

# MARINE CASUALTIES: REPORTING AND INVESTIGATION OBLIGATIONS AND DRUG AND ALCOHOL TESTING OBLIGATIONS

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## Reports to Coast Guard

46 U.S.C. § 6101 requires the owner, charter, managing operator, agent, master or individual in charge of a vessel involved in a marine casualty involving death or serious personal injury to an individual, material loss of property or material damage affecting the seaworthiness or efficiency of a vessel or any incident which involves “significant harm to the environment”<sup>1</sup> to the United States Coast Guard. Reports may be made to the Coast Guard National Marine Response Center or the appropriate Coast Guard Captain of the Port. to immediately report the same to the nearest Coast Guard Marine Safety Office, Marine Inspection Office or Coast Guard Group office, and to make a written report the fact of the casualty within five days of the casualty. See 46 CFR § 4.01-1 *et seq.* The required form for written reports, Form CG-2692, is available on the Internet at <http://www.uscg.mil/hq/g-m/nmc/pubs/forms/cg2692.pdf>.

46 CFR § 4.05-1(a) requires the owner, agent, master or person in charge of a vessel involved in a marine casualty to give notice as soon as possible to the nearest Coast Guard Marine Safety or Marine Inspection Office if the casualty involves either a grounding which creates a hazard to the safety of the vessel, navigation or the environment, or an occurrence materially affecting the vessel’s seaworthiness or fitness for service; or death or serious injury, or damage to property greater than \$25,000. Content of the notice is specified in 46 CFR § 4.05-5. A subsequent written report on form CG-2692 must be made. 46 CFR § 4.05-10.

Additionally, 33 CFR § 164.53 requires that the owner, master, agent or person in charge of any vessel of 1600 or more gross tons notify the Captain of the Port of the United States Coast Guard of any “hazardous condition” aboard a vessel within the jurisdiction of the port, including:

- loss of main propulsion
- fire
- flooding
- cargo spills (oil or chemical)
- loss of generator power
- loss of steering
- movement within a port in a dead ship status
- structural failures of a hull

Failure to make the required report of a casualty or of a hazardous condition can result in a civil penalty of up to \$25,000, or criminal penalties of up to \$100,000 and 10 years imprisonment.

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<sup>1</sup> The requirement to immediately report a marine casualty that involves significant harm to the environment applies to: (1) any vessel on navigable waters of the United States; (2) any U.S. vessel wherever such casualty occurs; and (3) any foreign tank vessel operating in the U.S. exclusive economic zone. “Significant harm to the environment” under the regulation means: (1) in the navigable waters of the United States, a discharge of oil sufficient to cause a film or sheen; and (2) in other waters subject to the jurisdiction of the United States, including the EEZ, a discharge in excess of the quantities permitted by MARPOL. A probable discharge of oil, hazardous substance, marine pollutant or noxious liquid substance must be reported.

See 33 CFR § 160.215. 46 CFR § 28.80 requires that any accident or injury involving a loss of life, an injured crewmember being disabled for more than 72 hours, a loss of the vessel, or damage to the vessel or its gear of more than \$25,000 be reported either to the vessel's insurance underwriter or to the Marine Index Bureau (P.O. Box 1964, New York NY 10156-0612). Information reported must include: name and address of the vessel owner and operator; name and address of the insurance underwriter; name, registry number, call sign, gross tonnage, year vessel was built, length, and hull material; date, time, location, nature and cause of the accident or injury; activity of the vessel and weather conditions; the fishery, intended catch and length of opening; date casualty was reported; name, registry number and call sign of any other vessel involved; the sum of money paid for any injury or death, the nature of damage and cost of repairs of damage to or by the vessel; and name, birth date, social security number, address, job title, length of disability, activity at time of injury, type of injury and treatment of any person injured. 46 U.S.C. § 6104(b) requires any primary insurance underwriter of a fishing vessel, fish processing vessel or fish tender vessel to submit periodically to the Secretary of the department which administers the Coast Guard data concerning marine casualties.

Failure to report an accident as required by Coast Guard regulations has been found to not affect the allocation of burdens of proof of liability for the accident. *Tisbury Towing & Transportation Co., Inc.*, 2001 U.S. App. Lexis 11725 (1<sup>st</sup> Cir. 2001). *Joseph v. Tidewater Marine LLC*, 2002 U.S. Dist. Lexis 15711 (E.D. La. 2002), held that violation of Coast Guard requirements of reporting injuries do not constitute violation of a "safety statute" that, under the Jones Act, preclude evidence of the plaintiff's comparative fault. See "VII.I.10.(b)", *supra*.

### **Uninspected Vessels: Reports of Injury to OSHA**

*Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 2002 AMC 305 (2002), held that OSHA regulations apply to uninspected vessels operating in territorial waters. *Herman v. Tidewater Pacific, Inc.*, 160 F.3<sup>d</sup> 1239, 1999 AMC 236 (9<sup>th</sup> Cir. 1998), held that Coast Guard regulations relative to reporting injuries and death do not supersede OSHA regulations applicable to working conditions and to record keeping of illness and injury applicable to workers within a state apply to seamen on uninspected vessels. Thus, under 29 U.S.C. §§ 657(c)(2), 673(a) and 1904.4, an employer must maintain a detailed log supplementary to any reports of injury required by the Coast Guard of any injury or illness involving medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job of any employee in state territorial waters.

### **Reporting Incidents of Sexual Harassment**

46 U.S.C. § 10104 requires the master of any documented vessel to report any complaints of sexual offenses to the Coast Guard. Sexual offenses are defined in 18 U.S.C. § 2241. The penalty for knowingly failing to make a required report is a fine of not more than \$5000.00.

### **Oil & Hazardous Substance Discharge Reporting**

33 U.S.C. § 1321(b)(5) makes any person "in charge" of a vessel or of an onshore or offshore facility or vessel from which oil or hazardous substance is discharged in a quantity that may be

harmful into waters or shorelines (as defined in the Act) who fails to notify immediately the appropriate federal agency as soon as he or she has knowledge of the discharge, subject to conviction of a felony punishable by a \$250,000 maximum fine (\$500,000 for corporations) and up to five years in prison. *United States of America v. Royal Caribbean Cruises, Ltd.*, 24 F. Supp. 2<sup>d</sup> 155, 1998 AMC 1841 (D. P.R. 1997), upheld application of the law to a small oil spill from a foreign-flag vessel in United States territorial waters. See also *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2<sup>d</sup> 1358, 1998 AMC 1817 (S.D. Fl. 1998), which involved a separate incident. There may be more than one person “in charge”: multiple defendants having authority at various levels can be charged, plus a corporation may be “in charge”. *Apex Oil Co. v. United States*, 530 F.2<sup>d</sup> 1291 (8<sup>th</sup> Cir. 1991); *United States of Royal Caribbean Cruises*. Reporting a spill results in limited immunity to an individual who makes a report: information reported cannot be used against the individual who made the report. 33 U.S.C. § 1321(b)(5). Reported information may be used against a corporation or against other individuals. Notice of oil discharge also is required to be given under 33 U.S.C. § 1906, MARPOL Protocol I; 33 CFR § 151.15. *Royal Caribbean* also rejected the defense that a truthful answer to government inquiries would expose the individual to criminal liability.

#### **Authority of Coast Guard to Investigate Marine Casualties.**

Pursuant to 46 U.S.C. § 6301 and 46 CFR Part 4, the Coast Guard has authority to investigate marine casualties. The stated purposes of such investigations are to determine the cause or causes of the casualty in order to prevent recurrence and thereby promote maritime safety and protect the marine environment. 46 U.S.C. § 6301. Casualty investigations may lead to criminal investigations and to proceedings against mariners for suspension or revocation of mariners’ documents or licenses, 46 U.S.C. § 7703; 46 CFR Part. 5. Civil penalties may be assessed against a responsible party pursuant to procedures prescribed in 33 CFR § 1.07.

**Definition of “marine casualty”.** 46 CFR § 4.03-1 defines a “marine casualty as any occurrence on the navigable waters of the United States, or anywhere if a United States-documented vessel is involved, which results in damage by or to any non-public vessel or its cargo, or in injury which requires professional medical treatment beyond first aid or death to any person.”

**Investigation Procedures.** 46 U.S.C. § 6301 *et seq.* and 46 CFR Part 4 establish procedures for Coast Guard investigations of marine casualties, including granting authority to the Coast Guard to subpoena witnesses and evidence. 14 U.S.C. § 89(a) gives authority to all Coast Guard officers, commissioned and non-commissioned, to board any vessel subject to the jurisdiction of the United States to make inspection, examinations, searches, seizures and arrests.

**Rights of Witnesses.** Although individuals may invoke Fifth Amendment privileges against self-incrimination in Coast Guard investigations, see, *e.g.*, *McCarthy v. Arndstein*, 266 U.S. 34 (1924), no such protection is recognized with respect to corporations, and does not exist with respect to potential exposures to civil penalties. See, *e.g.*, *United States v. Ward*, 448 U.S. 242 (1980), or to procedures for license suspension or revocation. *Roach v. National Transp. Safety Board*, 804 F.2<sup>d</sup> 1147 (10<sup>th</sup> Cir. 1986). Fifth Amendment “due process” protections do not apply to investigation proceedings. See, *e.g.*, *Georator Corp. v. E.E.O.C.*, 592 F.2<sup>d</sup> 765 (4<sup>th</sup> Cir. 1979).

**Duties to Preserve Evidence.** 46 CFR § 4.05-15(a) requires that vessel owners, agents and

masters preserve logs and other records that may be of assistance in determining the cause of a marine casualty, and to make such records available to the Coast Guard on its request.

**Authority to subpoena foreign citizens.** *Veldhoen v. United States Coast Guard*, 838 F. Supp. 280, 1994 AMC 494 (E.D. La. 1993), upheld the Coast Guard's subpoena power over foreign officers of foreign ships to investigate casualties involving United States citizens even if the casualties occurred on the high seas or foreign territorial waters, if the conditions set by 46 U.S.C. § 6101(e) are met (the passengers embark or disembark or tickets are sold in the United States).

### **Investigation of Casualties by NTSB**

The Independent Safety Board Act, 49 U.S.C. § 1901 *et seq.* provided for the creation of the National Transportation Safety Board and granted it authority to investigate any major marine accident occurring in United States territory or involving a United States vessel, excluding only public vessels. 49 U.S.C. § 1903(a)(1)(E) authorizes an NTSB investigation and a "determination of the facts, conditions, and circumstances and the cause or probable cause or causes of ... [a] major marine casualty". 49 CFR § 850.5 defines a "major marine casualty" as one involving a vessel that results in (1) the loss of six or more lives, (2) the loss of a mechanically propelled vessel of 100 or more gross tons, (3) property damage initially estimated as \$500,000 or more, or (4) "serious threat ... to life, property, or the environment by hazardous materials". The Coast Guard retains primary responsibility for investigating marine casualties that are not within the term "major marine casualty". 49 CFR § 850.1 *et seq.* *NTSB v. Carnival Cruise Lines, Inc.*, 1989 AMC 2730 (S.D. FL. 1989), established that the NTSB authority does not extend to casualties involving only foreign-flag vessels not occurring in United States territorial waters. By a letter of understanding dated September 12, 2002, the Coast Guard and the National Transportation Safety Board have clarified when the NTSB will lead investigations of major marine casualties. The letter provides that the NTSB may elect to lead the investigation of major marine casualties that risked or threatened high loss of life to innocent third parties, such as (1) passenger vessel accidents that placed passengers or crewmembers at serious risk, (2) a vessel accident that seriously threatened port facilities, (3) a cargo vessel accident that involved three or more crew fatalities; or (4) a multimodal marine accident that resulted in fatalities. As the Coast Guard is the primary executive agency charged with enforcing rules of the road, in cases of conflict between determinations of the NTSB and the Coast Guard the Coast Guard's determinations are entitled to deference. *Collins v. National Transportation Safety Board*, 351 F.3<sup>d</sup> 1246, 2004 AMC 153 (D.C. Cir. 2003).

### **Investigation of Casualties by State Pilotage Commissions**

When actions of state-licensed pilots are involved in maritime casualties, state pilotage commissions have authority concurrent with authority of the Coast Guard and the National Transportation Safety Board to investigate. *Collins v. National Transportation Safety Board*, 351 F.3<sup>d</sup> 1246, 2004 AMC 153 (D.C. Cir. 2003). *Collins* states that in cases of fault of pilots on foreign-flagged vessels and United States vessels operating in foreign trade, authority to discipline state-licensed pilots lies exclusively with the state pilotage agencies.

## Post-Casualty Alcohol and Drug Testing

**Federal Drug and Alcohol Education and Testing Regulations.** The Coast Guard has promulgated extensive rules and regulations relating to intoxication and chemical testing that are applicable to crewmembers of commercial vessels. A statute prohibiting operation of a vessel while intoxicated applies to commercial and recreational vessels. 46 CFR Parts 4, 5 and 16, and 33 CFR Part 95 state regulations applicable to “marine employers”, including not only operators of larger fleets but to the operators of any vessel other than a recreational vessel, including one-man owner-operated fishing vessels. The employers’ obligations are not only absolute as to the employers, but they require that employers indoctrinate their employees of the regulations’ requirements. Regulations were found enforceable against Constitutional and administrative law challenges in *Transportation Institute v. U.S. Coast Guard*, 727 F. Supp. 648, 1990 AMC 494 (D. D.C. 1989), except that the provisions for random testing were found to be too broad and thus offended Fourth Amendment expectations of privacy. The Coast Guard has reformulated the offending rules.

**Prohibition of use of alcohol prior to assuming watch or command.** 46 U.S.C. § 2302(c) prohibits any individual from being intoxicated as defined by the Secretary of the department which administers the Coast Guard when operating a vessel. 33 CFR Part 95 defines “intoxication” and prohibits a person from operating a vessel while intoxicated. The regulations apply to any vessel operated on waters subject to the jurisdiction of the United States, including a foreign vessel, and to a vessel “owned in the United States” on the high seas. § 95.05(a). § 95.05(a) deems a person operating a recreational vessel to be intoxicated if the individual has a blood alcohol concentration of 0.10% or more by weight, or, for vessels other than recreational (*i.e.*, commercial), 0.04% or more. § 95.025 (b) incorporates any stricter applicable state definitions of intoxication. § 95.045 prohibits a crewmember, pilot or watchstander on an inspected vessel or a vessel subject to inspection from performing or attempting to perform any scheduled duties within four hours of consuming any alcohol, from being intoxicated at any time, and from consuming any intoxicant while on watch or duty, including any legal prescription or non-prescription drug which may cause intoxication.

**Fines and penalties for operating a vessel while intoxicated.** 46 U.S.C. § 2302(c) provides that an individual who is intoxicated when operating a vessel, as determined under standards prescribed by the Secretary of the department which administers the Coast Guard, shall be liable for a civil penalty of not more than \$100, subject to a fine of not more than \$5,000, and imprisoned for not more than one year, or both. The vessel is also liable *in rem* for a penalty imposed under § 2302. 46 U.S.C. § 2302(d).

**“Employers” subject to testing and education regulations.** 46 CFR § 16.105 defines “employer” as a “marine employer”, including “sponsoring organizations” (consortiums, corporations, associations, unions or other organizations with which marine employers or the employees are associated). “Marine employer” is defined as the owner, managing operator, charterer, agent, master or person in charge of a vessel, other than a recreational vessel. *Id.* Thus, the regulations apply to all commercial vessels, irrespective of size or number of crew.

**Crewmembers subject to testing and education regulations.** 46 CFR § 16.105 defines “crewmember” subject to the regulations as any person on board a vessel acting under authority of a license, certificate of registration or merchant mariner’s document, whether or not the individual is a member of the vessel’s crew, or is employed on a vessel owned by the United States that is

required by law or regulation to employ or be operated by an individual holding a license, certificate of registry, or merchant mariner's document, except an individual primarily employed in the preparation of fish or fish products or in a support position not related to navigation on a fish processing vessel, or scientific personnel on a oceanographic research vessel, or other individuals not required under a certificate of inspection and who have no duties which directly affect the safety of the vessel's navigation or operations.

**Chemical testing.** Coast Guard regulations require "marine employers" to establish a program for and conduct chemical testing of crewmembers for drug and alcohol in four situations.

**Pre-employment testing.** 46 CFR § 16.210 prohibits a "marine employer" from employing anyone as a crewmember unless that individual first passes a chemical test for dangerous drugs (not for alcohol). This requirement applies to all prospective hires, except those who have either passed a pre-employment or periodic drug test within the past six months or have been subject to random drug testing during the past twelve months and have not failed or refused a test. 46 CFR § 16.210(b).

**Periodic license and merchant mariner's documents application or renewal testing.** The rules also require individual applicants for licenses, certificates of registry, or merchant mariner's documents to be subject to periodic drug testing as part of their required physical examinations. 46 CFR § 16.220. This requirement applies to all individuals, except those who can establish either that they have had such a test within the past six months or have been subject to random drug testing during the past twelve months and have not failed or refused a test. 46 CFR § 16.220(b). P.L. 101-380 also requires drug and alcohol testing, and that an individual applying for the license, document or certificate make available to the Coast Guard any information contained in the National Driver Register related to an offense committed by the individual related to a dangerous drug or alcohol.

**Random testing.** 46 CFR § 16.230 requires that "marine employers" implement a procedure for random testing of crewmembers for the presence of controlled substances. Under the rule, the frequency of testing and the development of a random selection method for testing has been left to the employer. But the rule does require testing at a 50% random sampling rate, and that each crewmember have "a substantially equal chance of selection on a scientifically valid basis" throughout his employment. The rule also requires that no employee shall know in advance when such testing shall occur.

**Post casualty testing.** Employers must test for drugs and alcohol "all persons directly involved in a serious marine incident" without regard to whether there is any reason to believe drugs or alcohol were a contributing factor. 46 CFR § 16.240. Subsequent to any marine casualty, marine employers must determine whether there was any evidence of alcohol or drug use by individuals directly involved in the casualty. 46 CFR § 4.05-12. A "serious marine incident" is defined by 46 CFR § 4.03-2 and -4 to include any accident resulting in death, injury requiring medical treatment, property damage over \$100,000, or loss of a vessel, any discharge of 10,000 or more gallons of oil into navigable waters, or discharge of a reportable quantity of hazardous substance into the environment. An individual is considered to be "directly involved" in a "serious marine incident" if that individual's action or failure to act is determined to be, or cannot be ruled out as, a causative factor in events leading to or causing a serious marine incident. Chemical testing including breath analysis or urine and blood sample testing is required after certain casualties. 46

CFR §§ 4.06-1 to 4.06-60. The employer is required to submit Form CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident) and the test results to the local Coast Guard Officer in Charge of Marine Inspection. 46 CFR § 4.06-60. No individual may be forcibly compelled to provide specimens for chemical tests. 46 CFR § 4.06-5(c). In cases where an individual refuses to submit to chemical design required by the regulation, an entry is to made in the official log book, if one is required to be maintained, and on Form CG 2692b. Such refusal is considered to be a violation of regulation and will subject individuals holding a license, certificate of registry, or merchant mariner's document to suspension and revocation of a license or document proceedings under 46 CFR Part 5. 46 CFR § 4.06-5(c). Any refusing individual shall be removed from any duties which directly affect the safety of a vessel's navigation or operations. If a crewmember refuses to provide a specimen, evidence of his refusal may be admissible against him at a Coast Guard administrative hearing on suspension or revocation, subject to rebuttal evidence by the crewmember. But if a law enforcement officer requests the test, a presumption arises that any crewmember who refuses to provide a specimen was intoxicated and the individual will be subject to an outright suspension of his license or document for a 12 to 24 month period. The regulations place strict and specific responsibilities on the employers as to how the testing must be conducted, specimens be collected, handled, submitted for testing, analyzed, reported and submitted. 46 CFR § 4.06-10 -60.

Effective June 20, 2006, most commercial vessels operating in United States waters must have alcohol testing equipment on board, and specimens for alcohol testing must be obtained within 2 hours of a serious marine incident. 46 U.S.C. § 2303a. Alcohol testing may be by breath, blood or saliva. Urine sample specimens for drug testing must be obtained within 32 hours of a serious marine incident.

**Responsibility of vessel masters to assure compliance.** 46 CFR § 16.230(d) forbids anyone from serving as master, operator or person in charge of a vessel in a position for which a license or merchant mariner's document is required unless all crewmembers are subject to the random testing requirements of the regulations, subject to suspension and revocation proceedings being initiated against the individual.

**Medical review officers.** 46 CFR § 16.370 requires employers to designate or appoint a Medical Review Officer, whose primary function is to review and interpret each confirmed positive test in order to determine if there is an alternative medical explanation for a positive test result. The MRO may be an employee of the employer, or of a contractor.

**Reports of drug and alcohol testing compliance.** The Coast Guard requires that each marine employer report by March 15 of each year a summary of its drug and alcohol testing program during the previous year, utilizing form CG-5573. If the employer utilizes a contractor, the contractor may make the report, but the employer must notify the Coast Guard in writing of the representative, and the employer remains responsible for accuracy and completeness of the data. 46 CFR § 16.500.