



JULY 11, 2002

CIRCULAR NO. 14/02

TO MEMBERS OF THE ASSOCIATION

Dear Member:

UNITED STATES COAST GUARD SCRUTINY OF OILY WATER SEPARATORS

Reference is made to Circular No. 9/01 of July 23, 2001, which featured an alert from the Club's correspondents in California in regard to increased US Coast Guard scrutiny of vessels under MARPOL regulations in that state.

In the interim – and particularly since the events of September 11, 2001 – the US Coast Guard has implemented a comprehensive program of boarding foreign-flag vessels calling at United States ports. In conjunction with this, the Coast Guard has also recently established an Oily Water Separation System Task Force (OWSSTF) to examine a wide range of issues relating to oily water separation equipment and its use on vessels in United States waters.

The attached memorandum from Messrs. Fowler Rodriguez & Chalos describes current circumstances in greater detail. We are most grateful to this firm – which is the Club's correspondent in a number of US ports – for supplying us with this summary.

It has been thought helpful to circulate it to Members at large in order to forewarn and forearm them in regard to this issue. The firm's recommendations on page 5 of the attachment and, in particular, the imperative that owners, operators, managers and all ship board personnel **must** at all times obey all international and US environmental regulations, are especially pertinent.

Once again, we are most grateful for Messrs. Fowler Rodriguez & Chalos for keeping the Club informed in such detail of these recent developments.

Yours faithfully,
Joseph E.M. Hughes, Chairman & CEO
Shipowners Claims Bureau, Inc., Managers for
THE AMERICAN CLUB

Attachment

FOWLER RODRIGUEZ & CHALOS

COUNSELLORS AT LAW

AMERICANA HOUSE
10 AUDREY

OYSTER BAY NEW YORK 11771

(516) 922-5800

TELECOPIER (516) 922-8131

July 10, 2002

MOBILE

3662 Dauphin Street
Mobile, Alabama 36608
(251) 344-4721
Telecopier (251) 343-7503

LONDON

Mitre House, 4th Floor
1214 Mitre Street
London EC3A 5BU ENGLAND
011-44207-929-4222
Telecopier 011-44207-929-0043

BOGOTA

Carrera 12A #77-41
Oficina 502
Bogota, COLOMBIA
011-571-313-4488
Telecopier 011-571-313-4677

NEW ORLEANS

201 51 Charles Avenue
36th Floor
New Orleans, Louisiana 70170
(504) 523-2600
Telecopier: (504) 523-2705

HOUSTON

4 Houston Center, Suite 1560
1331 Lamar
Houston, Texas 77010
17131654-1560
Telecopier (713) 654-7930

MIAMI

Gables International Plaza
2655 Lejeune Road, Suite 805
Coral Gables, Florida 33134
(305) 445-2930
Telecopier (305) 445-2450

GEORGE M. CHALOS

E-Mail: gmcCW.frc-law.com

ALERT TO ALL SHIP OWNERS. MANAGERS. OPERATORS. OFFICERS & CREW

Since the tragic events of September 11th, pursuant to a directive of the Office of Homeland Security, the U.S. Coast Guard has undertaken a comprehensive program of boarding foreign flag-state vessels calling U.S. ports. As a result of the new heightened security measures, there has been a significant increase in the scrutiny in which vessels, and its records/logs, are being inspected. Such scrutiny, rightly or wrongly, has led to a rash of vessel/crew detentions, as well as criminal allegations and charges against vessel Owners, Operators, Managers, Officers and crew.

Additionally, we have learned that the U.S. Coast Guard has recently established an Oily Water Separation Systems Task Force (OWSSTF) to examine a wide range of issues related to oily water separation equipment and its use on vessels in U.S. waters. Coast Guard personnel and other law enforcement personnel are scrutinizing the use and functionality of oily water separation systems more carefully than ever before, and U.S. authorities have made it clear that they will seek jail sentences for Masters and Chief Engineers of ships committing pollution offenses. Many times, even if no pollution incident has occurred, the Coast Guard and U.S. prosecutors, upon the mere "discovery" of flexible hose in the engine room, will commence a Grand Jury investigation seeking to prosecute an alleged illegal by-passing of the oily water separation system and/or the presentation of an Oil Record Book containing "false entries."

u.s. Government's Modus Operandi

Coast Guard investigators and prosecutors appear to have focused their efforts on alleged by-passes of shipboard oily-water separation equipment through the use of flexible hoses and flanges in order to effect illegal overboard discharges. While the U.S. has no jurisdiction over

Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, L.L.P.

Independent Affiliated Offices

CARACAS | GUATEMALA CITY | MEXICO CITY | MONTREAL | SAN JOSE | SAN JUAN | SAN PEDRO SULA | SAN SALVADOR | SANTO DOMINGO | SAO PAULO

unauthorized discharges by foreign-flag vessels in international waters in violation of MARPOL, it does, indeed, vehemently investigate and prosecute false Oil Record Book entries, obstruction of justice and witness tampering.

Criminal Sanctions

There are a broad array of criminal sanctions available to the U.S. government in the investigation and prosecution of cases involving a suspected criminal offense. Recently, there has been an exorbitant number of investigations regarding alleged MARPOL and other environmental offenses. The United States treats such violations seriously, and has demonstrated that it will spare no expense in the investigation of such matters.

For your guidance, we provide below a broad outline of a number of laws and statutes which U.S. Federal prosecutors generally look to in charging a vessel Owner, Operator, Manager, Officers or, in many circumstances, individual crewmembers.

A. The Act to Prevent Pollution from Ships (APPS)

The Act to Prevent Pollution from Ships, 33 V.S.C. §§ 1901-1911, adopts as V.S. law the provisions of the International Convention for the Prevention of Pollution from Ships ("MARPOL"). Various administration regulations have been promulgated by the Coast Guard to enforce the provisions of MARPOL and the APPS. See 33 C.F.R. pts. 151 and 155.

Under 33 V.S.C. § 1908(a), it is a class D felony to knowingly violate the provisions of MARPOL. A class D felony is punishable by up to 10 years imprisonment, and a fine of up to \$250,000 for an individual, and \$500,000 for a corporation, for ~ violation. 33 V.S.C. § 1809(a); 18 V.S. C. § 3559(a)(4); 18 V.S.C. § 3571 (b)(4); 18 V.S.C. § 3571(c)(3). A vessel violating a provision of MARPOL may be arrested and sold to satisfy any fine or penalty under the Act 33 V.S.C. § 1908(d).

The security being requested by Coast Guard officials and U.S. prosecutions for alleged MARPOL violations is a USD500,000 corporate surety bond, rather than the customary Letter of Undertaking.

Under 33 U.S.C. § 1908(e), the United States may revoke the U.S. Customs clearance of a vessel and detain it where reasonable cause exists to believe that the ship, its owner, operator or person in charge may be subject to a fine or civil penalty for a MARPOL violation under the APPS.

C. The Clean Water Act

The Clean Water Act (CWA) 33 U.S.C. § 1251, et seq. prohibits the unpermitted discharge of any pollutant by any person into navigable waters of the United States, 33 U.S.C. § 1311(a). A "knowing" violation of the Act is a felony. A "negligent" violation is a misdemeanor. The Act also prohibits the discharge of oil or hazardous substances into the navigable waters of the United States, or into the waters of the contiguous zone. . . in such quantities as may be harmful. 33 U.S.C. § 1321(b)(3). Failure to report a discharge is punishable by imprisonment of up to five years. 33 U.S.C. § 1321 (b)(5). The Clean Water Act also provides that the term "person" includes a "responsible corporate officer." 33 U.S.C. § 1319 (c)(6), (see, discussion of Responsible Corporate Officer, below at paragraph 6).

D. The Rivers and Harbors Act

Under section 407 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, et seq., any discharge of refuse of any kind from a vessel into navigable waters of the United States is prohibited. A violation of the Act is a misdemeanor. 33 U.S.C. § 411. The courts have taken a broad view of what constitutes "refuse" under the Act, and the Act has been extended to a discharge of oil or petroleum. Violation of the Act is a strict liability offense which does not require proof of either intent or negligence. Accordingly, a person can be convicted of a misdemeanor violation under the Act based solely upon proof that the person placed a banned substance into navigable waters of the United States.

The False Statements Act

Under 18 U.S.C. § 1001, providing a false statement to the U.S. Government is illegal. To sustain a conviction for a violation of the Act, the Government must show: (1) that a statement or concealment was made; (2) the information was false; (3) the information was material; (4) the statement or concealment was made "knowingly and willfully;" and (5) the statement or concealment falls within the executive, legislative or judicial branch jurisdiction.

Falsity through concealment is found to exist where disclosure of the concealed information is required by a statute, government regulation, or form. Also, a false statement about, or concealment of any prohibited discharge satisfies both the Act to Prevent Pollution from Ships or the Clean Water Act, since both impose the duty to report. Likewise, a false entry in a vessel's oil record book has been the grounds for numerous felony indictments.

F. Responsible Corporate Officer Doctrine

Fowler, Rodriguez, Kingsmill, Flint, Gray & Charas, L.L.P. 3

Independent Affiliated Offices

CARACAS 0 GUATEMALA CITY 0 MEXICO CITY 0 MONTREAL 0 SAN JOSE 0 SAN JUAN 0 SAN PEDRO SULA 0 SAN SALVADOR 0 SANTO DOMINGO 0 SAO PAULO

Under the "Responsible Corporate Officer Doctrine," criminal liability for violations of environmental laws can be imposed on corporate managers or officers who were in a position to know about and prevent a violation, even if they did not actually commit the alleged crime. A person can be held liable as a responsible corporate officer based upon the persons' ability or authority to influence the corporate conduct which constituted the violation. In the past, the United States has used this doctrine to convict high level officers of corporations, including presidents of corporations, for violations of environmental laws committed by lower-level employees.

Generally, there are three requirements which must be satisfied to impose liability under the doctrine. First, the individual must be in a position of responsibility which allows the person to influence corporate policies or activities. Second, the person, by reason of his corporation position, could have prevented or corrected actions which constituted the violation. Third, the individual's actions or omissions must have facilitated the violation.

The Responsible Corporate Officer Doctrine has been applied in the context of violation of environmental laws. There is certainly a potential for individual criminal exposure for violations by corporate officials for violations of which they have knowledge and the authority to prevent. Knowledge of the facts can be inferred in many cases, requiring only that the government establish that the person had the authority and capacity to prevent the violation, and failed to do so.

G. Providing False Information to Government Representatives

Criminal laws of the United States provide for severe penalties for providing false information to a government representative, and similarly, providing false testimony under oath to a Grand Jury. Similarly, influencing or attempting to influence the testimony of another, or destruction or alteration of evidence are viewed under United States law as extremely serious, and would result in extremely serious criminal consequences to any individual crewman or others involved in such activities.

H. Witness Tampering

U.S. authorities vigorously investigate and prosecute individuals and corporations suspected of tampering with witnesses in connection with an on-going investigation of pollution and/or illegal discharge incidents. Under 18 USC § 1512, anyone who knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person with the intent to hinder, delay or

Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos, I.L.P. 4

Independent Affiliated Offices

CARACAS D GUATEMALA CITY [] MEXICO CITY D MONTREAL [] SAN JOSE D SAN JUAN [] SAN PEDRO SULA D SAN SALVADOR D SANTO DOMINGO D SAO PAULO

prevent the communications to a law enforcement officer or a judge of the United States of information relating to the commission, or the possible commission, of a federal offense, shall be fined or imprisoned up to ten (10) years, or both.

I. Conspiracy

If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, pursuant to 18 USC § 371 each shall be fined or imprisoned up to five (5) years or both.

Respect to U.S. authorities inspections and criminal investigations

1. Owners/Operators/Managers and Shipboard personnel must, at all times, obey all international and U.S. environmental regulations;
2. As a matter of practice and procedure, all flanges should be removed from any flexible hoses maintained on board vessels, so as to avoid creating wrongful suspicion of an illegal by-pass of the oily-water separation equipment;
3. Blank-off any flanges located at or near the oily-water separating equipment and overboard discharge valves, which may exist as original or modified construction, but are not used as a matter of course;
4. All entries in the Oil Record Book must be truthful, and in compliance with MARPOL;
5. All shipboard personnel must be truthful and forthcoming during all port state inspections;
6. Owners/Operators/Managers must not attempt to influence officers and/or crew as to their discussions with the authorities, other than to insist that the officers and crew are honest and forthright with all authorities; and
7. Legal assistance, including criminal counsel, must be engaged as soon as possible in order to assess the situation and provide advice to the Owner/Operators/Managers/ Officers and Crew, including engaging individual counsel for all officers and crew, as necessary and appropriate.

Fowler. Rodriguez. Kingsmill. Flint. Gray & Chalos. L.L.P. 5

Independent Affiliated Offices

CARACAS 0 GUATEMALA CITY 0 MEXICO CITY 0 MONTREAL 0 SAN JOSE 0 SAN JUAN 0 SAN PEDRO SULA 0 SAN SALVADOR 0 SANTO DOMINGO 0 SAO PAULO