company that finds itself under investigation by the United States Government may be confronted both with searches by investigators at company offices in the United States and with searches of its vessels. Many times, regulatory compliance inspections may lead to subsequent criminal investigations.

Coast Guard and other United States agency enforcement personnel may board vessels under a variety of different authorities. It is important for vessel owners and operators, as well as vessel masters, to understand the different authorities and the limits of these authorities. This is particularly true since courts have consistently treated vessels differently than land-based facilities in terms of government authority to board and search vessels, and to seize evidence of criminal violations. Additionally, because most vessels that operate in waters off of the United States coast are foreign flag vessels, there may be international law issues that limit the ability of United States enforcement personnel to board and search these vessels in order to investigate possible violations of United States environmental laws.

Constitutional Requirements for Searches

The Fourth Amendment of the United States Constitution governs all searches and seizures conducted by federal, state and local government officials, including boardings and searches of vessels and regulatory compliance inspections. As a general rule, the Fourth Amendment protections apply whether the search involves a United States citizen or foreign citizen, or a United States or foreign flag vessel, although there are some exceptions. The Fourth Amendment contains two important clauses to govern searches and seizures: a prohibition against unreasonable searches and seizures, and a requirement that probable cause for a search be established to support each warrant issued.

The United States Supreme Court has interpreted the Fourth Amendment to generally require a warrant for government searches, including administrative (regulatory compliance) searches, and seizures. The warrant must describe the scope of the search with particularity and must identify the evidence that is sought for seizure.

Additionally, the Supreme Court has generally held that probable cause is required before a government search will be deemed to be reasonable under the Fourth Amendment. Probable cause means that the government must show that there is a fair probability that evidence of a crime will be found in a particular place. But there are some exceptions to this requirement, particularly as they apply to boarding and searches of vessels. (See section below entitled “Vessel Boardings.”)

**Search
Warrants**

Government searches of company offices and facilities aimed at uncovering environmental problems can be confusing for various reasons. You can greatly minimize confusion when responding to a government search by keeping two basic principles in mind:

- 1) Treat all searches of corporate offices and land-based facilities as criminal searches because any search potentially has criminal implications. (Searches of vessels are different because courts have generally held that no warrant is required for these searches. See section entitled “Vessel Boardings” below.)
- 2) Request to see a warrant prior to the government agents commencing such searches, and ensure that, to the maximum extent possible, the government agents strictly adhere to the limits set out in the warrant.

What follows is provided to help you better understand government searches of shore-based offices and facilities, and how your company can best respond to them.

Warrant Myths and Facts. Understanding the tools that government investigators most often use in conducting criminal investigations is an important starting point in equipping your company and its employees to respond effectively to government searches. Sometimes investigators may seek to cause confusion and raise stress levels, thereby inducing mistakes by company representatives during searches. In doing so, the investigators may seek to exploit common misunderstandings involving government authority to conduct searches:

Myth #1: The scope of the search is expanded if the government team executing the search is composed of representatives from numerous federal and state/local agencies, each with varying jurisdictions and regulatory responsibilities.

Fact #1: The scope of any search will almost always be governed by the specific terms of a search warrant. (If you consent to a search, the scope of the search is governed by the specific terms of your consent.)

Myth #2: The plain language of the applicable environmental laws and regulations provides the government with the right to search any facility or company office at any time without a warrant

for purposes of determining that facility's or company's environmental compliance.

Fact #2: Courts have placed significant constitutional limits on such statutory provisions, generally requiring a warrant for any search, even one conducted to determine compliance or other administrative reason. (For a discussion of the limited exceptions to the general rule requiring a warrant, see the section later in this chapter entitled "Exceptions to the Warrant Requirement.")

Myth #3: Any effort on your part to control the scope of a search or to record the activities of the government search team amounts to obstruction of justice.

Fact #3: You are entitled to:

- ⇒ ask for a copy of the warrant;
- ⇒ object to any entry on company property by government agents or personnel without a warrant;
- ⇒ object to any aspect of a search or seizure that exceeds the scope outlined in the warrant; and
- ⇒ record (including videotape) all activities of the government during the search.

However, you should not attempt to prevent or impede an entry, search, or seizure in the face of government demands that may have merit. Simply object to the improper behavior, request the government's justification for proceeding, and document how the government proceeds. (Preventing an entry, search, or seizure that is legally justified under the Fourth Amendment may result in charges of obstruction of justice.)

Myth #4: Evidence discovered during the course of a search may provide investigators with sufficient cause to expand their current search beyond the terms of their warrant.

Fact #4: Evidence rightfully obtained during a search may provide the "probable cause" necessary to support an additional search beyond the scope of the current warrant. Such evidence may include any relevant evidence that is in plain view while the

investigators are conducting a search. In most instances, however, investigators must show cause to an independent judicial officer (*i.e.*, obtain a new warrant) prior to expanding the scope of their search.

If the element of surprise is added to the misunderstandings created by these myths, it is easy to see that, unless well prepared, there are several things that could occur during the search to create problems for the company. Among other things, company representatives and employees could waive critical rights on behalf of the company, or fail to effectively monitor evidence gathered by the government, or even lead to allegations by the government of improper conduct by the company during the search itself.

For more detailed advice on how to respond to a government search of company offices, read the chapter entitled “Searches of Company Facilities or Offices Under a Search Warrant” in Chapter 4. Also see the quick-reference cards on responding to government searches provided in Appendix I of this manual.

**Some Basics
on Searches**

This section discusses (1) the various agencies that may be involved in shore-side searches for evidence of environmental violations and (2) the types of searches with which you need to be concerned.

Agencies Involved. In recent years, environmental enforcement efforts have become incredibly sophisticated, with various federal, state, and local enforcement agencies often working together. It is not uncommon for any of the following to be involved in a government search team:

- prosecutors or investigators from the local United States Attorney’s Office (USAO);
- prosecutors or investigators from the Environmental Crimes Section of the United States Department of Justice (DOJ);
- attorneys or investigators from various offices of the United States Environmental Protection Agency (EPA);
- attorneys or investigators from other federal agencies, including the FBI, the Coast Guard, the Army Corps of Engineers, the Department of Transportation, the Department of Natural Resources (Fish and Wildlife Services), or even the Department of Defense;

- prosecutors or investigators from state environmental crimes enforcement units or environmental agencies; and/or
- state or local law enforcement officers.

Generally, any government search team that includes a representative from the office of a federal prosecutor, state prosecutor, or state/local law enforcement agency indicates that the search is a criminal, as opposed to an administrative, search. This is also true any time that the individuals involved in the search include agents from the FBI, or when the agents specifically identify themselves as being “special agents” from a particular federal enforcement agency. Additionally, the investigation is also likely criminal when the individuals involved include uniformed police officers or armed agents.

Do not be intimidated by the number of government agencies represented on a search team because, as a rule, the duties and jurisdictions of the various government agencies participating in the search do not determine the permissible scope of the search. The warrant itself is what matters.

Since information gathered during any search may ultimately be used in criminal proceedings, the safest course is to **treat all inspections and searches of offices and facilities as criminal searches requiring a warrant** (with the possible exception of some purely routine regulatory inspections).

Administrative Inspections or Searches. Administrative searches, also known as regulatory compliance inspections or investigations, are also subject to the warrant and reasonableness requirements of the Fourth Amendment. Rather than probable cause, however, warrants for administrative searches need only be supported by reasonable legislative or administrative standards (i.e. statutes or regulations).

There is an exception to the warrant requirement for regulatory compliance inspections or investigations. Searches without a warrant are permitted in the case of “pervasively regulated industries.” Courts generally have been unwilling to find that the fact that a particular industry must comply with environmental regulations means that the industry is “pervasively regulated.” However, there have been some instances in which closely related concerns have meant that a particular industry has been found by the courts to be “pervasively regulated.” For instance, one court held that the search of a facility that sold liquefied propane gas was justified under the “pervasively regulated industry” exception to the warrant requirement of the Fourth Amendment due to the fact that it was involved in the sale and transport of hazardous materials.

An administrative search may also authorize a search for evidence of criminal violations so long as (1) the “primary purpose” of the search is administrative (and not investigative) and (2) the search for evidence of criminal violations does not exceed the scope of the administrative warrant. Furthermore, any evidence obtained during an administrative search may be shared with state or federal prosecutors and later used to argue there is “probable cause” for a subsequent criminal search, or itself used as evidence in a criminal prosecution. This is particularly important in the context of environmental law enforcement because the standard of intent for proving environmental crimes is minimal, and in the marine pollution context, prosecution may even be based on proof of simple negligence or on strict liability. This means that companies must exercise particular care when a search is conducted for evidence of environmental violations or to investigate a discharge of oil or other pollutant.

Consent to Search. Of course, an appropriate authority at your company (*i.e.*, company counsel, facility manager, or other high-level official) may consent to government entry, search, or seizure without a warrant. This is perfectly appropriate in the case of most routine inspections by federal or state regulatory authorities.

However, consenting to surprise inspections or searches may not as a general rule be advisable because there is no meaningful opportunity to weigh all potentially negative factors. These include the potential for loss of corporate or individual rights or privileges, disclosure of violations, disruption of normal operations, damage to facilities, and injury to employees or government personnel when areas that pose a high risk for safety are searched. For this reason, it is highly recommended that company policies clearly establish which officers or individuals have the sole authority to consent to a search of company facilities. For instance, the policy would state that any requests for consent to search or inspect the facility or office may only be granted by the company counsel or other specifically named individual.

If you do consent to a search, it is highly recommended that you **carefully circumscribe the scope** of the search to which you consent **in writing**, then make sure that the government investigators or agents conduct the search within the defined scope of the search as written. If this does not occur, the consent for the search may be withdrawn.

Vessel Boardings

Vessel boardings by government agencies such as the Coast Guard are considered searches that are subject to the provisions of the Fourth Amendment, but are generally treated by the courts very differently than searches of shore-side facilities. The courts have recognized several

general exceptions to both the warrant and probable cause requirements for vessel boardings and searches, particularly when the Coast Guard is the boarding agency. In fact, these exceptions have rendered the warrant requirement of the Fourth Amendment for searches of vessels to be, for all intents and purposes, non-existent.

Coast Guard Authority. The United States Coast Guard has one of the most sweeping law enforcement authorities granted to any agency in the United States. Under this authority, the Coast Guard may board any U.S. vessel anywhere, and any foreign flag vessel under U.S. jurisdiction, to conduct a document and safety inspection. The courts have generally held that a Coast Guard boarding to conduct a document and safety inspection meets the reasonableness requirement of the Fourth Amendment and that no warrant is required.

During the course of this inspection, the Coast Guard may visit public areas of the ship, such as the engine room, the bridge or cargo holds. They may address questions to crewmembers. The Coast Guard may also photograph or videotape areas, and do such things as take oil samples. Such boarding is authorized without a warrant even though the Coast Guard may suspect criminal activity. If observations made during the course of the boarding enable Coast Guard boarding members to develop reasonable suspicion of criminal activity, courts have recognized that the Coast Guard may extend the search beyond a document and safety inspection. If observations made result in the Coast Guard developing probable cause to believe the vessel was engaged in criminal activity, then a full stem to stern search of the vessel is authorized.

In addition, Coast Guard officers are deemed by law to be Customs officers of the United States. The courts have recognized an exception to the warrant requirement of the Fourth Amendment for vessels that are entering or leaving the functional equivalent of the border of the United States, which the courts have deemed to be the waters of the contiguous zone for most purposes. This exception allows Customs officers to board vessels to determine if the vessel is in compliance with applicable United States laws. As Customs officers designated by law, the Coast Guard is authorized to conduct searches of vessels at the border without a warrant, and take appropriate enforcement action if evidence of violations of environmental laws of the United States is discovered.

Exigent Circumstances. Courts have recognized a number of other exceptions to the warrant requirement of the Fourth Amendment as they relate to the boarding and search of, and seizure of evidence from, vessels. These exceptions may allow agencies other than the Coast Guard, such as

the Environmental Protection Agency or Federal Bureau of Investigation, to board vessels without a warrant to investigate possible environmental violations.

The most frequently cited exception is the “exigent circumstances” exception. Because vessels have access to the open sea and can easily dispose of incriminating evidence over the side, courts have held that the vessel may be boarded and searched without a warrant if there is probable cause to believe that a vessel was engaged in criminal activity. Some courts have recognized this exception even in situations in which the vessel was in drydock.

Courts have held that sighting of a vessel discharging oil is sufficient probable cause such that the “exigent circumstances” exception to the warrant requirement of the Fourth Amendment is applicable.

Consent to Search. Another exception to the warrant requirement is if the ship’s master or, in some cases another person in the crew, consents to the boarding and search. Basically, anyone with authority over, or that has a sufficient relationship to, the place being searched can give valid consent to a search. Thus, the engineering officer on a ship can likely give valid consent to search the engine room even if the master has not specifically consented. For this reason, the vessel owner or operator should consider issuing a memorandum to the fleet or an entry in the vessel operations manual clearly establishing that only the master or other designated officers may consent to a search of the vessel. Vessel owners or operators may also wish to direct the master to contact the company’s attorney before issuing consent.

Any evidence discovered after valid consent to search is given can be seized and admitted at trial. Consent to search can be limited in scope (the engine room, a particular cargo hold, etc.) and generally the scope of the search cannot exceed the limitations of the consent as given. Additionally, consent to search can be withdrawn at any time.

Plain View. Courts have held that law enforcement officers may seize evidence of violations of United States law that is in plain view without a warrant. However, the seizure of evidence in plain view is valid only if the law enforcement officer is validly in the place where the evidence was found. This means that the officer must be at the location either pursuant to a valid search warrant or a valid exception to the warrant requirement.

Because there are so many exceptions to the warrant requirement that justify the presence of Coast Guard and other law enforcement agents

aboard vessels, the plain view exception becomes very important. For instance, if a Coast Guard investigator or agent is validly aboard a vessel under the Coast Guard's general vessel boarding and search authority, the investigator or agent may be able to seize any evidence that is in plain view. Thus, any evidence of environmental violations in the engine room, on the bridge or otherwise in or on public areas of the vessel may be validly seized if it is in plain view and the incriminating character of the evidence is apparent.

Regulatory Compliance Boardings. Some courts have found that some types of commercial vessels, particularly fishing vessels, are pervasively regulated, and that a regulatory compliance boarding of these vessels by the Coast Guard, therefore, does not require a warrant. In addition, some environmental statutes give the Coast Guard or other enforcement agencies authority to board vessels to determine if a violation of environmental laws or regulations has occurred. As stated above, it is important to note that evidence of violations discovered in the course of these regulatory compliance boardings may subsequently be used as evidence by prosecutors in a criminal prosecution.

International Law

International law principles may also serve to authorize, or in some cases limit, government agents or inspectors in boarding of foreign flag vessels. For instance, the Clean Water Act prohibits the discharge of oil or hazardous substances in quantities that may be harmful to the environment into the navigable waters of the United States, which includes the territorial sea. It also prohibits such discharges into the contiguous zone of the United States and into the Exclusive Economic Zone (EEZ). One way in which international law affects these provisions is that the Act allows discharges that are authorized under MARPOL in the contiguous zone and the EEZ of the United States. Another way in which international law would affect these provisions is the means by which UNCLOS provides that environmental laws can be enforced.

The United Nations Convention on the Law of the Sea. The United States is not a party to the United Nations Convention on the Law of the Sea (UNCLOS). However, the United States has recognized UNCLOS as reflective of customary international law and has committed to abide by the provisions of UNCLOS. At least one court has ruled that the provisions of UNCLOS legally bind the United States Government because the treaty has been submitted to the United States Senate for ratification. However, most United States courts have held that individual and corporate defendants do not have the ability to invoke the provisions of international laws or treaties to challenge actions, such as vessel

boardings, that were contrary to those international laws or treaties. Instead, this must be done by the affected nation, such as the flag state of the vessel or the country where the company is incorporated.

Flag State Consent. One important provision of international maritime law that is frequently used by United States law enforcement agencies to board foreign vessels is to seek the consent of the flag state to board. Under customary international law and UNCLOS, the flag state of a vessel has the exclusive right to exercise enforcement jurisdiction over its vessels on the high seas (which includes a country's EEZ). United States courts have held that the Coast Guard may board foreign vessels on the high seas with the consent of the flag state if there is a reasonable suspicion that the vessel was engaged in a violation of United States law. Recently, the Coast Guard obtained flag state authority to board a vessel off the coast of a foreign country based on the suspicion that the vessel had discharged oil in the navigable waters of the United States. Enforcement agents from the United States Coast Guard, the EPA, and the FBI, and prosecutors from the United States Attorney's office responsible for the area where the discharge had occurred, all participated in the boarding. This eventually led to criminal prosecution in the United States of the corporate vessel owner, the corporate vessel operator and individual crew members for the oil discharge that had occurred in U.S. waters.

Hot Pursuit. An exception under international law to the exclusive jurisdiction of the flag state for its vessels on the high seas is the right of hot pursuit. This allows a Coast Guard vessel to pursue a foreign vessel that has violated United States environmental laws within the internal waters or territorial sea of the United States beyond these waters, and to conduct law enforcement actions on board the foreign flag vessel on the high seas.

Port State Control Boardings. International environmental conventions, such as MARPOL, may provide authority for states that are parties to the convention to board vessels of other parties to enforce the provisions of the convention and to investigate violations. Under MARPOL, a party to the convention, such as the United States, may board any ship to which the MARPOL Convention applies to determine whether the ship has discharged any harmful substances in violation of the Convention. These are known as port state control boardings. Such boardings may result in discovery of evidence of criminal violations of United States laws. For instance, if evidence discovered during a port state control boarding indicates that a discharge of oil occurred in waters subject to the jurisdiction of the United States, this evidence may be turned over to the

United States government by the port state that conducted the boarding. The United States may then initiate appropriate enforcement actions, including criminal prosecution when authorized, for violation of MARPOL or any other applicable United States laws. MARPOL authorizes a party to the Convention to request that a port state control boarding and investigation be conducted by any party to the Convention in whose port the suspect vessel may be found.

In a recent case, the Coast Guard requested that a foreign port state investigate the discharge of oil in a United States port from a vessel whose next port of call was in that port state. In fact, the United States received permission from the foreign port state to participate with the port state in the investigation, and United States federal criminal agents boarded the vessel in conjunction with port state officials. Evidence discovered during the investigation led to criminal charges being filed in the United States for violations of United States environmental laws against the corporate vessel owner, the corporate vessel operator, and individual crew members.

This port state boarding and investigation authority becomes particularly important in cases in which the company that owns or operates the vessel has business ties to the United States that may be sufficient to allow the United States to exercise criminal jurisdiction. Even if no such ties sufficient to establish criminal jurisdiction exist, the company may consent to jurisdiction if failure to do so could lead to the inability of the company to trade or call in the United States in the future, significantly affecting company profits.

Additionally, records, such as the Oil Record Book or Garbage Record Book, are required to be kept under MARPOL. Duly authorized officials of port states that are parties to MARPOL, such as the United States, are authorized to ask for and review these records to ensure that the vessel is in compliance with the provisions of MARPOL. The owner, operator and crewmembers of a foreign flag vessel have been prosecuted under United States law for false statements in such records when they are presented to a United States government agency, such as the Coast Guard, while the vessel is in a United States port. Courts have upheld the exercise of criminal jurisdiction by the United States in these cases even though the incident for which the false entry was made itself occurred on the high seas outside of the jurisdiction of the United States.

CHAPTER 2: PREPARING FOR THE WORST CASE SCENARIO

Planning and training are important factors in preventing pollution. Planning and training are also important for responding to pollution. Vessels and facilities are required to plan for pollution emergencies, and to conduct training and drills of crew and employees to ensure that the response to a pollution emergency will be effective. But what happens when the prevention plan does not work and an environmental violation occurs, or if the response plan needs to be implemented because of an oil spill, and the company comes under investigation by the government? As is evident from the previous chapter, employees of companies that own or operate vessels then will likely come into contact with representatives of government agencies, particularly the Coast Guard, who are investigating the violation or spill. However, very few companies have done the planning and training necessary to ensure that the company and its employees can adequately and effectively respond in these situations, even though criminal prosecutions are a real possibility. Such planning and training can help to ensure that a company is in the best position to defend itself and its employees against criminal or civil sanctions that may arise out of these situations.

Planning for the First Critical Hours

There are some general issues that the company should address in order to be best prepared to deal with government investigations of environmental violations or spills of oil or other harmful substances. These issues will need to be addressed if the company ever finds itself the subject of a criminal investigation. It is not in the best interests of the company to wait to address these issues until a major spill or other environmental incident occurs, when the pressure and lack of time for adequate consideration of important issues can lead to ill-conceived decisions.

The first hours after the company becomes aware it is the focus of a government investigation are critical. The investigation may occur during an oil spill, when there is significant pressure on the company and the crew of the vessel involved to respond and mitigate the environmental effects of the spill. On the other hand, the company may first become aware of the investigation with the service of a criminal search warrant, when the government may descend on company offices with numerous agents, and may be accompanied by the press. If the company is not prepared in advance, government agents, who already hold a significant advantage, could overwhelm the company. Additionally, employees who are not adequately prepared may try to hide information, opening up other problems for the company.

**Reporting of
Pollution
Incidents
And Marine
Casualties**

The first important event that occurs in a pollution incident is the reporting of the incident to the government. In fact, the failure to report an oil spill may be in and of itself a criminal offense depending on the location of the incident. Likewise, if the pollution is the result of an incident that is also considered a marine casualty, then other reporting criteria applies. In light of the increasing risk of criminal prosecution associated with marine pollution incidents, the information shared with the government in the initial report of an oil spill could have significant adverse impact on the company or the individuals who may face this risk. How, when, and by whom the information is reported and the content of the report are all important factors that could later have a significant impact on the company or individuals involved if the government decides to pursue criminal prosecution.

Clean Water Act. The Clean Water Act requires that any oil spill or discharge that results in a sheen on the navigable waters or the waters in the contiguous zone of the United States be immediately reported to the National Response Center by telephone (1-800-424-8802) or other means. While there is no specific reporting form established by law or regulation, such reports typically will include source, location, type of oil, and other information that will allow the government to ascertain the scope and significance of the oil spill, and to initiate the oil spill response and investigation. The Clean Water Act specifically states that the notification received shall not be used against any person in a criminal case, except in a prosecution for perjury or a false statement. Thus, the statute provides a form of immunity for individuals, but not for companies or other business entities.

MARPOL. The MARPOL Convention requires that discharges of harmful substances be reported. Under MARPOL, this includes petroleum oil, noxious liquid substances, and likely even garbage. In the United States, the Act to Prevent Pollution from Ships (APPS) requires that United States flag vessels operating anywhere and foreign flag vessels operating in the navigable waters of the United States comply with the requirements in Annexes I and II of MARPOL. (For garbage and plastics discharges, the requirements of Annex V apply to foreign vessels in the navigable waters and the Exclusive Economic Zone (EEZ) of the United States.) Under the APPS and MARPOL, discharges in violation of MARPOL must be reported using the format prescribed by MARPOL. Knowing violations of the reporting requirements may be criminally prosecuted under the APPS. There is no immunity provided by the APPS for the notification required by MARPOL.

Marine Casualties. An oil spill or pollution incident on a vessel may also be reportable as a marine casualty. If the pollution incident is the result of grounding, collision, structural failure or other vessel-related problem, a report of the marine casualty is also required. The report must be made immediately after addressing any safety concerns as a result of the casualty, and must be followed up by a written report (CG-2692) within five days. The written report is a more comprehensive report that requests information regarding the cause of the casualty. Such information is obviously important in terms of assisting the Coast Guard in determining the cause of the casualty. However, any incriminating information provided in the notification or written report may later be used against the owner and/or operator of the vessel involved, or the individuals involved, in subsequent environmental criminal prosecution, as there is no immunity provided for these reports by law.

Hazardous Conditions. Another reporting requirement is for the reporting of hazardous conditions that occur on vessels. A hazardous condition is any condition that may adversely affect the safety of the vessel or the environmental quality of any port, harbor or navigable waterway of the United States that occurs on a vessel or is caused by the operation of a vessel. Any hazardous condition must be reported immediately to the nearest Coast Guard unit. Willful violation of this requirement may itself be prosecuted as a criminal offense under the Ports and Waterways Safety Act.

Company Reporting Procedures. While the information provided in the notification of an oil spill under the Clean Water Act cannot be used against any individual by law, there are other requirements for notification and reporting that may also be required for the same incident that do not contain such safeguards. Companies should develop policies regarding the reporting of spills that take into account this fact. If the company has a policy in place that requires its vessel captains to make the written report of marine casualty, the company should also ensure that the vessel captains understand that the information provided in the report can be used against them in later proceedings. Additionally, the Fifth Amendment privilege against being compelled to make a statement that could incriminate the individual would apply to, for instance, the report of marine casualty or other reports that are not protected under the Clean Water Act. As stated above, however, the Fifth Amendment protections apply only to individuals, not to companies or other business entities.

In light of the above, vessel owners and operators should look very closely at their current reporting system to ascertain if there are ways to minimize

the risks involved. Obviously, the report of the spill must be made immediately, but the information provided as to any likely cause of the spill should be closely scrutinized. Some companies have consulted criminal defense attorneys to work with them on their reporting procedures. Even if this is not done, if the spill is significant, criminal counsel should be consulted as soon as possible, but especially before providing any written statements or reports to the government.

**Legal
Representation
During An
Investigation**

One of the most important decisions that can be made early is how the company will be legally represented in the event of an oil spill or other incident that results in a government investigation. Some companies have determined that they require criminal defense counsel to be available any time that there is an oil spill in United States waters. This is because criminal sanctions can be based on strict liability and simple negligence in the vast majority of these cases. In this regard, there are several things that the company should consider in preparing for this possibility.

In-House vs. Outside Counsel. Company officers, directors, or general counsel must decide very early in responding to an investigation whether to retain outside counsel or to rely solely upon the company's own in-house attorneys to oversee the company's response to a government investigation.

In-house counsel must be involved in responding to any government investigation because they have important knowledge about the company's history, structure, and employees, which will be invaluable in identifying sources of information and assessing the allegations. In addition, they are usually in a better position to deal with company management and to seek cooperation of employees.

On the other hand, retaining outside counsel can provide the company with particular expertise in criminal matters. If in-house counsel was in any way involved with the business decisions or corporate policies under investigation, the government may question the independence and validity of the results of his or her analysis and investigation. Prosecutors may also perceive outside counsel as more independent during negotiations. Finally, bringing in outside counsel to conduct an internal investigation may provide a better argument that documents and information generated for the investigation are protected under the attorney-client or work product privileges.

Getting Criminal Counsel Involved Early. Because the standard of intent for proving an environmental crime is much more diluted than the standard of intent for proving most other types of crimes, virtually any violation of environmental laws is potentially subject to criminal prosecution. (See section entitled “Enforcement Agencies and Prosecutors Have Substantial Discretion In Determining Whether Pollution Incidents Will Be Criminally Prosecuted” in Chapter 1.) The decision is ultimately within the discretion of the government investigators and prosecutors handling your case. Thus, violations of environmental laws or pollution incidents that appear fairly innocuous can quickly transform into investigations with serious criminal ramifications.

This means that it is extremely important for criminal counsel to be involved in responding to the government environmental investigations as early as possible. Better yet, criminal counsel should be made a part of the response planning and should be made a part of response drills. Additionally, if outside criminal counsel is identified, the counsel should be made part of in-house training programs. (See section entitled “Employee Training” later in this chapter).

Criminal and Civil Attorneys. Criminal enforcement is sufficiently different from civil enforcement such that immediate involvement of criminal counsel is necessary once your company appears to be the subject of any inquiry concerning environmental issues. There are too many things that can go wrong early in a criminal investigation when it is run solely from a civil liability perspective. For example, civil attorneys handling criminal matters often run into credibility problems with prosecutors or even allegations of obstruction. This is because discovery in the civil context is often quite antagonistic and drawn out while subpoenas for document production during a criminal investigation require an immediate, thorough, and timely response, without exception.

There are other potential issues related to the representation of companies by civil attorneys, particularly admiralty attorneys, for purposes of potential criminal investigations. In certain oil spill cases, admiralty attorneys who act as local correspondents for the company’s P&I Club(s) may be able to represent the vessel owner, the insurer and the master or other members of the crew in a civil liability context. The same is usually not true in a criminal liability context. Conflicts of interest will nearly always exist between the vessel master, some members of the crew and the corporate vessel owner in any oil spill case. This is because all of these persons are potentially criminally liable based on the availability of strict liability, simple negligence or minimal criminal intent statutes as a possible basis for criminal prosecution. Further, criminal sentencing

guidelines reward cooperation with the government, setting up a situation in which the first party to cooperate with the government in an investigation will likely receive more favorable treatment by government prosecutors. This means that attorneys may be constrained by ethical rules from representing the corporation and the individuals.

Finally, failure to initially recognize this conflict may result in the company's civil or admiralty counsel having to withdraw from representing the company, adversely affecting the company's ability to defend against civil liability. This could arise if the civil or admiralty counsel questions individual crewmembers regarding the cause of the casualty and elicits a response that suggests possible criminal liability on the part of the crewmember. In this case, unless it had been made clear to the crewmember in advance of questioning that the counsel is representing the company, the lawyer must represent the individual's best interest, which may be contrary to the company's interest in presenting a defense.

Specific Civil Litigation Issues. Because of the easy crossover from civil to criminal liability based on the reduced intent requirements in environmental cases, information that is produced in the civil context may be of great benefit in prosecution of criminal cases. In many cases, maritime spills are the result of a marine casualty such as a collision or grounding. Within six months after such a casualty, proceedings may be filed by the owner of the vessel(s) involved seeking to limit liability under admiralty law. (Limitation of liability under traditional admiralty law does not apply to liability under the Oil Pollution Act for response costs or damages resulting from the pollution.) Evidence may be produced during these limitation proceedings that could be of benefit to criminal investigators and prosecutors.

Also, the Fifth Amendment privilege against self-incrimination is not applicable to corporations. For individuals, judges may not draw adverse inferences based on invocation of the privilege in criminal cases. However, the judge in a civil case may draw an adverse inference from an individual's silence in a civil case, despite the fact the individual retains the absolute right to decline to answer questions under the Fifth Amendment. Finally, the privilege may be waived for all purposes if it is not invoked in the civil case.

For all of these reasons, companies are well advised to plan to hire criminal defense counsel to be on-scene as soon as possible to defend the company, and advise the company on the representation of employees to avoid possible conflicts arising from potential criminal liability. In this regard, to the extent that planning would allow, criminal defense counsel who will be representing the company should be familiar to corporate officers and employees well in advance of an incident. Additionally,

advice received to best defend against criminal liability will often differ from that received by the company to best defend against potential civil liability. Therefore, it is highly recommended that the company's criminal defense and civil defense attorneys be familiar with each other and establish a working relationship in advance of any environmental incident.

**Representation
Of Employees**

Because a company can only act through its directors, officers, and employees, the conduct of employees is always at issue in a criminal investigation. Therefore, corporate counsel should determine early on, and in advance if possible, whether the corporation will pay for defense counsel for directors, officers and employees if these individuals' interests become adverse to those of the company. Failure to carefully examine potential conflicts in the early stages of a government investigation may result in defense counsel being disqualified not only from representing individual employees, but also from representing the company (as a result of confidences divulged by employees early on).

When Separate Counsel Is Needed. As a general rule, it is not advisable for company counsel to also represent employees, even if no conflict is foreseen at the inception of the investigation. Employees (including former employees) require separate counsel when:

- the prosecutor has identified the employee as a "target" or "subject" of the investigation; or
- the employee appears to have taken action contrary either to company policy or the directions of a supervisor.

Employees who are identified as "witnesses" are less likely to require separate counsel, unless facts known to the company suggest that such an employee could eventually become a target or subject of the investigation.

Arranging for and Paying Separate Counsel. If the company counsel determines that an employee (including a former employee) needs independent representation, company counsel should:

- arrange for individual representation by counsel with whom the company's defense counsel has worked comfortably in the past; and
- strongly consider paying for the representation.

In some circumstances, corporate policies, agreements with directors and officers concerning indemnity, union contract provisions, or state laws

allow, and may even require, the company to pay for representation. Regardless, it is almost never in the company's interest for an employee who is the subject of a criminal investigation to be without the benefit of representation, or to be represented by an attorney who is handpicked by the employee but has no experience in environmental criminal prosecutions.

Keep in mind that, once a company begins paying for such representation, it is difficult to stop merely because the employee is not cooperating with the company, as doing so creates the appearance of coercion.

Advantages of Separate Counsel. The decision to pay for counsel for individuals has some disadvantages. For instance, a decision to provide counsel may be viewed by the government as tying that individual's interest closely to those of the company. Recently, a memo issued by the Deputy Attorney General to DOJ prosecutors entitled "Bringing Criminal Charges Against Corporations" indicated that a corporation's promise to represent culpable employees and agents by paying for separate counsel may be viewed by the government as an attempt to protect its culpable employees. Such a determination can be viewed unfavorably by government prosecutors in determining whether the company is cooperating with the government in an investigation and may lead to less favorable treatment for the company in the long run. It is certainly true that, in a situation in which the company believes that the spill or violation was the result of a "rogue" employee acting intentionally or in bad faith, the company should not hire separate counsel for that employee.

However, even when there is no apparent conflict between the company and individual employees, there may still be advantages to hiring separate counsel for employees who may be witnesses or whose conduct may be subject to investigation. Separate counsel:

- Provides independent judgment for individual employees who might otherwise be deceived by inadequate offers of immunity or plea bargains, or intimidated by the prosecutor's power to seek and obtain an indictment.
- Will likely have greater credibility with the government regarding representations made on behalf of individuals.
- May be able to solicit more information from the government than corporate counsel may.

- Can prepare the employee to be interviewed or to testify without the risk that the company will be accused of improperly attempting to influence the employee.
- Serves to demonstrate the company's commitment to protect employees from the personal risks of a criminal investigation.
- Establishes a buffer between the company and recalcitrant or untruthful employees, thereby reducing inferences of corporate misconduct.
- Provides another voice to influence the prosecutor about the direction and scope of the government's investigation.
- Usually allows the company advance notice of the individual employee's decision to cooperate with the government as well as the content of any evidence that may be used against the company.

Insurance

Companies should contact their Directors and Officers (D&O) liability carrier, their P&I club and other relevant insurance carriers to determine the extent to which the costs of defending the company and its officers during the investigation and prosecution of environmental criminal cases are covered under current policies. In some instances, companies may have to purchase optional coverage for these purposes.

Even if such expenses are covered under insurance policies, in many cases the carrier will require prior approval of any costs of investigation and defense. Also, some insurance carriers will require prior approval of the criminal defense counsel hired, and in some instances, carriers may have an approved list of criminal defense counsel similar to the list of P&I club correspondent counsels. Finally, in most cases, even if these policies pay for the costs of criminal defense during an investigation or prosecution, they will not pay criminal fines and penalties. This is true even if the fines and penalties are the result of a plea agreement. In some instances, a plea agreement may be structured so that part of the payment is set aside for broad-based pollution remediation projects or pollution education programs. Coverage for these types of costs should be explored with the insurance carrier.

Many D&O insurance policies contain a pollution exclusion clause, or an outright preclusion clause, which denies coverage for penalties, fines or judgments flowing from environmental investigations. Once again, insured directors and officers should ascertain the extent to which the policy will cover other costs associated with the investigation and prosecution of environmental violations.

Response Issues The Oil Pollution Act of 1990 requires that most tank vessels operating in waters subject to the jurisdiction of the United States have pollution response plans for response to oil spills. MARPOL requires all vessels over 400 gross tons to have Shipboard Oil Pollution Emergency Plans. Under these plans, companies must establish a response command structure and provide for company personnel or agents to be on-scene to coordinate response actions with the Federal On-Scene Coordinator (FOSC).

Companies should carefully consider who within the company is designated as the company's on-scene response, media or government liaison representatives in these plans. **To the extent possible, these individuals should not be within the ship operations supervisory chain as these are the individuals within the company whose conduct will most likely be examined by government investigators for potential criminal liability.** Similarly, individuals with environmental compliance or vessel maintenance responsibilities within the company may also be a focus of investigators if oil is discharged from a vessel.

Vessel owners and operators may wish to identify individuals outside the management and compliance chain for duties associated with response to oil spills. While these individuals must obviously be adequately and appropriately trained in oil spill and pollution response, they will not have to worry about potential criminal liability because they are divorced from ship management and operations decision making processes that may come under government scrutiny.

In addition to determining who will represent the company at the scene of an oil spill, the company should consider establishing a policy as to whether the crew that was aboard at the time of the incident will be changed out or left aboard to respond to the spill. Companies have a duty to cooperate in the response to the spill and to mitigate the environmental damages that may result from a spill. Such response and mitigation should commence as quickly as possible. However, there is no legal requirement that the master or crew that was involved in the incident remain on-scene during the entire spill response. Having a qualified replacement crew available and on-scene as quickly as possible will ensure that the company's internal investigation can commence without adversely affecting response operations. It will also ensure that crewmembers involved in a pollution incident can consult with an attorney in the early stages of any government investigation.

Media Relations

Companies should prepare for dealing with the media during a government investigation. Many companies have media relations (public affairs) guidance and policy built into oil spill or emergency response plans. Others have independent public relations plans or have hired public relations consultants to develop public relations plans and to work with the company in the event of major oil spills or other crisis management situations.

An unfortunate reality is that media reports may influence government enforcement actions and determine whether the investigation is initially conducted as a criminal investigation or an administrative investigation. This is particularly true in instances in which a spill or other incident causes significant environmental or natural resource damage, or could potentially affect public health, when media interest will be especially high.

In light of this reality, companies should develop a media plan if they do not already have one, and if a company already has a plan, it should be reexamined, keeping in mind the following:

- The plan should identify audiences that are critical to the company's business, and the plan should have procedures for communicating with each of these audiences.
- The plan should identify the duties of a company spokesperson, but not necessarily establish who will be the company's spokesperson in all cases. In ultimately identifying a company spokesperson for a particular incident, keep in mind the issues discussed above in the response planning section concerning whether that person may have potential individual criminal liability based on the person's position in the company.
- Define the spokesperson's role and the role of corporate counsel in developing statements on behalf of the company. In particular, any statements should be reviewed for consistency and legal liability with the corporate counsel before they are issued.
- The plan should clearly state that, in the event of an oil spill or other pollution incident involving a vessel, the spokesperson should focus on general information regarding the company and the vessel, and on what the company is doing to respond to the spill and mitigate adverse environmental impacts. The spokesperson should never address the possible cause of the spill or incidents leading up to the spill. Instead, it should be made clear that the company is investigating the cause of the incident.

- The plan should clearly state that the spokesperson should avoid indicating that the company is cooperating in the government investigation, especially in the early stages of an oil spill when it is impossible to know whether the investigation will be focusing on possible criminal indictment. The spokesperson must understand that there is a difference between cooperation for purposes of response, which is required by law, and cooperation for purposes of the government investigation into cause. Ultimately, the level of cooperation with a government investigation should be determined by corporate counsel and, particularly in major spills or other situations in which criminal sanctions are a strong possibility, criminal defense counsel.
- The plan should state that all statements and information will be issued by the company's spokesperson, and crew members and other employees who may be fact witnesses should be prohibited from talking to the media. If possible, a central location for the media should be established and company statements and information issued only at that location.
- The results of all drug and alcohol testing conducted on crewmembers should be released only after being reviewed by corporate legal counsel. Because of personal privacy concerns for crewmembers who may have been tested, often the best policy is to state that the testing has been conducted as required by law and that the results were provided to the government.
- If possible, the plan should be reviewed by an attorney with experience in representing companies in environmental criminal investigations.

Employee Training

The most important preparation that vessel owners and operators can do is to prepare employees and crewmembers for the possibilities that the company will be the focus of a government investigation and that they may be questioned by government investigators or involved in the company's response to a government investigation. While tank vessels are often the main focus of government environmental enforcement efforts in the maritime area, owners and operators of other types of vessels, such as cruise ships, bulk carriers, containerships, and so on, must also be prepared.

Training of employees in the marine industry is especially critical because of different approaches that will be used by the government to conduct investigations of vessel-source pollution incidents. Different investigative approaches can be used depending upon whether the

government is investigating a vessel involved in a pollution incident or the shoreside operations of the company that owns or operates the vessel. While there is some guidance that is general in nature and applicable to investigations involving vessels as well as shore-side facilities and offices, company training must take into account significant differences in these two areas. At a minimum, the training program should focus on the following general areas:

- q Education of the company’s environmental compliance personnel and of vessel officers and crew on the nature of possible pollution and environmental investigations.
- q Education on the factors that indicate that a criminal investigation is underway and on corporate policies regarding when involvement of legal counsel is appropriate.
- q Education on the importance of being prepared to deal with government investigators.
- q Education on corporate procedures and policies for dealing with a government search warrant or subpoena.
- q Education on rights of individuals during government investigations, especially Coast Guard marine casualty investigations, and particularly on dealing with interview requests by government investigators.

**Preparing
Employees for
Government
Contacts**

The prospect of the government investigating your company or contacting your employees can be intimidating. When the government investigation is occurring after an oil spill and spill response is ongoing, or when the investigation begins with an unannounced search of a vessel or company office, the potential for mistakes or cover-up conduct by employees greatly increases if panic sets in. In many cases, these contacts can be very confrontational. What can be done to reduce panic and decrease risks of adverse consequences?

Disseminate Written Advice. To help your company and its employees, you need to communicate effectively to your employees and vessel crews the basic concepts outlined in Chapters 3 (Handling a Government Investigation On-Scene) and 4 (Protecting the Company During the Government Investigation). To that end, this manual comes with some useful tools for communicating to your employees and crews the most important advice to be followed when:

- Responding to Government Inspections and Searches
- Responding to Government Interviews

The manual has formats for several quick-reference cards in Appendix I that cover important information and advice for employees and vessel

crews concerning their rights and responses during government investigations. You should customize the quick-reference cards as appropriate for your company and produce them in a format that will encourage employees to keep and use them. For example, you may wish to have the cards printed on thick cardstock and laminated. The cards can then be distributed to employees and vessel crews as appropriate.

Take Time to Train. While the quick-reference cards will help employees and vessel crews to better deal with government agents and investigators under high stress situations, such as after an oil spill, you can and should do much more to prepare them for the prospect of government investigations.

Consider disseminating the quick-reference cards as part of a training session (perhaps a session incorporated into regular company-wide, fleet-fleet, divisional, and/or other regular meetings). Among other things, such a training session would:

- Educate employees about the potential penalties that the company (or in some cases, they themselves) may face as a result of investigations of oil spills and other environmental violations (see the Introduction to the manual). This will hopefully assist the employees and vessel crews to understand the importance of knowing and following the guidance on the quick-reference cards and other corporate policies.
- Help to prevent any potential misconceptions by employees that the company is distributing the quick-reference cards because the company is, or soon expects to be, under investigation by the government.
- Provide an opportunity for employees to get correct answers to any questions that they may have about why the company is disseminating the materials and/or how the employees should respond in specific circumstances.
- Disseminate company policy with regard to issues such as who within the company should be contacted in the event of a request by the government to conduct an inspection or search, and who within the company has authority to grant such a request.

At a minimum, your company should consider distributing the quick-reference cards to employees as appropriate with an accompanying written memo addressing these issues.

Incorporate Investigation Scenarios Into Spill Drills and/or Hold Mock Inspections or Searches. The first impression that your company makes on government agents or investigators often has a significant bearing on relations with these individuals during the inspection and the course of the investigation. Having employees who are calm and competent in these situations will go a long way to gaining the trust of the agents or investigators and can minimize the scope as well as mitigate the intensity of the inspection, search or investigation.

Therefore, even though the quick-reference cards may provide thorough step-by-step procedures for responding, your company will greatly benefit by drilling employees on these procedures just as you drill for pollution response situations. In fact, the best opportunity to practice these procedures may well be to incorporate scenarios involving government investigations into a spill response drill. A spill is an event that will test the company's procedures to the utmost.

Practicing your company's procedures in this way enables the company to identify issues that can be addressed in advance of a spill or other incident that will help to improve the credibility of the company with government investigators. For example, practicing the company's response to a government investigation or search may identify shortcomings in the company's communications flow. It may also assist the company in developing better methods to ensure that evidence collected by the government is tracked and identify the need for particular items (cameras, video cameras, fax machines, etc.) that will assist in this effort. Mock inspections held at shoreside offices may point up the need for a more effective means of keeping company compliance or maintenance records so that a company does not give the impression that it manages its business in a haphazard manner.

Finally, and most importantly, familiarity with the recommended procedures gained through practice under drill situations will help employees and vessel crews to gain confidence in themselves and the company. This will help to minimize mistakes that may arise due to panic or unfamiliarity with proper procedures.

CHAPTER 3: HANDLING A GOVERNMENT INVESTIGATION ON-SCENE

Dealing with the On-Scene Government Investigation of an Oil Spill or Other Marine Pollution Incident

Searches of Vessels

A government investigator's first priority when investigating an oil spill or other marine pollution incident will be to board the vessel involved in order to secure documentary and physical evidence and to interview the crew. It is likely true that in any such case the boarding may be done without a warrant. (See section entitled "Vessel Boardings" in Chapter 1.) This means that the crew members must be prepared to protect the company's interests without complicating the situation by obstructing justice, hiding evidence or making false or misleading statements. This will require that the crew members understand their rights and interests, be familiar with those steps that the company will take in providing counsel at the scene, and ensure that they take steps to track evidence that the government collects during the investigation. This can only be accomplished with training and planning.

In the section below entitled "Searches of Company Facilities Under a Search Warrant," detailed suggestions are made to assist companies in protecting rights, tracking evidence and preventing add-on allegations when the government serves a search warrant on company offices or facilities. Many of these suggestions are valid as well for vessel searches. In particular, vessel owners and operators should have training programs for vessel officers and crew to address the following items:

- Have quick reference cards for vessel crewmembers addressing their rights when government investigators come aboard. (This is covered in more detail in the section entitled "Rights of Parties/Witnesses" immediately below.)
- Have a plan in place to respond to government searches, and for tracking any evidence that may be collected by the government during the search.

If a vessel is involved in an oil spill or any kind of an environmental incident, government investigators will immediately take steps to document the discharge, take photographs or video of the oil on the water and the possible sources, take samples, and seize relevant vessel logs and documents. If possible, the general rule is the same as with searches of shoreside facilities – a member of the ship’s crew should accompany the government investigator and document the search. Obviously, this may be difficult to do if the majority of the ship’s crew is involved in responding to the spill or incident. Vessel owners or operators may wish to consider assignment of a shore-based owner’s representative, such as a port captain, when possible to serve as an escort. The escort should also have a videotape or camera available to record the activities of the investigators if possible.

Ship’s officers, crew, or shore-side personnel who may be escorts for government investigators should, to the best of their capability, do the following:

- Be professional and courteous.
- Ask to see identification. Record the investigator’s name, agency, address, and telephone number.
- Ask the investigator to articulate the authority under which he or she is conducting the investigation (i.e. Clean Water Act, 14 U.S.C. 89, Marine Casualty Investigation, etc.).
- Bring equipment and supplies along to record the investigator’s actions. This could include pen and notebook, still or digital camera, video camera, or audiocassette recorder. A small kit for this purpose could be maintained on the vessel.
- If the investigator takes videotape or pictures of certain areas of the vessel or particular pieces of equipment, take pictures or videotape of the same areas and equipment, preferably from the same angle.
- If the investigator asks that operational tests of equipment, alarms or monitors be conducted, videotape if possible, or record in detail, the results of those tests.
- If sampling is done, record detailed observations of how the investigator takes samples, the areas from which the samples were collected and other relevant information. If the equipment is available, videotape the entire sampling procedure. Before the investigator departs, request split samples.

- Record all questions asked, or comments made, by the investigator. Also record the names of all members of the crew that the investigator interviewed. This will help the company to ascertain the particular areas of interest that the government may have.
- At the end of the search, request an inventory of all items seized. This inventory should be sent immediately to corporate counsel, who should request copies of all of the documents, logs, charts and other information seized.

**Rights of
Parties/
Witnesses**

Members of the crew should be trained regarding their rights with regard to government interviews. In general, ships' officers and crews are unaware of these rights. This is particularly true for foreign crewmembers.

In addition, the government is not required to explain individuals' rights (known as *Miranda* warnings) before interviewing them. The well-known *Miranda* warnings addressing an individual's right to counsel and right to remain silent are only required to be given when an individual is in a custodial situation. In reality, there are very few instances that courts have found to be a custodial situation requiring rights warnings under *Miranda* other than when an individual is placed under arrest. Thus, there are few instances when an individual will be in a custodial situation during the initial phases of a pollution incident investigation. Unfortunately, many individuals believe that they will know when a criminal investigation is being conducted because they believe that the investigator is required to advise them of their *Miranda* rights. This is a very dangerous misconception.

Crewmembers who may have been involved in the actions that led to the discharge of oil or other pollution incident, must understand that anything that they say to government agents or investigators can be used against them in a criminal prosecution, unless they have received a grant of immunity. Government agents or investigators cannot grant immunity, only prosecutors may do so. Crewmembers should, therefore, be wary of assurances made by government agents or investigators that any statement that they may make will only be used for limited purposes, such as for purposes of determining the cause of a marine casualty.

Because they not only increase the risk to the company of criminal prosecution by their statements or actions, but also may incriminate themselves, crewmembers should be provided with cards that outline their rights anytime they are asked by government agents to give a statement. (See Appendix I).

General. Anytime any government investigator, whether federal, state or local, asks an individual to give a statement:

- The individual has the right to request the agent's identification and to record this information, which the individual should always do.
- The individual may decline the interview, or tell the agent that he or she will consent to an interview at a different time and/or tell the agent to submit all questions in writing.
- If an interview is consented to, the individual has the right to:
 - ⇒ confer with an attorney before and/or during the interview;
 - ⇒ choose the time and place of the interview;
 - ⇒ answer only selected questions or stop the interview at any time;
and
 - ⇒ take notes during the interview to help remember its substance.

Training of crewmembers should include additional advice about consenting to an interview, especially when the incident being investigated is an environmental incident that they may have had some role in. One of the first things that should be done is to encourage crewmembers to call the corporate counsel after the interview, particularly if the crewmember is contacted when off of the ship or outside of normal working hours. If the company has made a decision to provide independent representation for crewmembers involved in a pollution incident, this should be made clear to them. Training should also include advice that, if they choose to answer an investigator's questions, crewmembers should:

- Always be polite and professional.
- **Always answer truthfully.** There is no more certain way to change the focus of an investigation from administrative or civil to criminal than to have the government determine or believe that the information provided is false or an attempt to cover up.
- Never guess or speculate about matters that they do not personally know to be fact.
- Only provide such information as is necessary to answer the question asked by the investigator.

Fifth Amendment Rights. The Fifth Amendment of the United States Constitution states that no individual can be forced to give statements that

are self-incriminating. This right applies to individuals, but not corporations. Additionally, it is very important for companies to make it clear to corporate officers, employees, and crew members who are not United States citizens that the rights provided under the Fifth Amendment apply to them to the same extent as they do to United States citizens.

An individual who wishes to invoke rights under the Fifth Amendment must claim the privilege or else the rights will likely be deemed by a court to have been waived. Additionally, if an individual discloses a fact, then he or she will have also waived the Fifth Amendment privilege with regard to the details about that fact. Therefore, it is extremely important that employees understand that, without appropriate assistance by legal counsel, it is very possible that they may inadvertently waive their rights under the Fifth Amendment during a government interview. Also, they must understand that government investigators will likely not be required to inform them of their *Miranda* rights during the initial stages of the investigation of an oil spill or other environmental incident when they are first approached by government investigators to make statements.

The Fifth Amendment right applies to administrative hearings, such as Coast Guard or National Transportation Safety Board marine casualty investigations, when testimony that could be evidence of criminal violations may be sought. This is particularly important when the marine casualty investigation involves oil spills or pollution incidents because of the possible applicability of criminal sanctions based on strict liability, simple negligence and general intent to marine pollution incidents. An officer or crewmember whose conduct may have contributed to an oil spill, discharge of a pollutant, or other violation of an environmental law in U.S. waters may waive his or her Fifth Amendment rights if he or she testifies at a marine casualty investigation or gives statements to government investigators about the incident without first receiving a grant of immunity. The government can then use any incriminating statements made by the individual against him or her in a criminal prosecution. Therefore, it is highly recommended that the individual consult with an attorney, which is his or her right, before agreeing to make a statement.

Marine Casualty Investigations. Many times, an oil spill will be the result of a traditional marine casualty, such as grounding, collision, or other such event. In these situations, it is likely that the Coast Guard will conduct a marine casualty investigation. The National Transportation Safety Board (NTSB) also may become involved.

A Coast Guard investigation may be informal or formal. If the NTSB is involved in an investigation, public hearings will usually be conducted. In any case, the investigation will commence with evidence gathering at the

scene of the incident and with interviews of involved crewmembers. These investigations are safety investigations, not meant to determine civil or criminal liability. While the use of the evidence and statements gathered by the government in these investigations is limited for purposes of third party civil litigation, there is no such limitation for use of the evidence and statements in government criminal prosecutions. Thus, if the marine casualty also resulted in an oil spill or other pollution incident, any information provided by vessel owners, operators and crewmembers to the government in the marine casualty investigation may later be used against them individually if the pollution incident results in a criminal prosecution. For this reason, they should weigh carefully their potential criminal liability before giving statements to government investigators.

The general advice to employees and crewmembers regarding statements to government investigators summarized above also applies when they are giving statements during marine casualty investigations. Additionally, many of these individuals will likely be “parties in interest” to marine casualty investigations, who have rights established by statute. A “party in interest” is defined by statute the owner of the vessel, any holder of a license or certificate of registry, any holder of a merchant mariner’s document, any other person whose conduct is under investigation, or any other “party in interest” designated by the Coast Guard. A “party in interest” is allowed to be represented by counsel, to cross-examine witnesses and to call witnesses during the marine casualty investigation. There is no requirement that individuals be advised of these rights by Coast Guard investigators during the initial stages of a marine casualty investigation, so companies should provide training and information to crewmembers on this issue.

The Coast Guard also has authority to investigate any possible negligence or misconduct by holders of U.S. merchant mariner’s documents, licenses or certificates for purposes of potential suspension and revocation proceedings. Licensed personnel sometimes believe that they are required to make statements to Coast Guard investigating officers about pollution incidents and that failure to do so may somehow result in an administrative action against their license, document or certificate. Once again, in light of the risk of criminal liability that could arise as a result of a pollution incident in U.S. waters or involving U.S. flag vessels, this is a dangerous misconception that companies should address through training.

**Subpoenas and
Government
Requests for
Vessel
Documents**

If an oil spill results from an incident that also meets the definition of a marine casualty, such as a grounding, collision or loss of structural integrity, the Coast Guard has authority to, and likely will, issue subpoenas for vessel documents or witnesses. These subpoenas are enforceable in United States District Courts. They likely will be issued immediately to the vessel's captain and to individual crewmembers that the Coast Guard seeks to interview.

In general, the guidance below (See section entitled "Subpoenas for Documents" in Chapter 4) on dealing with subpoenas is also applicable to these types of subpoenas. However, the subpoenas issued by Coast Guard investigating officers to vessel personnel frequently provide relatively short compliance periods as opposed to grand jury or other investigative subpoenas that may be issued to companies during long-term investigations. Therefore, the ability to document and copy records responsive to the subpoenas may be limited.

In addition, Coast Guard regulations require the owner, agent, master or person in charge of any vessel involved in a marine casualty to retain voyage records and provide them to a Coast Guard investigating officer upon request. These records include deck and engine room logs, charts, radio logs, night orders and other similar records. The regulations indicate that the Coast Guard will return the records when they have served their purpose. However, if the case is being looked at for possible criminal prosecution, this may be a significant period of time.

Over and above the Coast Guard interest in vessel documents, and particularly during major spills or those that cause significant harm to the environment, the vessel may also be boarded by federal, state or local law enforcement agents who will seek to seize vessel documents. Depending upon the circumstances, this may be done pursuant to a search warrant, or these agents may try to seize the documents as evidence without a warrant pursuant to a Constitutional exception.

Vessel officers and crewmembers should be trained by the company to expect and deal with these various scenarios. In general, the following advice should be considered:

- Be polite, professional and courteous.
- Ask to see identification. Record the investigator's name, agency, address, and telephone number.

- Ask the investigator to articulate the authority under which he or she is conducting the investigation (i.e. Clean Water Act, 14 U.S.C. 89, Marine Casualty Investigation, etc.).
- Ask if the investigator has a subpoena or a search warrant identifying the documents to be seized. If so, obtain a copy of the document.
- Review the subpoena or warrant carefully to determine the exact nature of the documents to be seized. If the investigator seeks to seize documents not identified in the subpoena or warrant, voice an objection. However, do not, in any case, withhold the documents or in any way impede the investigator from obtaining the documents.
- Ensure that individuals, such as chief engineers, watch officers, radiomen and others who have records to be seized cooperate with the investigator in producing the documents. However, these individuals should also be trained to understand that this does not mean that they are required to answer questions or volunteer information about the documents.
- List all of the documents that are seized by or provided to the government investigator.
- Determine if there is a means by which copies of the pertinent portions of the documents can be obtained. If copy facilities are available aboard the vessel, make a request to the investigator to allow copies of the pertinent portions of the documents to be made before the documents are removed from the vessel.
- Identify for the investigator those documents or certificates for which the original is required by law to be retained aboard the vessel, and make a request to the investigator to accept a copy of these documents.
- Meet with the investigator at the end of the search or seizure and obtain an accurate inventory of the documents and records seized by the investigator.

CHAPTER 4: PROTECTING THE COMPANY DURING THE GOVERNMENT INVESTIGATION

This chapter provides guidance to help your company and its employees during a government investigation that has expanded to include searches of corporate offices, interviews of corporate employees, and subpoenas of corporate information. These situations contain some similarities to investigations of vessel-source pollution incidents on-scene, but are sufficiently different to warrant specific coverage. Such investigations may be the result of a continuation of the on-scene investigation to procure corporate information, or the initiation of an investigation of the company due to whistle-blower or other information provided to the government that indicates corporate-wide criminal liability. Based on the implementation of the ISM Code and other compliance requirements that more closely associate the corporate management with vessel operations, the likelihood that investigations of oil spills and other pollution incidents will involve investigations of corporate practices and supervision of vessels have never been greater. Specifically, the information in this chapter will provide guidance to:

- q preserve all applicable rights;
- q track all the evidence gathered by the government; and
- q prevent any “add-on” allegations (obstruction, concealment, and the like) resulting from ill-advised behavior in response to the government inquiry.

This chapter will discuss how to preserve your rights, track evidence gathered, and prevent “add-on” allegations in each of the following three contexts:

- q surprise government searches of company facilities or offices;
- q unannounced government interviews of employees; and
- q government requests/subpoenas for documents.

Searches of Company Facilities or Offices Under a Search Warrant

Protecting Rights

There are several basic things that company representatives can do to protect the rights of the company and its employees during a surprise search of a company facility or office:

Prepare for the Prospect. Disseminating the quick-reference materials on responding to government searches and interviews (provided in Appendix I of this manual) will go a long way toward guiding:

- reception personnel on how to deal with the arrival of a government search team;
- key company representatives (attorneys, facility managers, environmental managers, and so on) on how to supervise (“escort”) government agents during a search; and
- company employees on what their rights are if government representatives ask questions during the search.

Be Professional at All Times. Regardless of the demeanor of government representatives, always be calm, courteous, and serious. Too much humor and informality on the part of company representatives may suggest that the company does not take the government seriously. Yet, challenging the government at every turn may only increase the tenacity of the investigators.

Contact Company Attorney(s). Employees designated as escorts in the event of government searches should ask to delay the search until counsel arrives (or is contacted). If such a delay is not granted (and it need not be), assign another employee to deliver a copy of the warrant (and any other vital information) to the company attorney(s) immediately.

Obtain, Copy, and Review the Warrant. Ask to see the warrant and photocopy it so that (i) designated escorts can carry a copy with them while they supervise the various government search efforts, and (ii) the company has accurate information from which to prepare any later challenges to the warrant or search, if necessary. (You may also want to ask for the affidavit in support of the warrant, which will show the basis for granting the warrant. However, more than likely, you will have to obtain the affidavit from the issuing authority at a later point in time as it is often sealed.)

Review the warrant carefully, identifying the exact areas to be searched. Generally, the government is not entitled to search areas not identified in the warrant (or supporting affidavit), even if relevant documents or other items are in a place other than the area identified. If a search is conducted

elsewhere, inform the lead government representative of your objection, ask for the government's justification for going beyond the scope of the warrant, and take detailed notes and record the improper conduct (preferably on videotape). After voicing your objection, do not impede the investigator in any way.

Marshal Your Resources. Consider what resources you will need before the search proceeds:

- ***Additional Escorts.*** If it appears from the warrant that the government will be searching more than one area of your facility and there are several members on the government team, arrange to have additional “designated escorts” or other appropriate company personnel available, in case the government team splits up. In such case, designate one person as the “lead escort” (preferably company counsel) to manage complications (*i.e.*, answering difficult government questions, objecting to scope of the search/seizure, and so on).
- ***Necessary Equipment.*** Bring equipment you may need to record the search in detail: pen and paper, Dictaphone, camera, video recorder, sampling equipment, fresh batteries and tapes/film for electronic equipment, etc. (**You should strongly consider videotaping the entire search.**) Also, make sure that each escort has a cell phone, walkie-talkie, or other means of readily communicating with company counsel and other escorts during the search.
- ***Sampling Personnel.*** If the warrant indicates that sampling will occur during the search, you should summon company personnel (or environmental consultants) who are familiar with proper sampling protocols to observe the sampling.

Instruct Employees Carefully. Consider sending employees home and keeping only a skeleton crew on hand. Give employees notice of the search, inform them not to interfere with the government agents, and remind them that they are not required to answer agents' substantive questions. (You cannot, however, instruct employees not to answer questions.)

Accompany the Government During the Search. Company representatives have the right to accompany government investigators during any inspection or search, and should do so at all times, carefully recording everything that is said and done. (For detailed tips on how to

keep a thorough record of the government's search, see the section below entitled "Tracking Evidence.") Keeping a thorough record of all search activities is critical for several reasons. Company oversight helps to:

- keep the government search within the scope of the warrant;
- establish a record from which to later challenge improper aspects of the search;
- discern the focus of the investigation;
- identify prior sources of information that led to the search; and
- make a complete record of government evidence seized so that your company is well prepared for developing an effective defense.

Exercise Specific Rights during the Search As Needed. Company representatives may exercise any of the following rights as appropriate:

- ***Answering Questions.*** During the search, you may be asked questions about where certain items can be found (which you generally should answer), as well as more substantive questions (which you can decline to answer). At no time should you volunteer information.
- ***Objecting to Scope.*** The most important role of the designated escort is to make sure that government investigators' search and seizure activities stay within the scope of the warrant. If investigators stray from the terms of the warrant, the accompanying escort should immediately object and communicate with the company's lead escort on how to proceed. (The lead escort may then contact the authority that issued the warrant, if necessary, to clarify the warrant's scope and object to the government investigation team's interpretation of it.) At a minimum, record how the government proceeds after your objection (**preferably on videotape**).
- ***Identifying Privileged Materials.*** During the search (and again at the end of the search), company officials should make every effort to identify any confidential materials – whether legally privileged or of a proprietary business nature – and object to their seizure by government agents.
- ***Obtaining Samples.*** If the warrant allows sampling, it should also set out a specific sampling plan to be followed. Record detailed observations on how the government takes its samples (**preferably videotape sampling from start to finish**), request split samples, and

take samples of your own using approved sampling protocols. (See the section below entitled “Tracking Evidence” for detailed tips on what to do with sampling evidence.)

- ***Obtaining an Inventory of Items Seized.*** The company is entitled to an inventory of all items taken by the investigators. Carefully ensure that the inventory is complete before the government search team leaves your facility.

Ask to Meet with Investigators at the End of the Search. Before the investigation team leaves the facility, you should ask for a final opportunity to sit down with the government to:

- go over the inventory of items seized that the government is required to provide to ensure that it is complete and that no privileged materials have been seized;
- ensure that the company has split samples of all samples taken by the government, as well as a specific idea of what types of tests the government intends to conduct on the samples; and
- obtain copies of documents, photos, and the like that the government has seized (assuming the government is willing to provide them).

Tracking Evidence

There are several basic things that company representatives can do to effectively track evidence gathered by the government during a search:

Gather Basic Information at the Outset. The first designated escort or company attorney to arrive on the scene should obtain the names and credentials of each member of the government team. (If the team is extensive, you may be able to obtain the name and credentials only for the lead person associated with each agency represented on the team.)

In addition, gather any other useful information while reviewing the subpoena before the search starts, including:

- the projected length of the search;
- the number of “search groups” that the government will use;
- the areas of the premises to be searched; and

- specific items to be sought -- including documents, samples, and other physical evidence.

This information will help your company better track the government's evidence gathering activities and plan appropriate "escort routes."

Obtain Samples as Needed. During the course of the inspection, if the government investigator takes samples, the company should always request split samples. (Some environmental statutes provide that the subject of an inspection has the right to obtain a split sample. Regardless, it is EPA policy to provide split samples in most cases, although investigators will occasionally refuse to do so.) It is important to document the source of each sample taken, when it was taken, and how it was taken. **Videotaping all sampling activity is a good idea**, particularly if you do not have company personnel (or an environmental consultant) experienced in appropriate sampling protocol who can accompany and critique government representatives conducting the sampling.

If possible, the company should get a description of the particular tests that the government intends to perform on the samples. Once the tests are completed, counsel should request a copy of the government's results and chain of custody documents.

In addition to obtaining split samples, qualified company personnel (or environmental consultants) should take their own samples, following the proper sampling protocol and replicating the government samples. Any tests conducted by the company should be thoroughly documented (including the chain of custody) and, if possible, a representative portion of each sample should be preserved until the government's investigation is completely finished. (The government may later conduct tests not performed initially and the company may need to be in a position to replicate the government's new tests.)

Obtain an Inventory of Seized Items. At the company's request, the investigator must furnish a receipt for records or other property seized. Company officials should review the inventory of items taken from the premises prepared by the investigator. This inventory is important because the magistrate or judge who issued the warrant will examine it to assure compliance with its terms.

In addition to obtaining receipts for property taken, the company should make its own detailed inventory of the items and documents seized. The company should also request, through counsel, copies of any photographs and documents taken by the government. (While investigators are not

required to provide copies of these items, they often will agree to allow copies to be made.) At a minimum, the company should be able to clearly identify which of the documents seized it needs for its operations (such as tax returns or billing information) since the government may be ordered by the court to return those documents.

**Preventing
“Add-On”
Allegations**

While you need to remain confident and decisive during a surprise inspection or search, you should not needlessly create problems by being overly aggressive. It does not take much to encourage a zealous prosecutor to allege obstruction of justice, witness tampering, or false/concealing statements.

Therefore, your company should, at a minimum, carefully train all persons who will serve as “designated escorts” to treat government investigators professionally and respectfully at all times and to follow some **basic** ground rules:

- If the government presents a search warrant, either administrative or criminal, you may not deny the government entry to your facility to prevent them from executing the warrant.
- If the government requests your company’s consent to enter the premises, you may withhold consent and require a search warrant. However, while the government is in the process of obtaining a warrant, you may not use this time to correct or conceal problems that are clearly the focus of the government’s inquiry.
- If government agents attempt to speak with employees, you may advise employees that they are not required to answer substantive questions posed by the agents (or that they may have an attorney present when doing so). However, you may not instruct them to refuse to answer government questions.
- If government investigators arrive at your facility unannounced, you may send company representatives around the facility to dismiss non-essential employees, apprise them of the situation, and/or remind them of their rights. However, you may not instruct or encourage employees to conceal targeted problems, destroy documents, or coordinate their “stories.”
- If government investigators claim that exigent circumstances justify warrantless entry, search, or seizure, you should object. However, if the government refuses to heed your objection, you should not attempt to prevent or impede the improper entry, search, or seizure. (Attempting to prevent or impede government activities that later

prove justified, such as when the search falls under one of the recognized warrant exceptions, may result in charges of obstruction.) Rather, continue to object to the perceived improper behavior, request the government's justification for proceeding, and thoroughly document how the government proceeds (**preferably by videotaping** the government agents as they conduct their investigation).

Government Interviews

Some Basics on Interviews

A company may first learn that it is the subject of a government investigation when an officer, employee, or former employee reports to management that a law enforcement agent seeking an interview has contacted him or her. This is an increasingly common technique, as investigators understand the advantages inherent in surprise. Once such a contact has been brought to the company's attention, the response must be swift, as additional interviews are likely to follow.

Protecting Rights

There are several basic things that company representatives can do to protect the rights of the company and its employees in advance of, and in response to, unannounced employee interviews.

Employee Rights vis-a-vis the Government. As discussed in Chapter 1, disseminating the quick-reference card explaining an employee's rights when contacted by the government (provided in Appendix I of this manual) will go a long way toward protecting employee rights in the initial stages of an investigation.

Once a company becomes aware that an investigation is underway, it should, with advice of counsel, (1) attempt to identify all persons (current and former employees, consultants, and contractors) likely to be contacted by the government; (2) provide employees with a letter or memorandum informing them that an investigation appears to be underway and advising them in more detail of their rights; and (3) inform non-employees likely to be contacted by the government that an investigation is underway and ask them to call company counsel if the government does contact them. (Advising non-employees, such as shipping agents or former employees, of their rights can lead to the appearance of obstruction or witness tampering so company counsel should carefully discuss proper procedures to be used in dealing with non-employees.)

An advisory letter or memorandum to employees creates a permanent record of what the employees were told and ensures that communications

will not be misconstrued by the employees or misquoted when later described to government investigators.

At a minimum, it is recommended that this written information contain the following:

- an overview of the matters that the government appears to be investigating;
- a warning that government agents may be contacting employees without notice at home;
- a request that employees
 - ⇒ ask for identification from government agents before answering their questions,
 - ⇒ record the agent's vital information (name, agency, badge or credentials number, and phone number),
 - ⇒ immediately report the visit to designated company officials (whose name and contact information has been provided in the advisory letter/memo), and
 - ⇒ report to the designated company official any knowledge that the government has contacted former employees, contractors, or consultants of the company;
- an outline of employees' rights in the context of a government interview, including the right to
 - ⇒ consent to an interview;
 - ⇒ decline an interview;
 - ⇒ ask that questions be submitted in writing in the alternative to an interview;
 - ⇒ designate the time and place of an interview (*i.e.*, "meet me tomorrow at work");
 - ⇒ conclude an interview at any time for any reason;
 - ⇒ be treated fairly (*i.e.*, investigators should not employ intimidation or use express/implied threats);

- ⇒ consult with a company attorney before and/or during an interview; and
- ⇒ consult with a personal attorney before and/or during an interview – including an attorney whom the company may provide and pay for (depending on the circumstances).
- a discussion of the potential impacts of providing an interview to the government without consulting with an attorney, including the fact that:
 - ⇒ statements made during the interview may be considered legal admissions and may be used as evidence against the company, the individual, or both in future criminal, civil, or administrative proceedings;
 - ⇒ agreeing to an informal interview will not foreclose the possibility of future grand jury testimony or administrative hearings;
 - ⇒ failing to tell the truth may result in “add-on” charges against the individual, the company, or both;
 - ⇒ guessing or speculating about matters that the individual does not personally know to be fact may result in unnecessary further inquiry;
 - ⇒ disclosing privileged communications to the government could result in waiver of all communications related in subject matter; and
 - ⇒ disclosing proprietary information can compromise the company’s business position.

Some form of this memorandum should be readily available at all times. It is highly recommended that it be kept on site by the person(s) designated by the company to receive official visitors. In the event of a surprise search, your company may want to distribute copies to employees before execution of the search, if this is feasible.

Employee Rights vis-a-vis the Company. If the government has interviewed an employee, the company should ask the employee to provide a debriefing. At the outset of any employee debriefing, company counsel should provide a brief memo to the employee explaining the following:

- the nature of the investigation and reasons why the employee’s cooperation is important;
- that company counsel represents the company and not the employee;
- that the communications exchanged during the debriefing are privileged and confidential;
- that the company controls the privilege and may at its own discretion choose to waive it;
- that the employee may stop the debriefing at any time and seek advice of counsel (and whether the company is providing such counsel);
- that the company recommends that the employee seek counsel prior to government interviews (but has the right to not do so); and,
- that the employee must be truthful at all times.

Putting this information in written form creates a permanent record of what the employees were told and ensures that communications will not be misconstrued by the employees or misquoted when later described to government investigators.

If an employee refuses to participate in a debriefing, see the section entitled “Disciplining Employees” in Chapter 5 before implementing any disciplinary action.

In addition, there are three specific “employee rights” issues to keep in mind when company attorneys interact with employees (both current and former):

- **Targeted Individuals.** Employees (including former employees) will likely require separate counsel when
 - ⇒ the prosecutor has identified the employee as a “target” or “subject” of the investigation; or
 - ⇒ the employee appears to have taken illegal action contrary to company policy or the directions of a supervisor.

If the need for individual counsel does not become apparent until company counsel is in the process of debriefing or interviewing an employee, company counsel should consider ending the debriefing immediately to avoid receiving any statements that could be construed as admissions of illegal behavior. This could create eventual conflicts

and waive privileges. Company counsel should recommend that the individual obtain separate counsel. (It may be possible for company counsel to continue an interview or a debriefing in such circumstances **only** after **strongly** advising the individual once again that company counsel represents the company and not the individual, and that he or she need not continue the interview or debriefing.)

With the Department of Justice's focus on prosecuting individuals in addition to the company for environmental violations, the potential for encountering conflicts if an attorney represents both the company and individual employees has dramatically increased. The company should carefully consider providing individual counsel to persons who are likely to become targets themselves. For further information on how to deal with employees represented by individual counsel, see the section entitled "Dealing with Persons Represented by Separate Counsel" in Chapter 5.

- **Whistleblowers.** As a matter of law, companies cannot discipline or discharge employees for bringing environmental violations to light (assuming that the employees were not involved in causing the environmental violations). Most major federal environmental laws include specific provisions encouraging and protecting whistleblowers. In fact, the Act to Prevent Pollution from Ships (APPS) establishes a bounty or reward of up to half the criminal fine or civil penalty for individuals giving information leading to conviction or a civil penalty assessment for violations of the MARPOL or the APPS. Courts uniformly hold that such dismissals amount to wrongful discharges. Needless to say, ill-advised disciplinary measures can lead to significant legal problems for the company when they happen during the course of an ongoing government investigation.

As a matter of policy, companies should have compliance mechanisms in place to encourage and facilitate internal reporting of potential environmental problems or violations (*i.e.*, hotlines and other such systems).

- **Grand Jury Witnesses.** Although grand jury secrecy requires the prosecutor and members of the grand jury to treat testimony as confidential, grand jury witnesses may voluntarily disclose testimony. The company may not, however, compel such disclosure. Any effort to do so by actual or threatened disciplinary action may constitute obstruction of justice and/or subject the company to civil employment action.

**Tracking
Evidence**

There are several basic things that company representatives can do to effectively track evidence gathered by the government during interviews.

Identifying Persons Interviewed. The quick-reference card on responding to government interviews (provided in Appendix I) not only helps employees to understand their rights when a government agent approaches them, it provides them with important guidance that helps the company retain as much information about such contacts as possible.

Thus, disseminating these cards ahead of time is critical to ensuring that the company immediately finds out about government contacts with employees and about any impending criminal investigation. In addition, when the company circulates its initial letter or memorandum to employees (described in the section earlier in this chapter entitled “Employee Rights vis-a-vis the Government”), the company should specifically request that an employee contact company counsel if: (1) the government contacts the employee; or, (2) the employee becomes aware that the government has contacted a former employee, contractor, or consultant about the company.

Debriefing Persons Interviewed. The first step in responding to government interviews of employees (including former employees) is for company defense counsel (not non-lawyers) to debrief the individuals who were interviewed as soon as possible, before memories fade. Employees debriefed should be asked to recall:

- the name, physical description, and affiliation of the interviewing agents,
- the questions asked and answers given, and
- what documents the employee was shown by, or gave to, the investigator.

This debriefing may be the company's only source of information about the nature and focus of the ongoing investigation, so it should be thorough. To that end, a few additional recommendations are in order:

- ***Recording the Debriefing.*** Because the government will eventually be entitled to copies of all witness “statements,” do not record your debriefing session electronically or attempt to take verbatim-type notes. While you will want to record the matters discussed in great

detail, any eventual memorandum that you produce summarizing these discussions should not read like a verbatim statement of the witness.

- **Structuring the Debriefing.** To best preserve all applicable privileges, company defense counsel should run the interview. In addition, it might be helpful if a company representative with working knowledge or technical expertise in the operations under investigation participates in the questioning (but only if that person cannot be implicated in any way in the activities under investigation). Regardless, it is advisable to have a non-attorney company representative present (who also cannot be potentially implicated in any of the activities in question) to witness the debriefing. This will reduce the possibility of the government alleging obstruction and/or witness tampering.

Having a witness at each debriefing is particularly important because company counsel will not be able to record the interview in any verbatim-type fashion (so as to avoid creating a “statement” that must later be turned over to the government). It is important that the witness is a non-attorney because this will eliminate the possibility that members of the company’s legal defense team will have to testify in response to any charges of obstruction, witness tampering, and the like.

Dealing with Union Employees. Caution is required in interviewing employees who are covered by a collective bargaining agreement. The union may object to any interview without a union representative present. It is also possible that the union provided the information or complaint that gave rise to the government's investigation. The union may contend that the interviews of its members constitute unlawful harassment. Thus, the decision to interview unionized employees should be made only after discussion with the company's labor relations manager or counsel.

**Preventing
“Add-On”
Allegations**

Because the interests of the company may differ from the interests of employees (both current and former) during a criminal investigation, it is particularly important that the company do everything within its power to avoid even the appearance of obstruction, witness tampering, conflict of interest and harassment when it deals with its officers and employees, particularly in its attempts to gather information from those who have been contacted previously by the government. To that end, keep the following in mind:

- You can advise employees that they have the right not to talk to the government, the right to talk to the government with assistance of counsel, and the right to control the terms of the interaction (written in lieu of oral statement, location and duration of interview, etc.).

However, never instruct an employee not to answer government questions. Also, company counsel should not provide legal advice to former employees, contractors, consultants, or other third parties.

- When debriefing employees or other persons who have been interviewed by the government, you should have more than one company representative present. Because it is not advisable to record interviews verbatim (as doing so will enable the government to obtain copies of the transcripts), it is easy to end up in a “word against word” dispute over questions asked, things said, etc. Having a non-attorney witness to the interview minimizes the possibility of unfounded obstruction or witness tampering allegations.
- Ask open-ended questions during interviews so as to avoid the appearance that you are leading employees to favorable recollections, interpretations, and conclusions. Where stories appear to be at odds among employees, follow up discrepancies with care, preferably through counsel for those individuals (if they have counsel) to avoid the appearance of tampering with witnesses.
- When it seems clear that an employee may be individually exposed to liability and can conceivably have interests at odds with the company in later stages of the investigation or prosecution, strongly advise that person of his or her right to individual counsel (and, if applicable, of the fact that the company will be providing and paying for such counsel at no obligation to the individual).
- Do not discipline uncooperative employees without first determining their potential role in the case and consulting a defense attorney with substantial experience in dealing with issues surrounding employee discipline in the context of an ongoing investigation.
- Although the government and members of a grand jury are obligated to secrecy, a witness before a grand jury may, at his or her option, decide to share his or her testimony.
- Do not attempt to compel disclosure of employee grand jury testimony through threat of disciplinary action.

Subpoenas for Documents

Some Basics on Document Subpoenas

Use of a subpoena allows investigators to obtain a wide range of books and records, including internal company memoranda. It is common practice for the government to serve a subpoena for documents at the early stages of an investigation. While receipt of a subpoena does not necessarily trigger the immediate sense of urgency that company management may feel when responding to surprise searches of its offices, or that employees feel when responding to an unannounced visit by a government agent, responding to subpoenas for documents presents significant concerns of its own. These include:

- The enormous scope of many subpoena requests often makes what initially appear to be feasible deadlines difficult to meet.
- The sheer volume of files and documents to be reviewed creates the distinct possibility that responsive documents may be initially overlooked or temporarily misplaced, or that confidential documents may be inadvertently disclosed.
- The quality of the company's document production is crucial to establishing credibility with prosecutors and investigators and, thus, is often the source of significant tensions between the government and the company.

Who Can Issue Subpoenas? Certain administrative agencies, such as the Environmental Protection Agency, the Coast Guard, the Department of the Interior, and the National Transportation Safety Board have been granted authority by the United States Congress to issue their own subpoenas for documents. Subpoenas issued by agencies are creatures of statute (which will be cited in the subpoena). Reviewing the underlying statutory authority cited might divulge inherent limits on the scope of subpoena or insights into what information/evidence that the government may be seeking.

A federal or state grand jury acting at the request of a prosecutor may also issue a subpoena. In such case, its terms and any common law limitations, such as compliance with probable cause requirements, govern the scope of the subpoena.

Receiving Service. Your company should have the following procedures in place to ensure that any subpoenas served on the company are delivered immediately to company counsel:

- Independent of any investigation, a company should have clearly written security procedures that require that all visitors be received at a central location.
- Visitors should be asked to present proper credentials and state the purpose of their visit.
- The date, time, and purpose of each visit should be recorded in a log.
- Each visitor should be greeted with courtesy and attended to promptly, but in no instance should the security or reception personnel seek to engage an official visitor in a substantive conversation about the specific reason for the visit.
- The security or reception personnel should then call the company's designated recipient of service to their location (as opposed to escorting the government official to that person's office).
- If the company representative designated to receive service is not company counsel, the designee should forward a copy of the subpoena to company counsel immediately.
- Company counsel should determine the exact scope of the subpoena and whether immediate production is required.

Timing of Production. Ordinarily, a subpoena would not require an immediate production of documents under the Department of Justice's policy. If, however, the subpoena calls for an immediate or "forthwith" production, company counsel should contact the government official whose name appears on the subpoena to negotiate a reasonable period of time in which to assemble, review, and produce any documents. If company counsel and the issuing authority cannot negotiate a reasonable time frame for responding, counsel may elect to petition the court for relief.

Upon receipt of the subpoena, company counsel should meet with the company's senior management officials and those directly involved with the division, facility, activity, or program described in the subpoena. These individuals should attempt to identify all potential sources of documents responsive to the subpoena and to ensure that all potentially

responsive documents are preserved. **(Once a subpoena has been issued, destruction of any responsive documents -- even destruction of seemingly innocuous materials pursuant to the company's formal document retention policy -- may result in criminal charges of obstruction of justice.)**

Contacting the Issuing Authority. The agent in charge of the investigation will sign an administrative subpoena, and the prosecutor overseeing the investigation, usually an Assistant United States Attorney, will sign a grand jury subpoena. After working with company officials to learn about the nature and number of documents involved and what it will take to comply with the subpoena, counsel should contact the investigator or prosecutor named on the subpoena.

An informal contact can be useful in establishing a reasonable timetable and method for compliance, and in reaching agreement on questions such as whether the government will accept copies (rather than originals) or computer disks (rather than voluminous computer print-outs). Through such a discussion, counsel can learn a great deal about the focus of the investigation and, together with the prosecutor, may be able to narrow the scope of the subpoena to focus on the issues of actual concern to the prosecutor. It is important to attempt to find out at this point whether the company is viewed as the target of a criminal investigation, or whether it is being subpoenaed as a mere witness or source of documentary evidence for purposes of investigating another entity or individual. The status of the company will likely affect the nature and tone of future conversations with the government, and may have an impact on whether the subpoena is construed broadly or narrowly.

Administrative Information Demands. Many investigations start with administrative information demands because federal and state regulators can issue them without involving prosecutors or criminal investigators. Administrative information demands are similar to subpoenas, but are typically issued by regulatory agencies and pose questions with requests for narrative responses on behalf of the company. The request may or may not include documents. Handling an administrative demand is much like handling a subpoena, although the response date is generally shorter.

The government typically takes the position that administrative information demands cannot be challenged directly. The only way to get judicial review of a demand is to fail to comply. When the government brings an action to enforce the demand, the company then has a chance to challenge the substance of the demand. Given this situation, it is hard to challenge demands that may be overly broad or burdensome, and company

counsel may well recommend a more conciliatory approach than it would in the case of an overreaching subpoena for documents, which a court would review prior to the company's failure to comply. Nonetheless, agency staff usually will agree to narrow the scope to focus on those issues of concern and may allow more time to respond.

Protecting Rights

There are several basic things that company counsel can do to protect the rights of the company and its employees when responding to a subpoena for documents.

Motions to Quash. While the courts will accord investigators broad discretion in fashioning subpoenas, there are certain legal grounds for objection. Objection to a subpoena takes the form of a motion to quash. A motion to quash is appropriate if:

- the subpoena is not reasonable in scope or not sufficiently particular;
- the timing of the subpoena is unreasonable (and thereby undermines the recipient's right to counsel);
- the subpoena calls for production of material that is covered by a privilege such as the attorney-client privilege;
- the subpoena calls for the production of purely personal papers that may be protected by the Fifth Amendment privilege against self-incrimination;

(Remember, only an individual may assert the Fifth Amendment privilege. The privilege does not apply to corporations, partnerships, or even sole proprietorships.)

- the subpoena is issued to gather evidence for a criminal trial after an indictment has been returned; or
- a grand jury subpoena has been issued solely to gather information for a civil action.

Custodian of Records. The company will need to designate a "custodian of records" to oversee the document production. *This person should not be someone who is a potential witness or target in the matters under investigation and should not be a company attorney.* In any large document production, there may be mistakes such as temporarily misplaced documents, documents that are responsive to prior subpoenas

discovered after they were scheduled to be produced, and the like. Having someone who can devote full attention to the production will minimize such mistakes. More importantly, having someone who is “detached” from the substantive issues will eliminate many of the unnecessary allegations of obstruction or concealment that can result from production miscues. In addition, because the custodian likely will be called as a witness to testify to the source of specific documents, it is best if the custodian is not company counsel.

Written Search Protocols. Counsel will need to define in writing the areas and files to be searched in response to the subpoena and the procedures to be followed in the process. This will help company counsel, the custodian of records, and others supervising the production to more effectively: (1) track the progress of the production; (2) assess (and reassess) whether the scope of the production is sufficient; and, (3) document the work that was done should the prosecutor become impatient about the length of time required for the production or skeptical about the quality and responsiveness of the production.

Scope of Subpoena Requests. Counsel will need to read the definitions, date restrictions, and terminology in the requests very carefully. Otherwise, the company may fail to turn over documents that fall within the scope of the request, or needlessly turn over documents not requested. When definitions, relevant time periods, or terms applicable to any request are ambiguous, company counsel should discuss their interpretation with the prosecutor or agent who issued the subpoena.

Privileged Materials. Corporate counsel will need to set up a “fail safe” system for identifying privileged documents to be withheld from the production. Since non-attorneys may be involved in the initial document review, we recommend that you put together a list of indicators to assist them in determining whether a document is potentially privileged. (Having a paralegal or secretary simply cull documents stamped “PRIVILEGED” will not suffice.) Such a list should include all names of all company attorneys, both in-house and outside, who may have worked on potentially relevant documents during the time period(s) referenced in the subpoena.

In addition, the company will need to put together a log of the privileged documents that it intends to withhold. The list needs to be informative and detailed enough to enable the government to determine whether the privilege claim is legitimate, yet not so informative that it effectively

discloses vital information or even waives privileges. (This is often referred to as a *Vaughn* index.)

Tracking Evidence

Responding to broad-sweeping subpoenas that result in production of thousands of pages of documents can result in serious mistakes with disastrous consequences. Here are some tips to help you effectively produce all documents responsive to subpoena requests, prevent inadvertent disclosure of privileged documents, and track all responsive documents (whether produced or withheld as proprietary or privileged).

Identify All Sources of Responsive Documents. Company counsel, key management and administrative personnel, and the custodian of records will need to work closely to identify all potential sources of documents that could be responsive to the subpoena. Remember that, unless the issuing authority agrees otherwise, the company must produce all documents from all sources within its control -- even if this means producing the same document repeatedly (because it shows up in the files of numerous individuals). This usually includes all computer files, electronic mail, and other electronically recorded information. In some cases, it may also include documents in the control of agents of the company (*i.e.*, contractors, consultants, accountants, attorneys, and so on).

Circulate the Subpoena with Clarifying Instructions. Once all holders of potentially relevant documents have been identified, the custodian of records should circulate a memo (with relevant portions of the subpoena attached) to these persons. The memo should clarify the scope of the government requests, urge a thorough response (erring on the side of over-inclusiveness), and work out any other logistics as necessary, such as making copies for persons who need to refer to specific documents produced in the course of ongoing business.

Follow up with Individuals in Person. To the degree possible, the custodian of records should meet with those individual employees involved in producing documents regularly in order to keep them on schedule for the production deadline and, more importantly, to make sure that they have considered all possible sources of responsive documents within their control. (Non-lawyers typically do not fully understand the gravity of a subpoena for documents, the ramifications of an inadequate response, or the vigilance required to make sure that all responsive documents are produced.)

Require Individuals to Certify Their Efforts. Having individuals certify their efforts, even when they do not produce any responsive documents, not only helps the employees to better understand the gravity of their role in the production, but also increases the government’s trust in the quality and responsiveness of the production.

Track the Source of Documents Produced. As the custodian of record begins receiving responsive documents, he or she should make sure to track their source. This is necessary not only so that they can be returned to the appropriate persons and files, but more importantly so that company counsel can determine who was privy to the information included in key documents.

Bates Stamp Responsive Documents and Create a Thorough Index of Documents Produced. The company should number (more commonly referred to as “Bates stamp”) each page of all documents to be produced, which will be used as a universal reference in dealing with the documents. The company should also produce an index of documents turned over to the government that identifies each document by Bates number range and any other vital information (i.e., source, date, author(s), recipient(s), person(s) copied, general subject, and other relevant information).

Even though producing such an index is not clearly required under the Federal Rules of Criminal Procedure, it can go a long way toward assuring the government that the company has performed a high-quality, thorough production.

Furthermore, creating an effective index will help the company track and locate documents readily. In fact, the company may wish to create two different production indices – a very detailed one for internal purposes and a less revealing one to be turned over to the government.

At minimum, the company must create a “*Vaughn*” index for responsive documents that have been withheld as privileged. This index will inform the prosecutor of the documents that the company is claiming are privileged and why, and must provide sufficient information to enable the government to reasonably assess whether the company’s claims of privilege are legitimate.

Consider a Document Management Software Package. There are numerous software packages for managing document productions on the market now that allow you to do more than create a simple index. Most

allow you to scan documents into the system so that you can simply print documents at any time when you want to review them rather than physically locating them, pulling them, copying them, and returning them to their rightful location. In addition, some programs allow you to search the text of scanned documents for “key terms,” in addition to searching the key fields (“To,” “From,” “Re,” etc.). This enables you to readily perform comprehensive searches to identify documents relevant to a particular individual or topic.

Reproduce Extra Sets of Documents. Much of the cost of reproduction during a document production is for labor (separating stapled copies, sizing oversized materials, etc.). In other words, the cost of additional sets of copies is sometimes marginal. Therefore, you might consider having several additional sets of copies made -- for the employees (to use while their files are turned over), for in-house counsel, for outside criminal counsel, for admiralty or civil counsel, for individual employee counsel, and so on. This enables persons involved in the defense of the case to operate at maximum efficiency with all the potential evidence at hand.

One area that is particularly difficult is the copying and production of blue prints. Frequently, for investigations involving vessels, the government will request the blueprints for the vessel. This can be burdensome, and quite costly, if all blueprints are requested. For this reason, the company counsel should contact the government investigator or prosecutor to determine which blueprints are relevant in an attempt to limit the scope of the production. (If the spill was the result of a piping leak, it makes no sense to have to produce the electrical blueprints.) Additionally, the government will frequently settle for copies in lieu of originals, which will reduce the likelihood that the original blueprints are in any way damaged through handling.

Re-circulate the Subpoena with Clarifying Instructions. As the document production nears completion, it is always a good idea to repeat Step 2 (i.e., circulate the subpoena with clarifying instructions). Often times a “fresh read” of the subpoena requests (and related instructions) will help employees to recall materials that they had previously forgotten about or to reconsider materials that they had previously deemed to be non-responsive.

Keep a Complete Record of Your Production. Make sure that your company lays a meaningful paper trail that accurately reflects its production efforts. This includes doing the following in writing:

- delineating the company’s interpretation of ambiguous subpoena requests (in a consistent manner);
- documenting amendments and clarifications to those requests agreed upon with the prosecutor;
- recording the specific protocol followed in carrying out the production within the company (i.e., what information was circulated to which employees and why); and
- tracking when materials were turned over to the government. This will help the company effectively respond to any later government challenges concerning the sufficiency of the company’s production.

**Preventing
“Add-On”
Allegations**

The quality of a document production can go a long way toward making or breaking the company’s credibility with the government investigator or prosecutor. In the worst case scenario, when the prosecutor’s confidence in the production is suspect, allegations of obstruction and concealment tend to arise. Here are some ways to avoid these types of problems:

- Never destroy, alter, or conceal a document that is arguably responsive to a subpoena request, regardless of how innocuous the document appears to be. (The moment the company becomes aware that an investigation is underway, it should rescind any document standard retention policies that could result in the destruction of documents relevant to the investigation.)
- Unless expressly stated otherwise by agreement in writing with the issuing authority, always produce all responsive documents that each employee maintains, even though this may require producing numerous copies of the same document. The government needs to (1) know who had each document in their possession and (2) have copies of the same document if there are any hand-written annotations.
- Because all documents produced should be Bates-stamped, make sure to explain any gaps in Bates ranges to the issuing authority so as to avoid any concerns that relevant documents are being withheld.
- Clarify ambiguities in subpoena requests with the issuing authority, as well as amendments to the scope of requests, **in writing** so that there will be no confusion later on.
- Carefully evaluate (and reevaluate) the documents you withhold as privileged and provide a thorough log of such documents.

CHAPTER 5: ONGOING ISSUES IN A CRIMINAL INVESTIGATION

While Chapters 3 and 4 provide recommendations to help your company when initially confronted by searches, government interviews, or subpoenas for documents, this chapter provides recommendations to help your company develop a long-term approach for responding to an ongoing government investigation.

Such an approach is important because criminal enforcement cases develop very differently from civil or administrative enforcement cases. There is no open exchange of documents and witness accounts during criminal investigations like there is during civil or administrative discovery. The company under criminal investigation has no right to be informed of the source, scope, or nature of the government's pre-indictment investigation.

Because the ultimate goal is to avoid indictment altogether, the company must carefully conduct its own internal investigation so that it can assess its potential exposure and determine how best to convince the government that criminal charges are not appropriate. However, because the government may require the company to turn over results of its internal investigation in exchange for favorable treatment, management must carefully control the scope of its internal investigation and the methods used for conducting it.

To help your company carry out an effective internal investigation, this chapter provides guidance on how to:

- q structure an internal investigation,
- q gather all of the pertinent evidence, and
- q take corrective action (including employee discipline), if necessary.

In addition, this chapter provides guidance on how to:

- q deal with persons represented by separate counsel, and
- q anticipate issues presented by parallel proceedings and other collateral consequences.

Structuring an Internal Investigation

Initial Stages

As soon as your company has become aware that a government investigation is underway, management should meet with counsel to set the parameters for the company's internal investigation. The company will need to decide:

- what the scope of the company's internal investigation will be;
- how best to structure the investigation to protect the confidentiality of its results;
- what additional evidence (in the form of documents, employee/witness interviews, and sampling/testing) needs to be gathered; and
- whether any immediate corrective actions (in the form of remediating contaminated areas, improving the company's compliance procedures, or disciplining employees) are necessary.

At the outset, counsel should consider requesting formal written authorization from management to institute an internal investigation. Such authorization should include:

- a clear statement identifying the client,
- a statement that a government investigation has been initiated,
- a broad definition of the scope of the investigation,
- a statement of the confidential nature of the investigation,
- a statement that counsel has been retained to provide legal advice in anticipation of litigation (as opposed to mere business advice), and
- a directive requiring the cooperation of company personnel.

Scope of Investigation

The company's internal investigation should cover at least the same ground as the government investigation. However, because the purpose of an internal investigation is to eliminate surprises, your company's investigation may need to exceed the scope of the government's inquiry.

Your investigation should focus on developing those facts that mark the case as one that merits civil or administrative resolution (or even no enforcement action), rather than criminal prosecution. For more information on the types of evidence to develop, see the section later in this chapter entitled “Gathering All of the Pertinent Evidence.”

**Protecting
Investigation
Results**

How your company structures its internal investigation is largely a function of the degree to which the company intends to protect the findings of its investigation from disclosure.

For general information about the types of privileges that may apply to company communications regarding environmental compliance, see the section entitled “Tips for Keeping Communications Privileged” in Chapter 6. However, be aware that the advice in Chapter 6 concerns privileges in the context of *routine environmental compliance*, and therefore differs from the advice in this section concerning privileges in the context of *government investigation*.

Establish Attorney Supervision. The attorney-client privilege and work product doctrine offer more definitive and extensive protection to an internal investigation than they do to routine environmental compliance activities. Therefore, there is less need to assess the prudence of involving attorneys in all phases of the investigation and less need to lay a paper trail to convince a judge that each investigatory activity stems from the need to provide legal advice (as opposed to business advice).

Just the same, all members of the investigative team should report to defense counsel, and any consultants hired to assist in the investigation or defense preparation should be engaged directly by, and report directly to, defense counsel.

Finally, because the attorney-client privilege and work product doctrine are more likely to protect communications in the context of internal investigation, company counsel should consider drafting communications that *integrate* factual information and legal opinion to best protect written factual accounts from disclosure (rather than *segregating* such information, as is usually the approach for most routine environmental compliance efforts). However, be aware that the trend is for the government to require more disclosure of privileged materials prerequisite to plea arrangements than has generally been the case in the past.

Limit Circulation. Circulating materials to parties outside the company (other than the outside attorneys or environmental consultants involved in

the internal investigation) often will waive the privilege or violate the “confidentiality” requirement. However, even circulation within the company that is too broad can lead to the same result.

For example, blanket circulation of materials to all high-level company officials (including persons not involved in making decisions concerning the case) may violate the confidentiality requirement. Similarly, including low-level managers and line workers beyond the degree necessary to gather facts and identify issues important to the case may violate the confidentiality requirements as well.

With this in mind, consider taking the following protective measures:

- Limit the number of confidential documents that you circulate, number each copy for tracking purposes, and collect the copies once they have fulfilled their purpose.
- Avoid circulating copies or sharing information verbally beyond an expressly defined group of essential players.
- Keep all privileged materials in a secure location.
- Limit use of electronic mail for privileged communications and label any necessary confidential messages as privileged.

Finally, prior to communicating to the government any information setting forth legal and factual arguments in favor of not prosecuting the case, counsel should minimize the possibility of waiving privileges by:

- seeking a written agreement with the prosecutor that the communications will fall under Rule 11 of the Federal Rules of Criminal Procedure and that the government will not argue that the submission constitutes a waiver of privilege; and
- avoiding the inclusion of attachments that could be reasonably characterized as attorney work product (and thereby avoiding the issue of waiver).

Label Communications Clearly. All participants in an investigation should mark every page of every document that they generate with a description of the privileges that apply. Do not forget to include a notation that the materials are “Subject to Joint Defense Agreement” if you have reached such an agreement with counsel for related entities or individuals involved in the case.

In addition, you should preface particularly important documents, such as witness interviews, with a brief paragraph identifying the information as privileged and justifying such a claim.

Handle Witness Interviews Carefully. When recording information gathered during witness interviews, keep several things in mind.

- Prior to performing interviews of the employees, have the company's management issue a written directive specifically authorizing the investigation by counsel and requesting the cooperation of company personnel. This directive sets the context for claiming privilege, and should be provided to all persons who may become involved in the investigation. (For more information on what should be included in this directive, see the section entitled "Unannounced Government Interviews" in Chapter 4.)
- Use counsel to perform witness interviews because interviews performed by managers within the company, private investigators, or other non-legal personnel may dilute your company's claim of privilege. If in-house counsel is even tangentially involved with the activities being investigated, outside counsel should handle the interviews to minimize the appearance of self-dealing and to avoid increasing the exposure of in-house counsel to allegations of obstruction, witness tampering, and harassment.
- Do not: (1) electronically record witness interviews, (2) use questionnaires to interview witnesses, (3) record witness interviews in verbatim written form, or (4) ask witnesses to review and sign (or otherwise adopt) any documents summarizing their interviews. The government has a right to obtain copies of all "statements" of witnesses during the post-indictment phase of a criminal case.
- Remind the employee that the interview is privileged, that the privilege belongs to the company (not the employee), and that therefore the employee should not disclose the information exchanged during the interview without company permission.

Assume the Worst. Because materials that you are trying to protect may ultimately be disclosed to the government -- *e.g.*, the company may need to turn them over as part of a negotiated settlement with the government -- consider the following precautions:

- Draft (and review) documents containing key facts, analysis of vital information, and discussion of legal advice keeping in mind

that they may be turned over to the government or third parties in the future.

- As appropriate, consider communicating some information orally rather than in writing.

Gathering All of the Pertinent Evidence

After taking the immediate steps necessary to respond at the onset of a criminal investigation, such as responding to surprise searches, unannounced interviews, and subpoenas for documents, your company will need to develop a comprehensive plan to gather all pertinent evidence it will need to effectively respond to the government regarding your company's case.

Procedural Suggestions

As soon as your company learns that it is under government investigation, corporate management and counsel should:

- determine the type and location of documents that may be relevant to the investigation, and identify all persons who may have such documents in their possession;
- compile a list of all employees, former employees, and other witnesses who may have knowledge relevant to the investigation, and set a schedule for interviewing such individuals as expeditiously as possible; and
- decide what sampling and testing may be necessary to assess exposure, bolster defenses, or show that minimal harm resulted from the activities under investigation.

Because the government may later require the company to turn over results of its internal investigation in exchange for favorable treatment, management must carefully control the scope of its internal investigation and the methods used for conducting it.

Document Collection. If your company discovered that a government investigation was underway as a result of a subpoena for documents, you should have already selected a custodian of records and established comprehensive procedures for collecting documents from employees. However, if your company has the luxury of gathering and reviewing documents prior to being served with a government subpoena, refer to the section entitled "Subpoenas for Documents" in Chapter 4 for detailed tips on how to approach the document gathering process.

In addition to carefully following the recommendations in Chapter 4 on performing a thorough document production, keep in mind the following:

- ***Benefits of Collecting and Reviewing Documents Early.*** Documents are essential to uncovering the underlying facts because:
 - ⇒ they help to identify employees and other potential witnesses who should be interviewed;
 - ⇒ they can be used to refresh the memories of potential witnesses and to reconcile conflicting recollections;
 - ⇒ potential witnesses generally will answer questions more fully and completely when counsel understands the underlying facts, an understanding that often comes with review of key documents; and
 - ⇒ potential witnesses are sometimes reluctant to provide information voluntarily, especially when such information may show their own misconduct or that of a co-worker.

- ***Obtaining All Relevant Documents.*** To ensure that your company has the most complete and accurate information possible, you will need to leave no stone unturned in gathering relevant documents. To that end, do the following as necessary:
 - ⇒ suspend any company document retention policies that may call for the routine destruction of documents potentially relevant to the investigation;
 - ⇒ negotiate with the prosecutor to obtain access to, or copies of, any documents (or other physical evidence) previously seized by the government;
 - ⇒ be diligent (if not tenacious) in following up requests for employee documents by:
 - ü meeting in person with all key individuals to review their files,
 - ü making certain that employees produce electronic records (including e-mail and online planners), and
 - ü circulating additions and modifications to production requests in writing;

⇒ gather documents and other relevant information from all consultants, vendors, or other agents of the company who played a role in the activities under investigation; and

⇒ track the source of all documents carefully, as you will need to provide this information should the government later subpoena documents that you have gathered prior to government subpoena, and your inability to provide such information may be viewed as obstructionist behavior.

- **Reviewing and Analyzing Documents.** To gain the most benefit from reviewing the volumes of gathered documents, you will need to approach your review in a systematic way:

⇒ During your initial review, identify key documents, privileged documents, and any documents that appear to be missing.

You should consider creating an index of all key documents similar to the type used to respond to a government subpoena for documents. However, be careful not to alter the documents themselves. Even numbering (Bates-stamping) them for internal purposes may help the government more readily identify important documents or even infer legal strategy.

⇒ During follow-up reviews, consider organizing documents in a variety of orders, including by:

- chronology,
- event,
- witness, or
- other relevant consideration.

⇒ As you draft all chronologies, recitations of fact, and summaries of important events, key them to documents and persons who possessed them.

Interviewing Witnesses. Managers responsible for the company program, operation, or activity under investigation should work with counsel to generate a list of all current employees, former employees, and anyone else involved in the matters under investigation who may be sources of information. For detailed tips on how to approach interviews of employees, former employees, and other witnesses, see the section entitled “Unannounced Government Interviews” in Chapter 4.

In addition to carefully following the recommendations in Chapter 4 on handling witness interviews, keep in mind the following:

- ***Scheduling Employee Interviews.*** Consider selecting someone to serve as liaison between defense counsel and employees to contact potential interviewees and to set up appointments. Persons to be interviewed may be uncomfortable or unduly worried if their first contact about the matters under investigation comes from a company attorney.
- ***Benefits of Interviewing Early.*** The sooner you identify potential targets of the investigation and provide them with counsel, the better. Doing so may minimize instances of the government directly contacting such individuals. In addition, a witness' recitation of past facts often supports the party who first reaches the witness.
- ***Re-Interviewing As Needed.*** When interviewing employees or others in the early stages of an internal investigation, counsel may not fully understand the implications of statements given by witnesses. As counsel develops greater familiarity with all the facts, re-interviewing witnesses may be necessary, especially key individuals.
- ***Dealing with Uncooperative Employees.*** Finally, any employee who fails to cooperate with an investigation by refusing to be interviewed or by providing false information may be disciplined. However, such action should never be taken without advice of criminal defense counsel because inappropriate disciplinary action may lead to allegations of obstruction, witness tampering, or harassment. (For more information, see the section entitled "Disciplining Employees" later in this chapter.)

Sampling and Testing. If the government has taken samples from a company facility, you may have received split samples at the time of the search. (Although EPA has taken the position that providing split samples is not required for all criminal searches, its policy is to furnish such samples.) In addition, if you did not do so at the time of the search, you should attempt to find out what types of tests the government will perform (or has performed) on the samples, and attempt to obtain the results of such tests once they become available.

If you obtain information about government sampling and testing, consider hiring a consultant to perform identical tests on your split samples, as well as any other tests that the consultant deems necessary to authenticate or contest the government's methods or results. At the same time, you may want to ask your consultant to carefully examine the

government's chain of custody for potential discrepancies in the handling of the samples.

Finally, you should try to determine whether harm to health or the environment would play a role in the prosecutor's decision to pursue the case. If the prosecutor views this as a significant factor and it appears likely that your case may benefit from a concrete analysis to determine whether the activities in question resulted in harm to health or the environment, you may want to hire a consultant to perform appropriate sampling and testing for these purposes as well.

**Substantive
Tips**

Your investigation should focus on those facts that tend to indicate that civil or administrative resolution (or even no enforcement) is appropriate instead of criminal prosecution. In determining what types of facts would be relevant in this context, the company should focus on facts that address the factors identified by the Coast Guard, the EPA and the Department of Justice as relevant in determining when criminal prosecution is warranted. See the section entitled "Agency Criminal Prosecution Guidelines" in Chapter 1. These facts generally fall into one of four categories:

- the level of culpability involved,
- potential statutory and regulatory defenses,
- the company's response upon discovering the activities in question, and
- the gravity of the harm resulting from the activities in question.

While the latter two categories – *i.e.*, responsible company behavior after the fact, and minimal harm to public health and the environment – do not provide a legal defense to potential charges, they can weigh heavily as equitable considerations in a prosecutor's decision on whether to prosecute.

Level of Culpability. The intent of those directly involved in, or aware of, the activity under investigation is the single most important factor in determining whether your case merits criminal prosecution.

A company may be held criminally responsible for intentional violations of law committed by *low-level employees* if those employees were acting within the scope of their authority and if they were acting for the benefit of the company. (This is a very easy standard for prosecutors to meet.)

Moreover, the collective knowledge of a series of lower-level employees can be imputed to the company to achieve the requisite level of intent.

The government will be particularly interested in whether *high-level employees or corporate officials* were involved in the conduct or related decisions. To that end, the government will want to know:

- the company officials to whom low-level employees officially (and actually) reported;
- the company officials responsible for providing the supervision, resources, and funding needed to achieve environmental compliance;
- any company environmental policies, procedures, and compliance programs in place at the time of the activities under investigation;
- the degree to which any company officials had notice of similar types of compliance problems previously that existed within the company at the same facility or other facilities; and
- previous corrective actions taken by the company upon discovering such compliance problems.

Evidence that the conduct under investigation was the action of a *rogue employee* and was contrary to express company policy or supervisory instruction strongly indicates that the company and responsible corporate officers lacked the requisite intent for criminal prosecution.

Potential Statutory and Regulatory Defenses. Depending upon the nature of your case, there may be a number of potential statutory defenses that should be the focus of your investigation. For example, in a case of mishandled hazardous waste, there may be grounds to argue that the wastes do not fit the definition of “hazardous waste” for purposes of the Resource Conservation and Recovery Act (RCRA). Or perhaps, in the case of unpermitted discharges to water, there may be a reasonable basis to argue that the persons involved did not knowingly discharge a pollutant to “navigable waters of the United States,” as that term is defined under the Clean Water Act.

Company Response to Compliance Problems. The government will undoubtedly want to know whether the company had aggressive measures in place to uncover compliance problems and whether the company diligently and expeditiously corrected compliance problems upon discovering them. To that end, the government will be interested in

- how violations came to light,
- what action the company took to minimize the environmental impact that may have resulted from any compliance problems, discharges, etc.,
- what disciplinary measures the company took with employees and managers responsible for violations, and
- what additional measures the company implemented to prevent similar violations in the future.

An ongoing history of compliance problems that have been identified, yet ineffectively addressed, may provide strong circumstantial evidence of corporate “willful blindness,” if not intentional misconduct.

On the other hand, a company’s voluntary, expeditious, and complete correction of the violations may weigh heavily in the company’s favor when the prosecutor ultimately decides on the appropriate level of enforcement (if any).

Gravity of Harm. If the government is likely to have difficulty in proving intent or other statutory elements of an applicable offense, and the company has responded expeditiously and diligently to existing compliance problems, the company may tip the scales in favor of civil disposition (or even no enforcement action) by providing the government with convincing proof that its violations resulted in minimal or no harm to public health or the environment.

To that end, your company may want to hire environmental consultants to provide expert analysis and opinion on the harm resulting from the activities in question. If your company does choose to hire environmental consultants to assist in the investigation, keep in mind that you should:

- follow the recommendations outlined in the previous section of this chapter entitled “Protecting Investigation Results,” and
- ask the consultant to communicate preliminary results in non-written form so that you can determine whether they should proceed with more comprehensive testing and produce a final, written report.

Taking Corrective Action

Taking voluntary corrective action – whether in the form of implementing improved compliance measures to prevent future violations or disciplining employees involved in wrongdoing – is a double-edged sword.

Corrective action offers a distinct advantage in that it demonstrates good corporate citizenship and strong environmental values. Thus, it may play an important role in encouraging the government not to file criminal charges against your company or its employees.

On the other hand, taking corrective action may be viewed as an admission that the company is responsible for violations that may be attributable to others. As an example, changes in operating procedures implemented after discovery of a problem may be interpreted by the government as an admission that prior conduct was illegal, improper, or negligent. Also, disciplining employees may leave the government with the impression that the conduct in question was particularly egregious.

These precautions are not meant to discourage corrective action. In all cases, some form of remedial or corrective action will be necessary. However, the company should involve defense counsel before taking such actions (when possible) to avoid making inadvertent and damaging admissions, and to make sure that the company's action will not be viewed adversely by the prosecutor.

Improving Compliance Measures

In virtually every case involving a violation of an environmental law, the targeted company will need to develop and implement some improvements to its current compliance program. When doing so, keep in mind the following considerations.

Implement Realistic Measures. While extensive improvements may go a long way toward earning good will with the prosecutor, they may also serve to exaggerate the degree to which your company was previously falling short. Therefore, avoid including “bells and whistles” in the company's new programs that, in reality, will not improve compliance in any measurable sense.

If the government wants your company to implement an improved compliance program as part of a consent decree (or similar arrangement), negotiate the agreement carefully. Most such agreements contain “hair trigger” provisions that allow additional penalties to be assessed when the company fails to implement any required improvements spelled out in the agreement.

Interpret Legal Requirements Carefully. In many instances, the company will benefit -- either in the form of improved compliance or increased good will with the prosecutor -- from implementing compliance measures above and beyond those it is legally required to take. However, in such cases, the company should expressly state its interpretation of the legal requirements and specify those elements of its improved compliance program that are not required by law. Any such measures should be carefully discussed with company or criminal defense counsel prior to implementation as such measures may also serve to establish a higher legal standard of care that the company may be required to meet in the future.

Consider Involving the Prosecutor. In some cases, the company may even want to involve the prosecutor in developing and finalizing improvements to the company's compliance program. This decision will depend heavily on the company defense counsel's assessment of whether the likely gains in good will with the government outweigh the risks of slowing down the process and having to implement more onerous requirements.

**Disciplining
Employees**

Disciplinary action can be a particularly thorny issue. On one hand, the government likely will expect a company under investigation to carry out some form of discipline. On the other hand, taking inappropriate disciplinary measures or taking disciplinary action against the wrong individual may result in: (1) the prosecutor accusing the company of attempting to intimidate employees who are otherwise inclined to cooperate with the government; (2) employees pursuing civil remedies against the company for violations of labor agreements or state employment laws; or (3) employees with firsthand knowledge of important facts becoming more willing to cooperate with the government.

Needless to say, the company should not take any disciplinary action without first consulting defense counsel that are experienced in dealing with such issues in the context of a criminal investigation.

In general, while dismissal may be necessary in extreme cases -- when employees engage in culpable conduct or in fabrication or destruction of evidence -- some form of suspension, paid administrative leave, or reassignment is often preferable. Keep in mind that firing an employee drastically diminishes the company's access to that person during the course of the investigation.

Dealing with Persons Represented by Separate Counsel

Handling a Joint Defense

Courts have recognized that the joint defense doctrine permits parties with potentially conflicting interests to share privileged information without a waiver of confidentiality protections when they have a common interest in defending against a pending or anticipated proceeding.

Pros and Cons of a Joint Defense Agreement. A joint defense agreement may help the company by showing support for employees and improving the flow of potentially critical information among the defense counsel for any and all of the likely targets in a criminal investigation. In addition, it will usually ensure that the company is informed in advance if one of the parties to the joint defense agreement decides to cooperate with the government.

However, a joint defense agreement also may create some difficulty for the company. This is because the company needs to be free to act independently on the information that it receives (including potential disclosure of otherwise “privileged” communications to the government in an effort to cooperate or as a condition to a favorable plea arrangement for the company). In addition, most prosecutors have very negative views of joint defense agreements.

Elements of a Joint Defense Agreement. The basic elements of a joint defense agreement include:

- a statement of the mutuality of interests among the parties for a common defense;
- an agreement that information that would otherwise be protected from disclosure to third parties will remain confidential notwithstanding its exchange among parties to the joint defense agreement;
- an agreement that shared privileged information will not be disclosed to parties outside the agreement without the prior consent of the party who originally made the information available;
- an agreement that shared privileged information will not be used by one party against another in possible civil litigation after the resolution of the criminal case;

- a mechanism by which parties may withdraw their participation in the joint defense arrangement without compromising confidential information exchanged during their participation in the agreement; and
- preservation of the right to cross-examination at trial if one of the parties to the agreement later becomes a defendant and the other parties become witnesses against that party.

Joint defense agreements need not be in writing to be enforceable.

Anticipating Issues Presented by Parallel Proceedings and Other Collateral Consequences

Any company that becomes the subject of an environmental investigation faces a wide array of potential adverse consequences. Federal authorities may institute simultaneous or successive administrative, civil, or criminal enforcement actions arising out of a single set of facts. State authorities may do the same, even in the face of past or ongoing federal action(s) based upon the same facts. Even private litigants may bring action based upon the same facts. This not only multiplies a company's potential liability for a single violation, but also creates some difficult strategic choices.

Furthermore, environmental violations may have more wide-ranging effects than simply spawning several legal actions. They may result in:

- q loss of government contracting;
- q loss of vital environmental permits;
- q mandatory SEC disclosure; or
- q tax liabilities.

In short, a company cannot assume that its problems will remain confined to any one arena. It must be prepared to defend or negotiate on multiple fronts. Therefore, this section concludes with a brief discussion of global settlements.

Simultaneous Parallel Proceedings

The pendency of parallel criminal and civil proceedings poses two main strategic concerns:

- the fact that materials produced during civil discovery are available to the government during a criminal proceeding concerning the same set of facts; and

- the problems of Fifth Amendment privilege – *i.e.*, triers of fact in civil matters are allowed to draw an adverse inference from a defendant’s exercise of the privilege against self-incrimination necessitated by pending criminal proceedings.

(The reverse issue, that information gathered during a criminal investigation may be used in civil suits, does not pose nearly the strategic difficulty that the two issues just listed pose. However, companies should be aware that information given to the government as the result of cooperation or a plea agreement is public record, and could be used by third parties seeking civil damages as a result of a pollution incident or environmental violations.)

Civil Discovery in Criminal Cases. By federal rule, criminal discovery is meant to be restrictive and civil discovery is meant to be expansive. Thus, criminal defendants facing civil action must constantly fight efforts by the government to use civil discovery to more readily obtain information that is difficult to obtain through criminal discovery.

Because Congress has established a “broad-based enforcement scheme” in virtually all of the major federal environmental laws (allowing for simultaneous criminal, civil, and administrative enforcement), criminal defendants have little legal recourse against the government’s use of civil discovery to further its criminal investigation. So long as the government pursues civil discovery in good faith and does not do so exclusively for the purpose of furthering the criminal investigation, courts have allowed the use of civil discovery that also furthers a criminal investigation.

Fifth Amendment Privilege. As a starting point, it is important to keep in mind that companies do not enjoy the Fifth Amendment privilege against self-incrimination, and neither do employees when they seek to protect information concerning their jobs. Furthermore, even when employees can invoke a Fifth Amendment privilege as to key facts, the company should not rely on individuals exercising their privilege because, if the facts at issue are critical to the case, the government will undoubtedly strike a deal with key individuals by providing some form of immunity or reduced penalty in exchange for the crucial testimony.

Despite these qualifications, the Fifth Amendment privilege can play an important role in your company’s (and its employees’) criminal defense. However, if there is a parallel civil action pending, a real dilemma exists. When an employee exercises the Fifth Amendment privilege during the civil action (in order to preserve it for purposes of the criminal action), the

civil trier of fact is permitted to draw an adverse inference from the individual's failure to testify.

Potential Solutions. A defense counsel's preferred goal should be to stay civil action pending resolution of the criminal matter. However, because such an extreme measure is difficult to achieve, it may make more sense to simply seek a stay of civil discovery until the government decides whether to indict. An even more realistic option would be to seek a protective order precluding or limiting the civil authorities from sharing their discovery with criminal prosecutors.

Those seeking a stay must show that a criminal investigation is active or that indictment is likely, and must clearly demonstrate how continuation of civil or administrative discovery would compel them to assert the Fifth Amendment privilege. Any evidence of actual government misconduct is important in persuading a court to stay the civil matter. (Although it is nearly impossible to prove that a civil matter has been brought solely to further the criminal investigation, any evidence to this effect will help.)

In addition, denial of a motion to stay civil proceedings does not leave the company entirely without means to avoid abuse of civil discovery or an eventual adverse inference from Fifth Amendment silence in a civil proceeding. The following strategies may be helpful:

- Immediate response, cleanup and payment of restitution to third parties harmed may eliminate the need for government civil actions aimed at providing injunctive relief.
- DOJ and EPA policies on parallel proceedings recommend that a criminal proceeding be brought and resolved before a civil action. Therefore, the company should seek the assistance of agency policymakers or supervisors when local prosecutors or civil enforcement authorities handling simultaneous actions are unwilling to consider a stay of the civil proceeding.

Successive Proceedings

The prospect of successive government enforcement actions arising from the same operative facts leads to several important questions:

- What protections are available under the Double Jeopardy Clause of the United States Constitution?
- What limits (if any) exist on federal enforcement if states have already taken enforcement action (or declined enforcement) for the same violations?

- Does a criminal resolution (whether by conviction or plea) preclude relitigating basic issues in a civil context?

Double Jeopardy. Courts have long held that the Double Jeopardy Clause does not preclude two distinct sovereigns from trying a defendant criminally based on the same set of facts. Therefore, both federal and state authorities may bring criminal actions for the same conduct if it violates both federal and state law.

Until recently, courts held that the Double Jeopardy Clause placed limits on the ability of a single sovereign to seek “punitive” civil penalties in addition to criminal penalties. Therefore, even though most major environmental laws establish criminal, civil, and administrative penalties, federal enforcement authorities could not, in addition to criminal penalties, seek civil penalties so disproportionate to remedial purposes as to be deemed punitive.

However, all this has changed. Now, as long as Congress has labeled a penalty “civil,” a court will not treat it as a criminal penalty (no matter how punitive its effect), unless the legislative history of the civil penalty provision provides persuasive evidence of a criminal enforcement purpose.

Federal Overfiling. Most major environmental laws establish a scheme under which states implement the federal environmental program. This is primarily accomplished by states promulgating programs that satisfy federal minimum requirements. Once the minimum requirements are met, the federal government delegates authority to administer and enforce the environmental program to the state. Of most concern to vessel owners and operators is the fact that, under the Clean Water Act, most states have been delegated the authority to establish water quality standards and administer permit programs to limit discharges of pollutants into navigable waters within the state. This may result in states pursuing criminal or civil enforcement for discharges of pollutants from vessels if such discharges are made without the required permit.

Under this environmental enforcement scheme, federal enforcement authorities traditionally have been able to pursue an enforcement action at will, even when it follows the completion of a state action targeting the same violations. Often referred to as “overfiling,” such duplicative enforcement was recently limited in one important case.

Claim/Issue Preclusion. Once a criminal conviction or plea has been obtained, a court is almost certain to preclude the defendant from relitigating any claim or issues in a civil setting that were necessary to the determination of guilt in the criminal proceeding.

In addition to common law claim or issue preclusion, statutorily mandated preclusion under the Victim Witness Protection Act provides that a defendant convicted of an offense for which restitution has been ordered shall be estopped from denying the essential allegations underlying the criminal conviction in a subsequent federal or state proceeding brought by the victim.

Global Settlements

Given the seemingly unending sources of liability that a company faces in any environmental case, it is critical for defense counsel to proactively draw as many of the key government representatives to the negotiating table as possible. This will enable the company to hammer out a comprehensive settlement agreement that provides the company with maximum closure and a well-defined scope of any remaining liability.

In this regard, in April 1999, the Assistant Attorney General (AAG) for the Environment and Natural Resources Division in the Department of Justice issued Directive 99-20 entitled “Global Settlement Policy.” The policy states that each global settlement proposal must be evaluated on its own merits and ultimately must be approved by the AAG. Early consultation on any proposal for a global settlement is highly encouraged. In order to receive approval, the policy states that the following conditions must be met:

- Criminal plea agreements must be handled by criminal attorneys and civil settlements by civil attorneys.
- Each part of the settlement must separately satisfy the appropriate DOJ criminal plea agreement and civil settlement criteria.
- With respect to a civil settlement, all affected client agencies must approve the settlement.
- There should be separate documents memorializing the criminal plea agreement and the civil settlement.
- A defendant may not trade civil relief for a reduction in criminal penalty.

However, a truly global settlement that effectively addresses all types of liability is a virtual impossibility. Therefore, counsel should keep in mind the following:

- Depending on the status of the investigation or the nature of the violations, the company may be wasting its time pursuing a comprehensive civil and criminal settlement.

(In a civil case, the government likely will not waive criminal action until a thorough investigation of potential criminal liability is completed. In a criminal case, the government likely will not waive civil claims unless they are directly aligned with the criminal claims.)

- Representatives from different government agencies may have conflicting agendas. Therefore, the company may benefit from separate negotiating tracks. However, to the degree that differences simply center around structuring a settlement that fairly divides the penalties to be paid among the enforcement agencies involved, it is best to keep all the potential players at the same bargaining table.
- Despite the enormous fines and penalties that the company and individuals face as a result of environmental violations, in many cases the critical issue will be maintaining (or restoring) the right to contract with the government or maintain key environmental permits. Because it is rare that debarment and permitting officials will participate in an overall settlement, it is critical that defense counsel actively pursues and advances a separate negotiating track with such officials.
- There are plenty of creative options as part of structured settlements or plea arrangements, such as directing funds to affected parties or environmental causes, improved compliance measures within the company (or the company's industry in general), and the like. To the degree that enforcement personnel are amenable, the company may wish to pursue options that provide a more positive result than simply paying penalties directly to government coffers.

The ability to orchestrate constructive negotiations on a number of fronts is perhaps the most challenging and most valuable role that criminal defense counsel plays.

CHAPTER 6: AN EFFECTIVE COMPLIANCE PROGRAM IS A COMPANY'S BEST DEFENSE

Companies can best avoid the risks presented by a government criminal investigation by having an effective, comprehensive environmental compliance program because:

- q an effective compliance program will prevent many incidents that could lead to government investigation, and thus avoid not only criminal liability, but potential civil or administrative sanctions as well;
- q violations discovered through an effective compliance program will give the company the opportunity to disclose violations or incidents voluntarily, potentially allowing the company to take advantage of government voluntary disclosure “safe harbor” provisions;
- q the existence of an effective compliance program will be an important bargaining tool in trying to convince the government that an oil spill incident or environmental violation is most appropriately handled as a civil or administrative matter rather than a criminal case;
- q if the case is handled civilly or administratively, the compliance program will help in reducing civil penalties and in avoiding administrative sanctions, such as suspension and debarment for government contracts or subsidies;
- q an effective corporate compliance program can be the basis of a good defense at trial, particularly if a company is charged with negligence or intentional misconduct; and
- q even if an oil spill or other violation is criminally prosecuted, a comprehensive, effective corporate compliance program could head off a highly intrusive, government-mandated compliance program that is often imposed as a condition of probation for corporations in the event of a conviction, or as a condition of any plea agreement.

The Importance of Having an Effective Compliance Program under U.S. Criminal Enforcement Programs

In 1999, the Deputy Attorney General of the United States issued a Memorandum entitled “Bringing Criminal Charges Against Corporations.” This memorandum promulgates guidance to prosecutors, entitled “Federal Prosecution of Corporations,” regarding what factors should

generally be considered in making the decision whether to bring charges against a corporation in a particular case. The existence of a corporate compliance program that addresses the particular area that is the subject of the possible criminal case is one of the factors identified. Thus, for environmental cases, the effectiveness of a company's environmental compliance program will be an important consideration in determining whether to prosecute the company. There are also other reasons based on considerations under federal sentencing law why the existence of an effective environmental compliance program is important if a company that owns and/or operates vessels or marine facilities is the subject of a government investigation or faces potential prosecution for violations of environmental laws or regulations.

The 1999 Deputy Attorney General's Memorandum One of the primary factors to be considered by prosecutors under these guidelines in determining whether a violation should be criminally prosecuted is the existence and adequacy of a corporate compliance program, and specifically applicable to environmental violations, the company's environmental compliance program.

The memorandum also establishes other factors to be considered. In some instances, the ability to meet these factors will also, by necessity, rely heavily on the existence of a comprehensive and effective compliance program. For instance, one factor to be considered is the pervasiveness of wrongdoing within the corporation. In this regard, the memorandum states that the most important aspect of this factor is the role of management in establishing a corporate culture that either discourages or tacitly encourages criminal conduct. Obviously, comprehensive and effective corporate compliance programs discourage criminal or other aberrant conduct by establishing a system to encourage and oversee compliance with regulations and standards, and to discover and appropriately deal with noncompliance, all requiring the support of corporate management.

Another factor the memorandum requires to be considered is the past compliance history of the corporation. In this regard, the memorandum states that a corporation is expected to learn from its mistakes. This, of course, is the purpose of compliance programs, to discover nonconformities or violations, to learn from these problems, and to implement changes in corporate policies and procedures to address these problems and prevent their reoccurrence.

Finally, the memorandum states that another factor to be considered is the cooperation and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation. Prosecutors may consider the timely and voluntary disclosure of violations in evaluating the corporation's compliance program and corporate management's commitment to the compliance program.

Environmental Compliance Programs And the Federal Sentencing Guidelines	An effective and comprehensive compliance program is important, not just at the start of the criminal enforcement process, but also at the end. Even if a corporation has an effective compliance program, this does not guarantee that the corporation will not be prosecuted for environmental violations. However, if the company is prosecuted, and is convicted or pleads guilty, the existence of an effective compliance program will be an important factor in determining an appropriate sentence.
--	---

Official United States Government policies seek to reward corporate compliance and diligence with all applicable laws and regulations, including environmental laws. One way in which this is done is through the United States Sentencing Guidelines for Organizations. These Sentencing Guidelines give companies an opportunity to directly reduce the financial penalties for criminal violations of Federal laws if they have in place “an effective program to prevent and detect violations of law.” The Guidelines then establish elements for what an effective compliance program should be.

However, the Sentencing Guidelines for Organizations do not apply to corporate environmental crimes. When they were enacted in 1991, several specialized areas of criminal liability, including corporate environmental crimes, were exempted from the financial penalty provisions. So why should companies that own and operate vessels be concerned with environmental compliance programs under the Sentencing Guidelines for Organizations?

First, there will be some situations in which the direct mitigation of financial penalties for a corporate compliance program under the organizational Sentencing Guidelines will be applicable. More and more, government prosecutors are charging companies with common law criminal violations, such as false statements or conspiracy, in addition to violations of the environmental statutes. Companies may be charged with these types of violations if an employee falsifies records or logs for instance. In such a case, the United States Sentencing Guidelines for Organizations will apply, and the existence of an effective compliance program as a mitigating factor could reduce the fines awarded for these offenses substantially.

Even more importantly, while the financial penalty provisions of the Sentencing Guidelines for Organizations do not apply for environmental violations, the probation, restitution and remediation (clean up) provisions of the Guidelines do. Of particular importance in this context are the provisions applicable to corporate probation. These require that the court order a term of probation (typically five years) if, at the time of sentencing, an organization having 50 or more employees does not have

an effective program to prevent and detect violations of law. Further, if probation is ordered, the Guidelines recommend that the court impose as a condition of probation that such a compliance program be developed and submitted to the court for approval along with a schedule for implementation. The court will further require that periodic progress reports be submitted to the court or the probation officer.

By far the most burdensome requirement of probation is that the company submits to regular or unannounced examinations of its books and records by the probation officer or court appointed experts, who will be paid for by the corporation, and to questioning of corporate officers or employees regarding compliance. In many cases, the compliance program will be overseen by appropriate federal agencies, such as the Coast Guard or the Environmental Protection Agency.

General Benefits of an Effective Environmental Compliance Program

Over and above the enforcement implications of having a corporate environmental compliance program, such a program has general benefits, which is why they are so highly encouraged by the Federal government through legal requirements and agency policies and guidelines. Effective, comprehensive corporate environmental compliance programs help companies to identify small compliance problems before they become large ones. Among other things, environmental compliance programs help companies to:

- q reaffirm to all levels of management and employees the value of improved compliance and pollution prevention efforts, and prevent employee misconduct;
- q verify the environmental compliance of the company's facilities and vessels, and evaluate the effectiveness of environmental management systems;
- q prioritize compliance concerns and provide a method for allocating capital to address environmental problems;
- q generate company protocols that help facilities and vessels to better manage themselves and that allow headquarters to better monitor the performance of the company's operations;
- q provide a forum for lower level employees to report any information concerning violations or potential problems;
- q anticipate and respond to emergency situations;
- q enhance the company's reputation in the business community and as a good business partner for blue chip companies who must have compliance programs in place for not only themselves, but their agents and subcontractors as well; and

- q enhance the company's goodwill and reputation as a good corporate citizen with the government, the media and the general public.

What Constitutes an Effective Environmental Compliance Program

Compliance with the ISM Code provisions is legally required, or soon will be required, for most ocean-going vessels. As such, it can be argued that a safety management system that meets the requirements of the ISM Code is an effective environmental compliance program for purposes of United States criminal environmental enforcement. But there are other guidelines or policies created by statute or regulation or issued by U.S. government agencies with which a company that owns and/or operates vessels should be familiar when implementing its corporate compliance program or management system. This is true whether companies that own and/or operate vessels do so under the ISM Code or some other compliance program such as the ISO 14001 certification for environmental management systems or other programs developed for vessels not subject to the ISM Code. This will ensure that the company will be in the best position to argue that its compliance program is both comprehensive and effective if it ever becomes the subject of a government investigation as the result of an oil spill or environmental incident.

Obviously, the most important guidelines to consider are those applicable to corporate compliance programs under the U.S. Sentencing Guidelines for Organizations. This is so for two reasons. First, these are the primary criteria that Department of Justice prosecutors are familiar with and will likely use in assessing the effectiveness of any corporate compliance program. Second, as stated above, these will be the criteria that will be used by the court in determining whether the compliance program is effective for purposes of determining probation, restitution and remediation. Further, the corporation should examine the factors concerning corporate compliance programs discussed in Section VII of the United States Department of Justice Deputy Attorney General's Memorandum entitled "Bringing Criminal Charges Against Corporations." These factors are summarized above in the section entitled "The 1999 Deputy Attorney General's Memorandum."

The United States Environmental Protection Agency has also established guidelines specifically applicable to environmental compliance programs. Because EPA has become more and more involved in the enforcement of environmental laws in the maritime area, both unilaterally and in the context of joint enforcement with the Coast Guard and other environmental enforcement agencies, consideration of these guidelines is also recommended. When the EPA is involved, that agency looks at its own policies and guidelines to determine whether a company's environmental compliance program is effective.

ISM Code	The ISM Code, which is required to be implemented by the International Convention for the Safety of Life at Sea (SOLAS), requires that vessel owners and operators implement a management system that will ensure
-----------------	---

that their vessels comply with applicable flag state and international safety and environmental requirements.

The ISM Code is an international standard that focuses on compliance with international standards and flag state requirements for vessels. This is certainly important, as federal courts in the United States have recently held owners and operators of foreign flag vessels criminally liable for falsifying records and reports required to be maintained under MARPOL. However, owners and operators of United States flag vessels, and foreign flag vessel owners and operators doing business in United States ports, must also fully comply with a panoply of federal and state environmental laws that are broader in scope than those international standards that typically address traditional vessel-source pollution. For example, in the United States, the requirements of the Resource Conservation and Recovery Act (RCRA) may impact on the disposal of ship-generated hazardous waste if the ship discharges such waste ashore. Thus, in this context, an effective environmental compliance program would have to be broad enough to encompass all federal, state and local environmental laws that may be applicable.

Under United States Coast Guard regulations implementing the requirements of the ISM Code, a company's safety management system must include the following:

- a written safety and environmental protection policy;
- instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international conventions and U.S. safety and environmental protection regulations, including training of personnel, as required, on the company's management system and applicable rules, regulations, codes and guidelines;
- defined levels of authority and lines of communication between, and among, shoreside and shipboard personnel;
- procedures for reporting accidents, near accidents and non-conformities with the company and vessel's safety management system and the provisions of the ISM Code;
- procedures to prepare for and respond to emergency situations by shoreside and shipboard personnel; and
- procedures for internal audits, management reviews of the audit reports and correction of non-conformities identified by the audits and other reports.

ISO 14001

The International Organization for Standardization has developed standards for environmental management. ISO 14001 is the standard for environmental management systems and contains requirements that are very similar to those in the ISM Code. While compliance with ISO 14001 is not mandated for vessel owners and operators as is compliance with the ISM Code, there are significant marketing and public relations advantages for ship owners and operators that receive ISO 14001 certification. For this reason, some vessel owners and operators have chosen to implement compliance programs under ISO 14001.

In general, the environmental management standards of the ISM Code and ISO 14001 are very similar. In fact, in certain areas, the ISO 14001 requirements are more elaborate and substantive than the broad, skeletal scheme provided in the ISM Code. One advantage of ISO 14001 is that it is more familiar than the ISM Code to regulatory agencies in the United States who have recently become more involved with enforcement of environmental laws affecting the marine industry, such as the Environmental Protection Agency.

The Sentencing Guidelines for Organizations

In brief, the minimum standards for an effective environmental corporate compliance program as established by the United States Federal Sentencing Guidelines for Organizations are:

- the company must have established environmental compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of environmental violations;
- specific high-level personnel in the company must have been assigned overall responsibility to oversee compliance with these standards and procedures;
- the company must use due care not to delegate discretion to individuals in the company whom the company knew, or should have known through the exercise of due diligence, had a propensity to violate the law;
- the company must have a schedule and system to ensure employees are effectively trained on the company's standards and procedures for environmental compliance;
- the company must have monitoring and auditing systems in place to detect violations by company employees and agents and have in place

a reporting system, such as a hotline, through which employees and agents can report environmental violations without fear of retribution;

- the company must consistently enforce the standards and policies in place through appropriate disciplinary actions, including discipline of individuals who are responsible for failing to detect an offense; and
- after a violation has been detected, the company must take all reasonable steps to respond to the violation and prevent further similar violations, including modifying its compliance program if necessary to address shortfalls discovered in the program.

**EPA’s
Environmental
Management
System (EMS)
Guidance**

The United States Environmental Protection Agency (EPA) has been working in various forums to identify elements of an effective environmental management system (EMS). The EPA incorporates elements of ISO 14001 as well as other protocols developed by industry and international organizations into the criteria for an effective EMS. The EPA does not establish the elements for an effective EMS as a regulatory standard. Instead, it publishes the criteria primarily in policy documents such as the EPA’s Environmental Leadership Program (ELP) Environmental Management Systems Guidelines, which is used by the EPA to establish entry requirements for industry facilities into the ELP. These same criteria is then often incorporated into settlement agreements in major enforcement cases by EPA enforcement attorneys, and is used as guidelines by the EPA in determining whether a company’s compliance program qualifies under the EPA’s Voluntary Disclosure Program. Thus, these criteria should be considered in order to develop the most comprehensive environmental compliance program.

**Is Your
Compliance
Program
“Effective”?**

A quick comparison of the elements required for the safety management system under the ISM Code and for the other environmental compliance and management programs summarized above indicates that there is significant overlap among the various systems. This results in a distinct advantage to owners and operators of vessels who are required to comply with the ISM Code provisions. Instead of developing a compliance program from the ground up in order to meet the requirements of the Federal Sentencing Guidelines or other programs, modifications to the existing ISM Code safety management system may be all that is required to obtain the full benefits of an “effective” compliance program. One challenge for ship owners and operators under each of these programs is to identify all environmental laws that are applicable to vessel operations, and to establish procedures in their compliance system or program to ensure their vessels comply with these laws.

For example, ship owners and operators should address laws such as the Act to Prevent Pollution from Ships (APPS), the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Liability and Compensation Act (CERCLA) to name a few.

Even if you have identified these laws, however, there is no substitute for experience in attempting to determine whether the Department of Justice or other enforcement agencies in the United States will likely view a particular compliance program as “effective”. For this reason, vessel owners and operators may wish to consult with outside counsel familiar with the Federal Sentencing Guidelines and other agency criteria as well as with applicable federal, state and local environmental laws. In particular, many recent criminal prosecutions have resulted in either plea agreements or sentences with probationary conditions that require defendant companies to implement environmental compliance programs. The terms of these agreements or conditions of probation often offer some very good insight into the elements that the Department of Justice and other federal agencies expect in an “effective” environmental compliance program.

In general, a compliance program can be broken down into five overall areas – establishing and managing the program, personnel and training, auditing and reporting, dealing with discrepancies and reevaluating the program. A list of questions specifically applicable to these general areas is attached as Appendix III. As an initial step, companies with vessels operating in the United States should examine their current management system or compliance program based on the questions in Appendix III.

Environmental Audits and Voluntary Disclosure

An important part of any environmental compliance program or management system is monitoring and auditing the program to ensure that company employees and agents are following applicable laws and regulations and company standards and policies. The main issue involving auditing is what happens when the company finds problems or violations. This is an issue that has received a great amount of attention in the environmental area because, while companies are aware of the benefits of strong environmental compliance programs, there are risks if the government can discover and use information from a company’s compliance program and internal audits against it. The Environmental Protection Agency and the Department of Justice have established policies for environmental self-auditing programs and voluntary disclosure of violations that are found as a result of such programs. In the maritime area, auditing under the ISM Code is legally mandated under United States federal law. This means that documents outlining a company’s environmental compliance, such as internal and external audit reports, are especially susceptible to use for purposes of criminal or civil investigations by the United States government. Unfortunately, the Coast Guard has neither established a policy protecting auditing

information under the ISM Code, nor implemented a voluntary disclosure program under which it would forego criminal sanctions or reduce civil penalties for violations discovered through a company's safety and environmental management system required under the ISM Code. (In the absence of such Coast Guard policy, vessel owners and operators may wish to consider voluntary disclosure under the EPA or DOJ programs discussed below in order to reduce the impact of violations discovered by such audits or other self-policing programs. However, there is some question whether the EPA policy is applicable in light of the requirement that the discovery of violations voluntarily disclosed not be made through an auditing procedure that is otherwise required by law or regulation.)

Issues Involving Environmental Auditing In reviewing the discussion of environmental compliance programs above, it becomes readily apparent that auditing of compliance with the company's environmental policies and with applicable environmental laws and standards is an integral part of an effective compliance program. The United States Environmental Protection Agency (EPA) and the United States Department of Justice (DOJ) both encourage voluntary auditing because it helps companies to detect problems early, before they become large, expensive problems. It also helps the government in the sense that voluntary auditing by companies identifies problems and violations without government oversight, effectively allowing the government to use enforcement and regulatory resources more efficiently by freeing them up to deal with more egregious environmental problems.

Despite these recognized benefits, the government has not afforded voluntary audits protection from disclosure to, or use by, the government in pursuing criminal, civil or administrative sanctions against the company based on deficiencies or violations discovered as a result of the audits. Further, with the minimal standard of intent or negligence required in environmental criminal cases, information in the reports may be used against the company or individuals as proof of knowing or negligent conduct. In essence, companies that recognize the benefits of voluntary compliance programs and self-auditing are faced with conflicting interests. Companies must choose between implementing a self-auditing program that encourages prevention of pollution and protection of the environment, or foregoing such a program despite its obvious benefits because the auditing reports set up a "paper trail to liability" for government investigators and prosecutors.

ISM Code Under the Coast Guard regulations implementing the ISM Code requirements in the United States, companies must conduct internal audits and management reviews of accidents, near incidents, and audit discrepancies. Additionally, there are requirements for periodic verification audits by the Coast Guard or other person (usually an auditor from an approved class society) recognized by the Coast Guard. The

regulations require that all documents and records that make up the ISM Code safety management system, including auditing reports, are maintained and available for review by the government. When the ISM Code was enacted, Congress did not provide a self-evaluative privilege or other protection for the information in ISM Code audits, and the Coast Guard as the implementing agency did not provide for protection under voluntary disclosure programs such as those of the EPA and the DOJ.

The mandatory requirements for audits and the requirements that the resulting audit reports be available to the government make it difficult for companies to utilize privileges or other judicially recognized protections in order to protect these documents from discovery by the government during an investigation. For instance, the attorney/client privilege is not available if the information is shared with third parties, in this case, outside auditors or the government. Additionally, the Fifth Amendment can not likely be used to shield these documents from the government, even if they are likely to incriminate the company or individuals in the company. This is because the Fifth Amendment right against self-incrimination does not apply to corporations or companies. Additionally, it does not apply to records that are legally required to be kept. Thus, unless and until legislation is enacted that protects the audit reports and other associated documents from discovery or use, a vessel owner or operator may be faced with a situation in which these documents can be used by the government to prove criminal liability.

Additionally, the ISM Code requires the highest levels of corporate management to be involved in review of audit reports and the implementation of appropriate corrective actions for discrepancies discovered. Thus, these reports may make it easier for prosecutors to prove the necessary authority and responsibility of corporate officers.

State Audit Privileges

Many progressive companies, including shipping companies, have implemented safety and environmental compliance programs. As stated above, an important part of these compliance programs is an internal audit and review program, also called “self-evaluation” or “self-critical analysis.” Recognizing that self-evaluation promotes compliance, some states in the United States have recognized or created a self-evaluative privilege that protects the flow of information that a company self-evaluation program produces, and prevents the government from mandating forced disclosure. Twenty-two states currently have extended a self-evaluative privilege or audit immunity through state legislation to environmental compliance audits. (See Appendix 4.) These privileges and immunities may be important to vessel owners or operators in situations in which a state or local government seeks to exercise its jurisdiction to

criminally prosecute environmental incidents or violations of state or local environmental laws.

Some states treat all documents and communications associated with any corporate environmental audits as privileged. In some states, the government can overcome the privilege with a strong showing of need. Finally, in other states, including coastal states such as Virginia and Alaska, the privilege is absolute and even extends beyond documents to testimony concerning environmental audits. Shipping companies should ensure that they are aware of any such privileges accorded by state law to environmental compliance audits for those states at whose ports their vessels call.

**EPA's
Voluntary
Disclosure
Program**

More and more frequently, the marine industry is finding that it must deal with the U.S. Environmental Protection Agency (EPA) in addition to the United States Coast Guard when a pollution incident or environmental violation occurs in U.S. waters. This is because the EPA has independent enforcement authority to deal with Clean Water Act violations. The Coast Guard frequently works with the EPA in investigations of potential criminal violations. Also, with the recent focus by environmental agencies on all ship-generated waste streams, the marine industry is more likely to be dealing with the EPA as the primary enforcement agency for cases involving disposal of wastes ashore or for pollution cases not involving oil. Finally, the EPA administers the suspension and debarment program for environmental violations. It is therefore very important for vessel owners and operators to be aware of the EPA policy regarding use of environmental audit documents and of its voluntary disclosure program.

The EPA published a policy in 1986 on environmental compliance auditing. In this policy, the EPA stated that it would not routinely request a company's environmental audit reports for use in subsequent enforcement actions. But the agency did preserve the ability to obtain and use a company's audit reports against it, including in a subsequent criminal investigation, on a case-by-case basis. Additionally, the policy stated that it would consider good faith efforts by companies to identify and correct violations in determining enforcement actions. However, the guidance required companies to cooperate fully with the government and voluntarily disclose their audit findings in order to qualify for leniency and forbearance of subsequent use.

Subsequent to the issuance of the EPA policy, several states began to implement the audit privileges discussed above. The EPA opposed the implementation of these state privileges. In order to address the concerns raised by these state privilege laws, in 1995, the EPA revised its audit and voluntary disclosure policy. It restated its 1986 position that the agency

would not routinely request environmental audit reports. The agency also sought to encourage companies to report violations that they uncover during their routine compliance audits. To do so, it announced that in most cases it would reduce gravity-based civil penalties up to 75% for, and not recommend criminal prosecution of, companies who discover violations as a result of compliance audits and promptly disclose those violations to the agency. With regard to civil penalties, EPA reserved its right to pursue civil penalties based on economic benefit of non-compliance, so significant civil penalties are still possible even if the company is accepted into the program. Recently, in April 2000, the EPA liberalized its policy somewhat to lengthen the prompt disclosure period to 21 days in lieu of the original 10 days, and to make some other clarifications, but maintained the basic structure of the 1995 policy.

This policy against referral of violations for criminal prosecution does not apply to criminal acts of individual company officers or employees. Additionally, the reduction of civil penalty policy does not apply to a violation that constitutes criminal conduct by the company or any of its employees. In light of the existence of strict liability, simple negligence and minimal intent criminal provisions, almost any oil spill or other maritime environmental pollution incident could be prosecuted as a criminal violation. This means that the civil penalty leniency provision could well be swallowed up by the criminal conduct exception to the policy.

In 1997, the EPA issued a memorandum addressing how its voluntary disclosure program would be applied to disclosures of potential criminal violations. Of note, the policy states that it will not be applied to potential criminal cases in which serious environmental harm or imminent and substantial endangerment to human health or the environment has occurred.

There are several problems with the program. As an example, a requirement that violations be disclosed within 21 days of discovery means that it may be impossible for a company to investigate the violations sufficiently to determine whether the violation is isolated or systemic. Further, there are absolutely no guarantees that even if the company determines it wishes to take advantage of the program, the company will be deemed by EPA to have met the criteria for participation in the program. The decision to voluntarily disclose requires the company to furnish all information regarding the violation to the EPA, and hope that after the EPA's investigation is completed, it will accept the company into the program. Further, in cooperating with the government investigation, there is an issue as to whether this requires that the company waive legal privileges with regard to its audit documents or internal investigation. The EPA memorandum says that waiver is not required so long as the

privileges are raised in good faith, but this is subject to interpretation by the Agency. Also, the policy is just that, a policy. It is not law or even regulation that binds the EPA. Also, it does not bind Department of Justice prosecutors, United States Attorneys, or other agencies such as the FBI or the Coast Guard, any of whom may exercise their independent authority regarding the case.

In the end, it is unclear to what extent vessel owners or operators that have environmental compliance programs in place would benefit from the EPA Voluntary Disclosure Program. The policy is subject to a number of conditions. Most important to vessel owners or operators that may wish to take advantage of the EPA Program, the Program only applies to voluntary compliance programs. It is not known whether the EPA would accept a violation that was discovered during a legally mandated audit as is required under the ISM Code for consideration under its program. Additionally, the policy does not apply to disclosures that are otherwise required by law. Because oil spills and other environmental incidents involving vessels are often required by law to be reported, it is almost certain that the EPA audit and voluntary disclosure policy would not apply to violations that arise as the result of an oil spill.

Even in situations in which the EPA Program may be an option, companies cannot fully anticipate the effects of this Program on their own compliance programs until the EPA/DOJ track record in implementing the Program further develops. This is because many of the conditions in the Program are open to interpretation and, as stated above, the Program is based upon EPA policy and not binding law or regulation. Companies that desire more information about EPA's Program can log onto the EPA Audit Policy website at <http://es.epa.gov/oeca/apolguid.html> or call the EPA Voluntary Disclosure Board at (202) 564-2480.

**DOJ's
Voluntary
Disclosure
Program**

In 1991, the U.S. Department of Justice issued its policy regarding voluntary disclosure of environmental violations. The policy was meant to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by indicating that these activities are viewed as mitigating factors in the exercise of DOJ discretion for environmental criminal enforcement. Unlike the EPA's Program, the DOJ Program does not address civil penalty mitigation. However, in light of the fact that DOJ ultimately determines whether a case is criminally prosecuted, and may do so even if no enforcement agency recommends prosecution, the maritime industry and attorneys representing vessel owners and operators should be aware that the Program is available.

The DOJ Program is not subject to as many rigid conditions as the EPA policy that was just discussed. However, similar to the EPA Program, the

DOJ Program is policy and is not legally binding on the agency. Also, it has several problems that may affect a company's determination as to whether to take advantage of the Program. For instance, DOJ reserves its discretion to use audit documents when necessary to prove its case, regardless of whether the disclosure was voluntary and complete. Additionally, the company must give full cooperation and make all relevant material available to the prosecutors, including the results of any internal or external investigation and the names of all potential witnesses. Finally, and most importantly, the DOJ Program requires companies to essentially open all of their relevant internal documents to the government, which may result in the company waiving all potential legal privileges that may otherwise apply. Essentially, companies with environmental problems are required to put all of their trust in the hands of government prosecutors in the hope that they will reasonably exercise their discretion to follow the policy.

Related State Programs

Many states have enacted statutory (binding) incentives to encourage corporate environmental self-policing and voluntary disclosure. The ability of states to enforce environmental laws separate and apart from the Federal government means that vessel owners and operators should be aware of state voluntary disclosure and audit privilege programs for those ports at which their vessels call.

Penalty Reductions. Many states offer significant reductions in penalties for companies who voluntarily disclose violations discovered as a result of environmental audits. Some states provide complete immunity from both civil and criminal penalties while others are similar to EPA's policy.

EPA Leverage. It remains to be seen how long some of the more generous state provisions (offering complete immunity and/or an audit privilege) will last because EPA is applying substantial leverage against those states to encourage them to amend (and pare back) their legislation. EPA has publicly threatened numerous states that have not repealed their audit privileges, suggesting that the Agency will refuse to delegate the authority to administer and enforce key environmental programs, such as the permitting program under the Clean Water Act, to those states. The EPA has also threatened to step up federal enforcement in those states despite prior delegations to them. These threats have already resulted in some states repealing their audit privilege statutes.

Tips for Keeping Corporate Compliance Communications Privileged

Protections Available

This section discusses privileges potentially applicable to day-to-day communications concerning environmental compliance. For more information on how to structure an internal investigation to maximize the ability of the company to claim that documents are protected under the attorney-client privilege and the attorney work product doctrine, see the section in Chapter 5 entitled “Protecting Investigation Results.”

To a large degree, it is difficult to predict what protections the various types of privileges may afford your company’s day-to-day internal communications in the face of a later government investigation. This is true for several reasons:

- First, how the various privileges apply to documents that are related to routine environmental compliance is questionable.
- Second, while common law privileges may protect confidential communications to or from attorneys, they will not necessarily protect the underlying facts that may be discovered as the result of a compliance program or routine audit. Thus, there is some question whether basic observations made during an environmental audit (such as under the ISM Code), testing or sampling results, and other information that is arguably purely factual is subject to the various privileges and therefore protected from disclosure to the government.
- Third, even when privileges do apply, prosecutors frequently ask companies to waive their privileges and turn over confidential or privileged information to the government under the EPA or DOJ Voluntary Disclosure Programs or as a condition of a company plea agreement.

Attorney-Client Privilege. The attorney-client privilege applies to confidential communications between an attorney (including the attorney’s agents) and a client (including the client’s agents) if such communications were made for the purpose of enabling the attorney to provide legal advice to the client. This is an absolute privilege, meaning that the government cannot overcome it with a strong showing of need.

However, merely involving corporate or outside counsel in the environmental compliance program or in other operations of the company

does not necessarily mean that the communications in which the attorney was involved will be protected from disclosure under the attorney-client privilege. For instance, one court has held that environmental samples were not protected under the attorney-client privilege, even though corporate counsel substantially participated in the sampling process. This was because the court reasoned that a non-attorney could easily have done many of the tasks performed by the attorney, and employees could have provided the advice given with no legal background. In another case, a court held that the documents generated during the preparation of a waste management plan by a consultant were environmental services and not legal services. Finally, another court held that the attorney-client privilege did not protect from disclosure a company's annual environmental compliance report, which was done for the purpose of assessing a company's state of compliance with environmental laws in order to determine whether any changes to procedures would be appropriate. The court found that the attorney was acting more as a business advisor than a legal advisor. (However, at least one other court has found that the privilege did apply to an environmental audit report.)

Work Product Doctrine. The attorney work product doctrine protects materials that were produced by, or for, an attorney in anticipation of litigation. It is not an absolute privilege. In other words, the government can overcome the privilege by a showing of substantial need. For "core" attorney work product – materials containing mental impressions, analysis, and strategy – the government need for disclosure of the materials must be particularly compelling.

Routine environmental compliance documents do not generally qualify for protection as attorney work product because they are not prepared in anticipation of litigation.

Self-Evaluative Privilege. The self-evaluative privilege protects materials generated by an entity to assess whether its conduct conforms to some external standard. To qualify for protection under this privilege, the party asserting it must satisfy all of the following criteria:

- the information at issue must result from a critical self-analysis undertaken by the party seeking protection;
- the public must have a strong interest in preserving the free flow of the type of information sought;
- the information must be of a type whose flow would be curtailed if discovery was allowed; and

- the information must be prepared with the expectation that it would be kept confidential and must, in fact, have been kept confidential.

Like the work product doctrine, the self-evaluative privilege is qualified, not absolute. However, very few cases have applied the self-evaluative privilege to environmental compliance communications, particularly when the government is seeking information. Therefore, it is not a privilege upon which you should necessarily rely.

**How to
Maximize
Protection of
Documents**

This section provides tips to increase the likelihood that your company's day-to-day communications concerning environmental compliance will be protected. For more information on protecting communications in the context of an internal investigation, see the section of Chapter 5 entitled "Protecting Investigation Results."

Establish Attorney Supervision. Involving attorneys in all environmental audits and other compliance activities does not come without its cost. It undoubtedly slows down the process, results in less revealing (and likely less informative) written communications, and costs money. Therefore, you should carefully weigh these costs against the potential benefits of increasing the likelihood that the documents and communications will be protected under the privileges discussed above.

If your company decides to involve attorneys in environmental audits and other compliance activities, consider the following:

- Have all members of the environmental compliance team report to counsel. Any consultants hired to assist should be engaged directly by counsel.
- Consider hiring outside counsel simply because this is more persuasive evidence that the advice provided is truly "legal" and not just "business" advice.
- Initiate environmental compliance activities with a written request from counsel explaining how the work will assist counsel in providing legal advice.
- Have attorneys involved segregate their "business" advice from their "legal" advice in separate memoranda or communications. (This same advice may not be advisable in the context of an internal investigation. See section in Chapter 5 entitled "Protecting Investigation Results.")

- Whether in-house counsel or outside counsel supervises the work, make sure that they are actually involved and working on the matter, and not just included in the hopes of protecting the communications. Some courts have even begun to examine attorneys' timekeeping records to determine the actual involvement of the attorneys for these purposes.
- Company counsel should review all audit reports in draft form before the reports are finalized.

Limit Circulation. Circulating materials to parties outside the company (other than outside attorneys or environmental consultants directly involved in the compliance efforts) often will waive the privilege or violate the "confidentiality" requirement. However, even circulation within the company that is too broad may lead to inadvertent waiver of the privilege.

For example, blanket circulation of materials to all high-level company officials (including persons not involved in making decisions concerning the compliance effort) may violate the confidentiality requirement. Similarly, circulation to low-level managers and line workers beyond that needed to gather facts and identify issues important to the compliance effort may violate the confidentiality requirement as well.

With this in mind, consider the following measures:

- Limit the number of copies of confidential documents that you circulate, number each copy for tracking purposes, and collect the copies once they have fulfilled their purpose.
- Direct involved persons to avoid circulating copies or sharing information verbally beyond an expressly defined group of essential personnel.
- Direct involved persons to maintain confidential documents in a secure location.
- Direct involved persons to limit their use of electronic mail for privileged communications and to label any such essential messages as "Privileged and Confidential – Environmental Audit Materials."

Label Communications Clearly. All participants in an environmental compliance effort should mark every page of every document that the

company intends to protect with a description of the privileges that they believe apply. Additionally, don't forget to label the materials as "Privileged and Confidential – Environmental Audit Materials," or other such markings, particularly if applicable state law provides for such a privilege. Be careful, however, as simply labeling as privileged all environmental compliance documents will likely undermine other legitimate claims of privilege.

Segregate Discrete Projects. First, the company should have a process in place to ensure any problems or violations discovered are immediately investigated. (See Chapter 5 section entitled "Structuring an Internal Investigation.")

The moment that an audit turns up a potential problem, investigation of the scope of the problem and determination of the remedial actions necessary to address the problem should be made a distinct project. This will put the company in the best position to claim attorney-client privilege or take advantage of the work product doctrine because legal advice will be required and legal liability will be the focus of subsequent audits and actions related to the problem.

Assume All Documents Will Ultimately Be Disclosed. Draft and review documents containing key facts, analysis of vital information, and discussion of legal advice with the idea that they may be turned over to the government or adverse third parties in the future. This approach will ensure that the company always has a full range of options available regarding how it is going to deal with discovery of any violations as a result of an environmental compliance and auditing program. As appropriate, consider communicating some information orally rather than in writing. Establish and implement a rigorous document retention and destruction policy. In particular, avoid keeping drafts and notes unnecessarily.

(Note: Once a government investigation begins, the company should immediately cease routine destruction of documents that may be relevant to the investigation and consult with counsel before destroying such documents.)

APPENDIX I: QUICK-REFERENCE CARDS (SAMPLES)

This Appendix includes illustrations of the three quick-reference cards referred to in this manual:

- ⇒ Responding to Government Interviews [Rights of Ship's Officers and Crewmembers];
- ⇒ Responding to Government Interviews [Employee Rights];
- ⇒ Responding to Government Inspections and Searches of Company Offices, Terminals or Facilities [Procedures for *Security and Reception Personnel*];
- ⇒ Responding to Government Inspections and Searches [Procedures for *Designated Escorts*]; and
- ⇒ Responding to Government Inspections and Searches [Procedures for *Vessel Officers*].

Your company should customize these materials to fit its needs. At a minimum, your company should insert contact information (*e.g.*, work, home, cell, and beeper phone numbers) for key persons within your company (*i.e.*, company attorneys, designated escorts, operations managers, *etc.*).

RESPONDING TO GOVERNMENT INTERVIEWS

[RIGHTS OF SHIP'S OFFICERS AND CREWMEMBERS]

During your employment with [company name] or afterward, a government agent may telephone you or approach you without warning aboard ship, while ashore, at home, or at some other location, in an attempt to interview you in connection with a pending investigation into an oil spill or other pollution incident. Regardless of how persuasive and intimidating the agent may be, remember that **you have the following rights:**

- ⇒ You have the right to request the agent's identification and to record this information (which you should do).
- ⇒ You have the right to decline the interview, or to tell the agent to contact you at work the next business day, or to tell the agent to submit all questions to you in writing.
- ⇒ If you consent to an interview, you have the right to:
 - confer with an attorney (see list below) before and/or during the interview,
 - choose the time and place of the interview,
 - answer only selected questions or stop the interview at any time, and
 - take notes during (or immediately after) the interview to help you remember its substance.

If you choose to answer questions, consider the following:

- ⇒ You should always be polite and professional.
- ⇒ You must answer **truthfully**.
- ⇒ You should not guess or speculate about matters that you do not personally know to be fact, and should only provide as much information as necessary to answer any question.

If the pollution incident was the result of a marine casualty, such as a collision, grounding, equipment failure and so on, the United States Coast Guard may conduct a marine casualty investigation to determine the cause of the incident. If this occurs, you are considered a "party in interest" if you hold a United States Merchant Mariner's License, Document or Certificate of Registry, or, if you are not a holder of a U.S. license, document or certificate, if your personal conduct is under investigation. In addition to the above stated rights, you are entitled by law as a "party in interest" to be represented by counsel, to cross-examine witnesses, and to call witnesses.

For legal advice, contact one of the following company attorneys:

- ⇒
- ⇒

Also, please call one of these attorneys immediately if the government has approached you with questions about your job or the company, or if you become aware that the government has approached a former employee, agent, or contractor of the company regarding similar concerns.

RESPONDING TO GOVERNMENT INTERVIEWS

[EMPLOYEE RIGHTS]

It is conceivable that during your employment with [company name] or afterward, a government agent will telephone you or approach you without warning at work, home, or some other location in an attempt to interview you in connection with a pending investigation. Regardless of how persuasive and intimidating the agent may be, remember that **you have the following rights:**

- ⇒ You have the right to request the agent's identification and to record this information (which you should do).
- ⇒ You have the right to decline the interview, or to tell the agent to contact you at work the next business day, or to tell the agent to submit all questions to you in writing.
- ⇒ If you consent to an interview, you have the right to:
 - confer with an attorney (see list below) before and/or during the interview,
 - choose the time and place of the interview,
 - answer only selected questions or stop the interview at any time, and
 - take notes during (or immediately after) the interview to help you remember its substance.

If you choose to answer questions, consider the following:

- ⇒ You should always be polite and professional.
- ⇒ You must answer **truthfully**.
- ⇒ You should not guess or speculate about matters that you do not personally know to be fact, and should only provide as much information as necessary to answer any question.

For legal advice, contact one of the following company attorneys:

- ⇒
- ⇒
- ⇒

Also, please call one of these attorneys immediately if the government has approached you with questions about your job or the company, or if you become aware that the government has approached a former employee, consultant, or contractor of the company regarding similar concerns.

RESPONDING TO GOVERNMENT INSPECTIONS AND SEARCHES OF COMPANY OFFICES, TERMINALS OR FACILITIES

[PROCEDURES FOR *SECURITY AND RECEPTION PERSONNEL*]

- 1) **Be Professional at All Times.** Regardless of the demeanor of the government agents or investigators, always be calm and courteous.
- 2) **Identify the Government Agents or Representatives.** As politely as possible, obtain as much of the following information as you can:
 - ⇒ the name and title of the lead government agent or investigator,
 - ⇒ the number of persons in the government's team, and
 - ⇒ the government agencies that are represented on the team.
- 3) **Contact Proper Company Representatives.** Ask the government team to wait while you contact a company representative to meet with them. If the lead government agent or investigator does not ask for a particular company representative, call the following persons with your information:
 - ⇒ at least one of these **designated escorts** (call in the order below):
 -
 -
 -
 - ⇒ at least one of these **company attorneys** (call in the order below):
 -
 -
 -
- If possible, contact at least half as many designated escorts as there are government representatives.
- 4) **Do Not Feel Obligated to Answer All Questions.** Provide basic information, but do not feel obligated to answer more probing questions about the company, its offices or facilities, its personnel, or its operations or activities (particularly if there are others more qualified to answer). Do not volunteer information, but always be truthful when answering questions.
- 5) **Copy Any Warrant.** If the government team offers a search warrant, or if they refuse to wait for a designated escort to accompany them during their search, ask to photocopy their warrant. Immediately deliver a copy to the persons whom you have contacted in Step 3. (If government agents or investigators state that they have no warrant because a company official has consented to the search, they should be willing to wait for the arrival of an appropriate company escort or representative to verify this information before commencing the search.)

RESPONDING TO GOVERNMENT INSPECTIONS AND SEARCHES OF COMPANY OFFICES, TERMINALS OR FACILITIES

[PROCEDURES FOR *DESIGNATED ESCORTS*]

— Side 1 —

- 1) **Identify Lead Government Agent or Investigator/Obtain Warrant.** Identify the leader of the government team. Ask for credentials and the search warrant and have them copied. Identify other members of the team and the agencies they represent.
- 2) **Contact Company Attorney(s).** Ask to delay the search until the company attorney(s) arrives (or is contacted). If delay is not granted, assign another employee to deliver a copy of the warrant to the company attorney(s) immediately.
- 3) **Review Warrant.** Review the warrant carefully (whether administrative or criminal). It will identify the exact areas to be searched. Generally, the government is not entitled to search areas not identified in the warrant, even if relevant documents or other items are in an area not identified. If a search is conducted outside the scope of the warrant, follow the procedures in Step 8 for objecting to the improper search.
- 4) **Marshal Your Resources.** Consider what resources you will need before the search proceeds:
 - ⇒ **Additional Escorts.** If it appears from the warrant that the government will be searching more than one area of your facility and there are several members on the government team, arrange to have additional company personnel available in case the government team splits up. In such case, designate one person as the “lead escort” (preferably company counsel) for purposes of managing complications (*i.e.*, answering difficult government questions, contacting the authority issuing the warrant to object to scope of the search/seizure, *etc.*)
 - ⇒ **Recording Equipment.** Bring any equipment that you may need to record the search in detail: pen and paper, dictaphone, camera, video recorder, sampling equipment, fresh batteries and tapes/film for electronic equipment, *etc.* (**You should strongly consider videotaping the entire search.**) Also make sure that each escort has a cell phone, walkie-talkie, or other means of readily communicating with company counsel and other escorts.
 - ⇒ **Sampling Personnel.** If the warrant indicates that sampling will occur during the search, you should summon company personnel (or environmental consultants) who are familiar with proper protocols to observe the sampling.

- 5) **Instruct Employees.** Consider sending employees home and keeping only a skeleton crew on hand. Give employees notice of the search, inform them not to interfere with the government agents or investigators, and remind them that they are not required to answer the agent or investigator's questions. [**DO NOT instruct them not to answer agents' questions. This is illegal.**]
- 6) **Plan "Escort Route(s)."** When guiding government agents or investigators to specific areas identified in their warrant, avoid taking them through areas with extensive operations or large numbers of employees to avoid disrupting the company's operations.
- 7) **Accompany and Record.** Without interfering, accompany the agents or investigators at all times and carefully record all that is said and done concerning every file that is searched or seized. (**You should strongly consider videotaping the entire search.**) You may be asked where certain items can be found (and you should answer), as well as more substantive questions (which you may decline to answer). Write down all such questions, because they contain useful tips about the government's prior sources of information and the focus of their investigation.
- 8) **Object as Necessary.** Object to any aspect of the search or seizure that exceeds the scope outlined in the warrant. If the government agent or investigator persists, contact the company's lead escort (or company counsel), continue to object, and document (**preferably videotape**) how the agent or investigator proceeds. [**DO NOT** attempt to physically prevent the investigator from continuing or impede the agent in any way. This could later result in charges of obstruction of justice.]
- 9) **Request Split Samples and Take Additional Samples.** If there has been an oil spill, or if soil contamination or water pollution is at issue at a facility or terminal, agents may take samples. If the government is conducting a search with a warrant, there should be a detailed sampling plan accompanying the warrant, and you should verify that the agents or investigators are taking the samples in accordance with the sampling plan. **Videotape the government agents or investigators as they take any samples**, request split samples, and take samples of your own, if the necessary equipment is available, using approved sampling protocols.
- 10) **Protect Privileged Materials.** Actively identify any privileged or proprietary materials, and object to government seizure of these materials.
- 11) **Obtain Inventory and Copies of Items Seized.** The company is entitled to an inventory of all items taken by the government, so request a complete inventory. Also, while government agents or investigators are not required to provide copies of documents seized, they often will agree to allow copies to be made.
- 12) **Request Closure Meeting.** Ask to meet with the government team before it leaves your facility or offices so that you can carefully double-check your inventory of items seized, make sure that you have received a split sample of all samples that may have been taken, obtain copies of all documents and materials seized (if possible), and find out as much about the investigation as possible (*i.e.*, focus, scope, and so on.)

RESPONDING TO GOVERNMENT INSPECTIONS AND SEARCHES

[PROCEDURES FOR *VESSEL OFFICERS*]

In the vast majority of cases, officers of the United States Coast Guard will board vessels involved in an oil spill or other pollution incident to investigate the cause. However, more and more frequently, representatives of other United States agencies, such as the Environmental Protection Agency, the Department of Justice, or even state and local environmental or law enforcement agencies, conduct investigations into oil spills or pollution incidents. No matter the agency involved, when the vessel is boarded, vessel officers should:

- 1) **Be Professional at All Times.** Regardless of the demeanor of the government agents or investigators, always be calm and courteous.
- 2) **Identify the Government Agents or Investigators.** As politely as possible, obtain as much of the following information as you can:
 - ⇒ the name and title of the lead government agent or investigator,
 - ⇒ the number of persons in the government's team, and
 - ⇒ the government agencies that are represented on the team.
- 3) **Contact Proper Company Representatives.** Ask the government agents or investigators to wait while you contact a company representative to meet with them. If the government agents or investigators do not ask for a particular company representative, call the following persons with your information:
 - ⇒ at least one of these **designated vessel operations personnel** (call in the order below):
 -
 -
 -
 - ⇒ at least one of these **company attorneys**:
 -
 -
- 4) **Do Not Feel Obligated to Answer All Questions.** Provide basic information, but do not feel obligated to answer more probing questions about the vessel, its personnel, or its operations (particularly if there are others more qualified to answer). Do not volunteer information, but always be truthful when answering questions.
- 5) **Copy Any Warrant.** If the government agents or investigators offer a search warrant, ask to photocopy the warrant. Immediately fax a copy to the persons whom you have contacted in Step 3. (Because of exceptions to the warrant requirement that are applicable to vessels in many circumstances, it is unlikely that the agents will have a warrant. If they do have one, however, remember that the scope of the search must conform with the terms of the warrant.)

- 6) **Accompany and Record.** If the government agents or investigators do not wait for shoreside management before conducting the search, without interfering, have vessel officers (and if necessary, crew) accompany the agents or investigators at all times and carefully record all that is said and done concerning every file that is searched or seized. **(If equipment is available, strongly consider videotaping the entire search.)** You may be asked where certain items can be found (and you should answer), as well as more substantive questions (which you may decline to answer). Write down all such questions, because they contain useful leads regarding the government's prior sources of information and the focus of their investigation.
- 7) **Advise Officers and Crewmembers Not to Consent to Broadening of the Search.** In instances when a search is being conducted under a search warrant, the warrant determines the scope of the search. Even if the vessel is boarded without a warrant, in most instances the government agents or investigators may only search common areas of the vessel (i.e. engine room, bridge, cargo areas, etc.) and not private staterooms or other such areas. Agents or investigators may often ask for permission to search specific areas. Officers and crewmembers should refer the government agent to the Master or to vessel operations managers ashore, and not give consent themselves. Always note the areas that are searched, and also note those areas that the agents or investigators request permission to search, even if they do not initially search these areas.
- 8) **Object as Necessary.** Object to any aspect of the search or seizure that exceeds the scope outlined in the warrant, if a warrant is used. If the Master or vessel operations managers ashore give permission to search, the scope of the search is limited by the consent given. If a government agent or investigator persists in searching areas for which you have objected, contact company counsel or vessel operations, continue to object, and document **(preferably videotape)** how the agent or investigator proceeds. **[DO NOT attempt to physically prevent the agent or investigator from continuing or impede him or her in any way. This could later result in charges of obstruction of justice.]**
- 9) **Request Split Samples and Take Additional Samples.** If agents or investigators take samples from the vessel (such as the bilge, engine room, etc.), note the areas of the vessel from which the samples are taken and, if the necessary equipment is available, **videotape or photograph the government agents or investigators as they take any samples.** Also, request split samples (i.e. a part of the sample taken) by the government, and, if the necessary equipment is available, take separate samples using approved sampling protocols.
- 10) **Obtain Inventory of Items and Copies of Documents Seized.** The company is entitled to an inventory of all items taken by the investigators, so request a complete inventory. Also, while agents or investigators are not required to provide copies of documents seized, they often will agree to allow copies to be made.
- 11) **Request Closure Meeting.** The Master should ask to meet with the government search team before it leaves the vessel so that you can carefully double-check your inventory of items seized, make sure that you have received a split sample of all samples taken, obtain copies of all documents and materials seized (if possible), and find out as much about the investigation as possible (i.e., focus, scope, and so on.)

APPENDIX II: GOVERNMENT CONTACTS

This list of government contacts includes Internet website addresses for most of the agencies referenced.

U.S. Coast Guard

U.S. Coast Guard Headquarters

The Assistant Commandant for Marine Safety and Environmental Protection (G-M) has responsibility for the enforcement of marine safety and environmental laws and treaties for U.S. flag vessels operating anywhere in the world, and for foreign flag vessels operating in waters subject to the jurisdiction of the United States. Under the Assistant Commandant, the following offices will most likely be involved regarding the enforcement of environmental laws.

Website: www.uscg.mil/hq/g-m/gmhome.htm

Contacts: Office of Compliance
U.S. Coast Guard Headquarters (G-MOC)
2100 Second St., S.W.
Washington, D.C. 20593
(202) 267-2978

Office of Investigation and Analysis
U.S. Coast Guard Headquarters (G-MOA)
2100 Second St., S.W.
Washington, D.C. 20593
(202) 267-1430

The Chief Counsel of the Coast Guard serves as legal advisor for all legal issues involving the Coast Guard. The following office is primarily involved in advising on legal issues related to the enforcement of marine safety and environmental laws, as well as the enforcement of all other laws and treaties for which the Coast Guard is responsible.

Office of Maritime & International Law
U.S. Coast Guard Headquarters (G-LMI)
2100 Second St., S.W.
Washington, D.C. 20593
(202) 267-1527

Coast Guard District Commanders operationally manage Coast Guard units, such as Marine Safety Offices, that enforce environmental laws relating to the marine industry. District Commanders have the authority to refer environmental incidents and violations to the Department of Justice (appropriate Offices of United States Attorney) for criminal prosecution. The phone numbers provided are for the Office of Compliance, which deals with enforcement of environmental laws and treaties. The specific waters covered by the districts are delineated at 33 Code of Federal Regulations Part 3.

<u>District</u>	<u>States Covered</u>	<u>Address/Phone</u>
First (New England and North Atlantic)	ME, NH, MA, VT, RI, NJ, NY, CT	408 Atlantic Avenue Boston, Massachusetts 02210-3350 (617) 223-8130
Fifth (Mid-Atlantic)	DE, DC, MD, PA, VA,NC	431 Crawford Street Portsmouth, Virginia 23704-5004 (757) 398-6619
Seventh (Southeast and Caribbean)	FL, GA, SC, Puerto Rico Virgin Islands	909 S.E. First Avenue Miami, Florida 33131-3050 (305) 536-6537
Eighth (Western Rivers and Gulf of Mexico)	ND, SD, WY, KS, NE, IA, CO, MO, KY, WV, TN, AR, OK, NM, TX, LA, MS, AL, PA, IL, MN, WI, IN, OH, FL, GA	Hale Boggs Federal Building 501 Magazine Street New Orleans, Louisiana 70130-3396 (504) 589-6743
Ninth (Great Lakes)	PA, NY, MI, IN, MN, OH, WI, IL	1240 E. 9 th Street Cleveland, Ohio 44199-2060 (216) 902-6052
Eleventh (Pacific - California Coast)	CA, AR, UT, NV	Coast Guard Island, Bldg. 50-6 Alameda, California 94501-5100 (510) 437-2945
Thirteenth (Pacific Northwest)	WA, OR, MT, ID	Jackson Federal Bldg. 915 Second Avenue Seattle, Washington 98174-1067 (206) 220-7224
Fourteenth (Hawaii and Pacific Islands)	HI, Guam, American Samoa	Prince PJKK Federal Bldg. 300 Ala Moana Boulevard Honolulu, Hawaii 96850-4982 (808) 541-2119
Seventeenth (Alaska and Far North)	AK	P.O. Box 25117 Juneau, Alaska 99802-5517 (907) 463-2083

U.S. Environmental Protection Agency (EPA)

EPA Voluntary Disclosure Board

EPA's Office of Enforcement and Compliance Assurance (OECA) heads the EPA Voluntary Disclosure Board, which can be reached at

Office of Criminal Enforcement, Forensics and Training (OCEFT)
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Room 1211
MC 2231A
Washington, DC 20460
(202) 564-2480
www.epa.gov/oeca/polguid0

While voluntary disclosures of potentially serious violations should be made directly to OCEFT at the address above, less serious violations may be made through EPA regional contacts listed on the EPA Audit Policy website (address listed immediately above)

Office of Enforcement and Compliance Assurance (OECA)

EPA's Office of Enforcement and Compliance Assurance (OECA) takes the lead in:

- establishing federal environmental enforcement policy;
- determining which environmental cases to refer to DOJ for criminal (or civil) prosecution;
- providing enforcement resources and technical support for criminal (and civil) investigations of environmental matters; and
- responding to voluntary disclosures of environmental violations under the new EPA Audit Policy.

The primary administrative offices for OECA are located at

Ariel Rios Fed. Bldg.
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 564-2440 (telephone)
es.epa.gov/oeca (website)

However, OECA has regional offices as well.

<u>EPA Region</u>	<u>States Covered</u>	<u>City/Phone/Website</u>
Region 1	CT, MA, ME, NH, VT, RI	Boston (617) 372-7341 www.epa.gov/region01
<u>EPA Region</u> Region 2	<u>States Covered</u> NY, NJ, PR, USVI	<u>City/Phone/Website</u> New York (212) 637-5000 www.epa.gov/region02/epd/contact
Region 3	DE, DC, MD, PA, VA, WV	Philadelphia (215) 814-2950 www.epa.gov/reg3ecej/contacts
Region 4	AL, FL, GA, KY, MS, NC, SC, TN	Atlanta (404) 562-9655 www.epa.gov/region4/emergenc
Region 5	IL, IN, MI, MN, OH, WI	Chicago (312) 886-9296 www.epa.gov/region5/rtms
Region 6	AR, LA, NM, OK, TX	Dallas (214) 665-2210 www.epa.gov/earth1r6/6en/contacts
Region 7	IA, KS, MO, NE	Kansas City (913) 551-7003 www.epa.gov/region07
Region 8	CO, MT, ND, SD, UT, WY	Denver (303) 312-6312 www.epa.gov/region8
Region 9	AZ, CA, HI, NV, Guam, American Samoa	San Francisco (414) 744-1500 www.epa.gov/region09/lib-hot
Region 10	AK, ID, OR, WA	Seattle (206) 553-1265 www.epa.gov/region10

EPA Regulatory Program Offices

In addition to regional OECA personnel, EPA maintains regulatory program offices in each region that often provide technical support during EPA and DOJ investigations. The following are Public or External Affairs contacts within each EPA Regional Office.

<u>EPA Region</u>	<u>States Covered</u>	<u>City/Phone/Website</u>
Region 1	CT, MA, ME, NH, VT, RI	Boston (617) 565-4154 www.epa.gov/region1
Region 2	NY, NJ, PR, USVI	New York (212) 637-3000 (212) 637-3660 www.epa.gov/region2
Region 3	DE, DC, MD, PA, VA, WV	Philadelphia (215) 814-5120 www.epa.gov/region3
Region 4	AL, FL, GA, KY, MS, NC, SC, TN	Atlanta (404) 562-9900 www.epa.gov/region4
Region 5	IL, IN, MI, MN, OH, WI	Chicago (312) 353-2000 www.epa.gov/region5
Region 6	AR, LA, NM, OK, TX	Dallas (214) 665-2200 www.epa.gov/region6
Region 7	IA, KS, MO, NE	Kansas City (913) 551-7003 www.epa.gov/region7
Region 8	CO, MT, ND, SD, UT, WY	Denver (414) 312-6312 www.epa.gov/region8
Region 9	AZ, CA, HI, NV, Guam, American Samoa	San Francisco (414) 744-1500 www.epa.gov/region9
Region 10	AK, ID, OR, WA	Seattle (206) 553-4269 www.epa.gov/region10

U.S. Department of Justice

Environmental Crimes Section (ECS)

The Environmental Crimes Section (ECS) handles cases referred by EPA for criminal prosecution as well as cases that ECS initiates on its own. In addition, ECS provides limited oversight in some cases initiated by U.S. Attorneys' Offices (namely, cases dealing with simultaneous investigations in multiple districts, cases involving issues of first impression, or cases with foreign policy implications). The ECS office is located at

601 Pennsylvania Avenue, NW
Room 6101
Washington, D.C. 20004
(202) 305-0322
www.usdoj.gov

Environmental Enforcement Section

The Environmental Enforcement Section (EES) handles cases referred by EPA for civil prosecution as well as civil cases that the EES initiates on its own. In addition, EES provides oversight for some civil cases initiated by U.S. Attorneys' Offices. The EES office is located at

Room 13065
1425 New York Ave., N.W.
Washington, D.C. 20005
(202) 514-4353
www.usdoj.gov

U.S. Attorneys' Offices

Any U.S. Attorney's Office may initiate and prosecute an enforcement action (criminal or civil) for environmental matters without the approval of the ECS or EES. For a list of U.S. Attorneys' Offices, see the following website:

www.usdoj.gov/careers/oapm/lab/usaoadd

Other Federal Agencies Involved in Environmental Enforcement

Federal Bureau of Investigation (FBI)

Website: www.fbi.gov

Contact: FBI Bldg.
935 Pennsylvania Ave., N.W.
Washington, D.C. 20535-0001
(202) 324-3000

U.S. Army Corps of Engineers

Website: www.usace.army.mil

Contacts: Casimir Pulaski Building
20 Massachusetts Ave., N.W.
Washington, D.C. 20314-1000
(202) 761-0660

Counsel for Environmental Law & Regulatory Programs
(202) 761-8556

U.S. Department of Transportation

Website: www.dot.gov/ost/ogc/org

Contact: Assistant General Counsel for Environmental,
Civil Rights and General Law
Room 10102 (C-10)
U.S. Department of Transportation
400 7th St., S.W.
Washington, DC 20590
(202) 366-4710

U.S. Department of Interior

Website: www.usgs.doi.gov

Contact: Fish, Wildlife, & Environmental Protection
Room 6560
1849 C St., N.W.
Washington, D.C. 20240
(202) 208-6172

U.S. Department of Defense, Environmental Security

Website: www.acq.osd.mil/ens/

Contact: Director of Environmental Compliance
Crystal Park Five
Room 600
2451 Crystal Dr.
Arlington, VA 22245-5201
(202) 604-0519

State Environmental Agencies

What follows is a list providing a general point of contact for each state environmental enforcement agency. (Many states also have environmental crimes units within their Offices of Attorney General – to which the corresponding state environmental agency can readily direct you.)

Alabama Department of Environmental Management
1751 Cong. W. L. Dickinson Dr.
Montgomery, AL 36109-2608
(334) 271-7700
www.adem.state.al.us

Alaska Department of Environmental Conservation
Compliance Assistance Office
555 Cordova St.
Anchorage, AK 99501
(907) 269-7586
www.state.ak.us

Arizona Department of Environmental Quality
3033 North Central Ave.
Phoenix, AZ 85012
(602) 207-2300
www.adeg.state.az.us/

Arkansas Department of Pollution Control and Ecology
Environmental Preservation Division
8001 National Drive
Little Rock, AR 72209
(501) 682-0744
www.adeg.state.ar.us

California Environmental Protection Agency
555 Capitol Mall, Suite 525
Sacramento, CA 95814
(916) 445-3846
www.calepa.ca.gov

Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, CO 80246-1530
(303) 692-1000
www.state.co.us/govdir/cdphedir/environe

Connecticut Department of Environmental Protection
79 Elm St.
Hartford, CT 06106
(860) 424-4180
dep.state.ct.us/aboutdep/contact/contact

Delaware Department of Natural Resources and Environmental
Control
P.O. Box 1401
89 Kings Highway
Dover, DE 19903
(302) 739-4506
www.dnrec.state.de.us/main

District of Columbia Environmental Health Administration
2100 Martin L. King Ave., S.E.
Washington, D.C. 20020
(202) 645-6617

Florida Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 10
Tallahassee, FL 32399-3000
(850) 921-1222
www.dep.state.fl.us

Georgia Environmental Protection Division
4244 International Parkway
Suite 114
Atlanta, GA 30354
(404) 362-2671
www.dnr.state.ga.us/dnr/environ

Hawaii Department of Land and Natural Resources
1151 Punchbowl St., Room 231
Honolulu, HI 96813
(808) 587-0330
www.state.hi.us/dlnr

Idaho Division of Environmental Quality (is an EPA cite)
1410 N. Hilton St.
Boise, ID 83706
(208) 373-0502
www2.state.id.us/deq

Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, IL 62702
(217) 782-3397
www.epa.state.il.us

Indiana Department of Environmental Management
Indiana Government Center North
100 N. Senate
P.O. Box 6015
Indianapolis, IN 46205-6015
(317) 232-8603
www.state.in.us

Iowa The Environmental Protection Division
Henry A. Wallace Bldg.
502 E. 9th St.
Des Moines, IA 50319-0034
(515) 281-8973
www.state.ia.us

Kansas Department of Health & Environment
Division of Environment
Forbes Field
Building 740
Topeka, KS 66620
(785) 296-1535
www.kdhe.state.ks.us/environment

Kentucky Department for Environmental Protection
Frankfort Office Park
14 Reilly Road
Frankfort, KY 40601
(502) 564-2150
www.state.ky.us/agencies/eqc

Louisiana Department of Environmental Quality
7290 Bluebonnet Blvd.
Baton Rouge, LA 70810
(225) 765-0741
www.deq.state.la.us

Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017
(207) 287-7688
www.state.me.us/dep

Maryland Department of the Environment
2500 Broening Highway
Baltimore, MD 21224
(410) 631-3000
www.mde.state.md.us/

Massachusetts Department of Environmental Protection
1 Winter Street
Boston, MA 02108
(617) 338-2255
www.magnet.state.ma.us/dep

Michigan Department of Environmental Quality
P.O. Box 30473
Lansing, MI 48909-7973
1-800-662-9278
www.deq.state.mi.us

Minnesota Pollution Control Agency
520 Lafayette Rd.
St. Paul, MN 55155-4194
(612) 296-6300
www.pca.state.mn.us

Mississippi Department of Environmental Quality
P.O. Box 20305
Jackson, MS 39289-1305
(601) 961-5171
www.deq.state.ms.us

Missouri Department of Natural Resources
Division of Environmental Quality
P.O. Box 176
Jefferson City, MO 65102
1-800-334-6946
www.dnr.state.mo.us/deq

Montana Department of Environmental Quality
1520 E. Sixth Ave.
Helena, MT 59620
(406) 444-2544
www.deq.state.mt.us/

Nebraska Department of Environmental Quality
1200 N Street, Suite 400
P.O. Box 98922
Lincoln, NE 68509
(402) 471-2186
www.deq.state.ne.us

Nevada Conservation and Natural Resources Department
Department of Environmental Protection
123 W. Nye Lane, Room 230
Carson City, NV 89706
(702) 687-4360
www.state.nv.us

New Hampshire Department of Environmental Services
Health & Human Services Bldg.
6 Hazen Drive
Concord, NH 03302-0095
(603) 271-3503
www.state.nh.us/des/start

New Jersey Department of Environmental Protection
401 E. State St.
7th Floor, East Wing
P.O. Box. 402
Trenton, NJ 08625-0402
(609) 292-2885
www.state.nj.us/dep

New Mexico New Mexico Environment Department
Harold S. Runnels Bldg.
1190 St. Francis Dr.
Santa Fe, NM 87505-4182
(505) 827-2855
www.nmenv.state.nm.us

New York Department of Environmental Conservation
50 Wolf Road
Albany, NY 12207
(518) 474-2121
unix2.nysed.gov/ils/executive/encon

North Carolina Department of Environment and Natural Resources
512 North Salisbury St.
P.O. Box 27687
Raleigh, NC 27611-7687
(919) 733-4984
www.enhr.state.nc.us

North Dakota Environmental Health Section
North Dakota Health Department
1200 Missouri Ave.
P.O. Box 5520
Bismarck, ND 58506
(701) 328-5150
www.health.state.nd.us/ndhd/environ/index

Ohio Environmental Protection Agency
Lazarus Government Center
122 South Front Street
Columbus, OH 43215
(614) 728-3778
www.epa.ohio.gov

Oklahoma Department of Environmental Quality
707 North Robinson
Oklahoma City, OK 73102
(405) 702-6100
www.deq.state.ok.us

Oregon Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204
(503) 229-5696
www.deq.state.or.us

Pennsylvania Department of Environmental Protection
Rachel Carson State Office Bldg.
400 Market Street
Harrisburg, PA 17105
(717) 787-2814
www.dep.state.pa.us

Puerto Rico Environmental Quality Board
P.O. Box. 11488
Santurce, PR 00910
(787) 767-8181
www.dprsjl.er.usgs.gov/public

Rhode Island Department of Environmental Management
235 Promenade St.
Providence, RI 029808-5767
(401) 222-6800
www.state.ri.us/dem

South Carolina Department of Health and Environmental Control
Environmental Quality Control
2600 Bull St.
Columbia, SC 29201
(803) 734-5360
www.state.sc.us/dhec/eqchome.

South Dakota Department of Environment and Natural Resources
Joe Foss Bldg.
523 E. Capitol
Pierre, SD 57501
(605) 773-3151
www.state.sd.us/state/executive/denr

Tennessee Department of Environment and Conservation
21st Floor, L&C Tower
401 Church St.
Nashville, TN 37243
1-888-891-8332
www.state.tn.us/environment

Texas Environmental & Consumer Health
Environmental Health Bureau
1100 W. 49th St.
Austin, TX 78756
(512) 834-6640
www.state.tx.us/

Utah Department of Environmental Quality
P.O. Box 144810-4810
168 North 1950 West
Salt Lake City, UT 84114-4810
1-800-458-0145
www.eq.state.ut.us/eqoas/org

Vermont Agency of Natural Resources
Center Building
103 South Main St.
Waterbury, VT 05671
(802) 241-3600
www.anr.state.vt.us/env98

Virginia Department of Environmental Quality
629 East Main St.
Richmond, VA 23219
(804) 698-4000
www.deq.state.va.us

Washington Environment and Natural Resources
1111 Washington St., SE
P.O. Box 47000
Olympia, WA 98504
(360) 902-1000
www.wa.gov/dnr

West Virginia Division of Environmental Protection
Office of Waste Management/Environmental Enforcement
1356 Hansford St.
Charleston, WV 25301
(304) 558-5929
www.dep.state.wv.us/

Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707
(608) 266-2621
www.dnr.state.wi.us/Environment

Wyoming Department of Environmental Quality
122 West 25th St., Herschler Bldg
Cheyenne, WA 82002
(307) 777-7682
www.deq.state.wy.us/

APPENDIX III – EXAMINING ENVIRONMENTAL COMPLIANCE AND MANAGEMENT PROGRAMS

These questions are examples of the types of questions that should be asked by vessel owners and operators to determine whether the environmental compliance and/or management program currently in place is complete and comprehensive. In particular, they address the types of areas likely to be examined by government investigators in determining whether the program meets the United States Federal Sentencing Guidelines and other relevant criteria used by United States environmental enforcement agencies to determine the effectiveness of environmental compliance and management programs.

Establishing and Managing the Program

- Does the program clearly establish that environmental compliance is a major priority for the company, its vessels and its employees, agents and contractors through general principles, policies, rules and procedures?
- Have all waste streams and discharges produced by the company and its vessels been identified within the environmental compliance program, including but not limited to:
 - § Hazardous materials (paints, solvents, batteries, etc.)
 - § Bilge water
 - § Ballast water
 - § Gray water
 - § Garbage
 - § Plastics
 - § Air emissions
 - § Oil mixtures
 - § Sewage
 - § Cargo residues
- Has a system been established to ensure that all applicable international, flag state, and United States federal, state and local environmental laws for the handling, storage, and disposal of relevant waste streams can be identified and communicated to vessels, employees and agents of the company as necessary?
- Have procedures been established within the program to ensure that these laws are complied with ashore, in port and at sea?

- Are detailed functions clearly established to ensure compliance with the company's program and applicable environmental laws?
- Are organizational responsibilities for performing the functions clearly established?
- Are all lines of authority, oversight and ultimate responsibility for environmental compliance clearly established including those related to required reporting to regulatory agencies?
- Is there an appropriate level of oversight of the environmental program by the corporate board of directors?
- Are appropriate procedures in place to safeguard audit reports and other compliance program elements from disclosure outside the company?
- Is there an environmental compliance due diligence review conducted for contractors performing work on vessels or for the company on shore when appropriate?
- Are adequate resources provided for environmental compliance, including staffing, funding, equipment and external support?
- Have waste minimization opportunities been identified, programs to address these opportunities established, and measures of effectiveness identified?
- Is environmental planning integrated into other plans developed by the company as appropriate (e.g., capital improvements, training, maintenance, etc.)?

Personnel and Training

- Have personnel been clearly designated who have responsibility to ensure that these environmental laws and company procedures are implemented within the company and on its ships?
- Are these personnel given an appropriate level of authority within the company?
- Are appropriate personnel, both in terms of experience and past performance relating to environmental compliance, currently in these positions?
- Are potential consequences for departure from specified operating procedures described in the compliance program and communicated to employees, including criminal, civil, administrative and company employment sanctions?
- Is there a disciplinary system in place that will ensure that employees are appropriately disciplined for violating environmental laws and for failing to adequately perform their compliance duties or to report environmental violations?

- Are there any hidden or overt personnel performance standards or corporate bonus programs established for employees for performance that may inadvertently undermine policies stated in the company's environmental compliance program?
- Is environmental compliance a standard by which employee and corporate departmental performance is evaluated?
- Has an adequate training program been established that trains company personnel, especially ships' crews, on the compliance program and applicable environmental laws and regulations?
- Does the system identify education and training required for employees and is there a process to document, evaluate and improve the training provided?
- Are these training programs documented and are training records kept?

Auditing and Reporting

- Does the system in place describe and demonstrate top management commitment to the compliance auditing program?
- Does the system ensure pre-planning of systematic audits and coordination of audits?
- Is an effective reporting system (such as a hotline) established that will allow anyone in the company to report environmental problems or violations to the company without fear of retaliation?
- Is there an effective communication program in place that ensures that employees know that reporting of environmental problems and violations is expected of them and will not result in retaliation?
- Are procedures established for internal and external auditing of the environmental compliance program?
- Are auditors used who are familiar with U.S. environmental laws and environmental compliance program standards?
- Are adequate resources committed to the auditing program?

Dealing with Discrepancies

- Are procedures established for reporting of results of audits to appropriate persons or committees within the company?

- Is there a committee or high-level person within the company responsible for reviewing audit or hotline reports, investigating reported discrepancies or violations, and determining appropriate actions to deal with discrepancies that are verified?
- Does the committee or high-level person have the appropriate level of authority to ensure any environmental discrepancies or violations that are discovered by audits or internal investigations are adequately addressed within the corporate planning and financing process?
- Are procedures in place to ensure that recommendations made by or discrepancies discovered by auditors are addressed in a timely fashion?

Reevaluating the Program

- Is there a system in place to track and verify the effectiveness of corrective and preventative actions taken?
- Are there procedures established to periodically review and amend the environmental compliance program in light of discrepancies or violations discovered as a result of the auditing and reporting system or other compliance program reports?
- Is there a mechanism for tracking changes in the laws and regulations, the nature of waste streams produced, and vessel trading patterns, and adjusting the program as appropriate?

Appendix IV - Listing of State Environmental Audit Privileges or Immunities Laws

The following states have enacted laws establishing both privileges and immunities associated with environmental compliance audits as of August 1999:

STATE	STATUTE CITE
Alaska	Alaska Stat. 9.25.450 et seq. (1997)
Colorado	Colo. Rev. Stat. 13-25-126.5, 25-1-114.5 (1994)
Iowa	Iowa Code 445J.1 et seq. (1998)
Kansas	Kan. Stat. Ann. 60-3332 et seq. (1995)
Kentucky	Ky. Rev. Stat. Ann. 224.01-040 (1994)
Michigan	Mich. Comp. Laws Ann. 324.14801 et seq. (1996)
Montana	Mont. Code Ann. 75-1-1201 et seq., 80-1-301 et seq. (1997)
Nebraska	Neb. Rev. Stat. 25-21 et seq. (1998)
Nevada	Nev. Rev. Stat. 445C.010 et seq. (1997)
New Hampshire	N.H. Code Admin. R. Ann. (Public Health) 147-E:1 et seq. (1996)
Ohio	Ohio Rev. Code Ann. 3745.70 et seq. (1996)
South Carolina	S.C. Code Ann. 48-57-10 et seq. (1996)
South Dakota	S.D. Codified Laws 1-40-33 et seq. (1996)
Texas	Texas Rev. Civ. Stat. 4447cc (1995)
Utah	Utah Code Ann. 19-7-101 et seq. (1995)
Virginia	Va. Code 10.1-1198 et seq. (1995)
Wyoming	Wyo. Stat. 35-11-1105 et seq. (1995)

The following states have enacted laws establishing either a privilege or immunity for environmental audits as of August 1999:

STATE	STATUTE CITE
Arkansas	Ark. Stat. Ann. 8-1-301 et seq. (1995) (privilege)
Illinois	Ill. Comp. Stat. Ann. 415-5/52.2 (1995) (privilege)
Indiana	Ind. Code 13-28-4-1 et seq. (1994) (privilege)
Mississippi	Miss. Code Ann. 49-2-71 (1995) (privilege)
Oregon	Ore. Rev. Stat. 468.963 (1993) (privilege)
Rhode Island	R.I. Gen. Laws 42-17.8-1 et seq. (1997)