

I N S I D E   T H E   M I N D S

# Complying with Transportation Regulations

*Leading Lawyers on Successfully Adapting  
to Increased Enforcement and Avoiding  
Potential Violations*



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Tailoring Environmental  
Compliance to Address  
the Increasingly Stringent  
Regulations Imposed on  
the Maritime Industry

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## Introduction

The maritime industry has always been subject to regulation by individual countries—with often-inconsistent requirements varying by port. Since the early part of the twentieth century, the maritime industry has also been subject to regulation by international agreements such as the Safety of Life and Sea treaty (or SOLAS) entered into in response to the *Titanic* disaster. Maritime disasters, such as the foundering of the *Exxon Valdez* in 1989 and the Macondo well incident in the US Gulf of Mexico in 2010, have generally spurred more extensive and increased regulation of the maritime industry.

In addition, increased environmental awareness in coastal countries of potential environmental damage due to vessel discharges and emissions, such as ballast water and engine emissions, has sparked an ever-increasing array of environmental regulation applicable to vessels.

As regulations have expanded and become more detailed and intrusive, many port states have stepped up their enforcement efforts. The US Coast Guard and the US Justice Department in particular have been vigilant with regard to environmental violations, particularly the bypassing of oily water separators and false reporting on vessel's oil records. Recent fines have included a payment of \$10.4 million by Columbia Shipmanagement GmbH and Columbia Shipmanagement Ltd., based in Germany and Cyprus respectively, in 2013 after those companies pled guilty to felony obstruction of justice charges and violations of the Act to Prevent Pollution from Ships (APPS).<sup>1</sup> Each company was placed on probation for four years.

The maritime industry has responded with a variety of measures intended to ensure compliance with applicable regulations, including increased and more regular training of ship personnel, appointment of shore side personnel dedicated to compliance, routine and surprise company inspections and other measures. This chapter focuses on how maritime attorneys can assist their clients ensure that they are up to speed with regulatory developments and ensure full compliance with all regulations.

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<sup>1</sup> Press Release, Dep't of Justice, Shipping Corporations to Pay \$10.4 Million for Environmental Crimes on Four Ships, Mar. 21, 2013, <http://www.justice.gov/opa/pr/2013/March/13-enrd-330.html>.

## **Increasing Pressure for Vessel Owners, Operators, and Managers to Comply with Environmental Regulations**

The maritime industry has seen two major trends in the regulatory arena in the last two decades. First, there has been a move toward regulating all types of vessel emissions, including air emissions, and all discharges, including ballast water and garbage. Second, once the regulatory framework is in place, the requirements evolve over time to be more stringent.

For instance, Annex VI of the International Convention for the Prevention of Pollution from Ships, 1973 as modified by the protocol of 1978 (commonly referred to as MARPOL)<sup>2</sup> sets limits on the sulfur oxide (SO<sub>x</sub>) and nitrogen oxide (NO<sub>x</sub>) emissions from ship exhaust, and prohibits deliberate emissions of ozone-depleting substances. Annex VI was adopted in 1997 and entered into force on May 19, 2005. Following entry into force in May 2005, the Marine Environment Protection Committee (MEPC) of the UN International Maritime Organization agreed to revise MARPOL Annex VI to strengthen the emission limits significantly. The revised MARPOL Annex VI entered into force on July 1, 2010, and included significant reductions in SO<sub>x</sub> and NO<sub>x</sub> emissions.

The Act to Prevent Pollution from Ships (APPS)<sup>3</sup> is the US law that partially implements MARPOL. This law and the regulations implementing it are applicable to all US-flag vessels no matter where they are located, and all foreign-flag vessels when in the navigable waters of the United States or at a US port.<sup>4</sup> Under APPS, shipping companies and ship crewmembers face the risk of significant criminal and civil liability for certain kinds of illegal vessel pollution.<sup>5</sup> In addition to criminal liability in the form of fines and possible jail time, companies may face a ban from US ports and court-enforceable environmental compliance plans (ECPs) that span multiple years. Whistleblower rewards for crewmembers who notify US authorities about APPS violations exacerbate the already heightened enforcement environment in the United States.

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<sup>2</sup> International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 U.N.T.S. 184, and the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 61.

<sup>3</sup> 33 U.S.C. §§ 1905–15 (West).

<sup>4</sup> 33 U.S.C. § 1902(a) (West).

<sup>5</sup> 33 U.S.C. § 1908.

For these reasons, our clients are primarily concerned with environmental compliance, although security and other compliance issues are also important. Vessels' environmentally related actions have become increasingly heavily regulated over time, and today many environmental laws and regulations carry criminal (as well as civil) penalties, and government agencies actively enforce these laws. The US Coast Guard has become more adept at writing and promulgating common sense regulations that reflect both US and international consensus on solutions to problems. As explained later in this chapter, the Environmental Protection Agency (EPA) has also taken on a larger role in the regulation of vessels, particularly with respect to the discharge of ballast water and air emissions. As a result, vessel owners, operators, and managers are paying careful attention to internal compliance programs.

### **Helping Clients Stay Abreast of the Regulations Affecting Vessels**

The regulations affecting vessels have a number of sources, including international treaties, conventions, and agreements; national laws and regulations; and local laws and regulations. Consequently, vessels trading between countries must be mindful of an almost dizzying array of overlapping—and sometimes inconsistent and conflicting—regulations. The other concern for owners of vessels traversing US waters is the EPA's increased authority in the regulation of vessel matters the US Coast Guard previously primarily regulated. This has occurred as regulations have expanded to areas traditionally regulated by the EPA, such as air emissions, and as a result of court action in requiring the EPA to apply the Federal Water Pollution Control Act (also called the Clean Water Act)<sup>6</sup> to vessels as it has historically done with factories and other point sources of potential water pollution.

A variety of US regulations may apply to a vessel depending on the vessel's flag and where it is located. All commercial vessels that trade internationally are subject to MARPOL, which is probably the most important regulation from a compliance standpoint. MARPOL's regulations govern the prevention of pollution by oil, "noxious liquid substances," packaged harmful substances, sewage, garbage, and air pollution.<sup>7</sup> In addition to

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<sup>6</sup> 33 U.S.C. §§ 1251 *et seq.* (West).

<sup>7</sup> 33 C.F.R. § 151 (West).

MARPOL, compliance plans should address compliance with the Clean Air Act of 1970<sup>8</sup>, the Clean Water Act<sup>9</sup>, the Marine Protection, Research, and Sanctuaries Act of 1972 (also known as the Ocean Dumping Act),<sup>10</sup> the APPS<sup>11</sup>, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,<sup>12</sup> the Oil Pollution Act of 1990 (OPA 90),<sup>13</sup> and other environmental laws.

Although Coast Guard regulations, similar to the regulations of other agencies, are published in the *Federal Register*, which is easily accessible, the Coast Guard also issues regulations through informal guidance and policy letters, as do many other agencies. It is important to keep a careful eye on the Coast Guard website, as well as industry blogs and bulletins that keep track of Coast Guard regulatory actions. Attorneys can assist clients in keeping current on these regulations by following formal and informal regulatory developments closely, developing relationships with regulators, and providing regular, targeted information updates to clients on developments that may affect their businesses. My firm also routinely posts a maritime-related blog on our website that includes notices of developments.

### **Counseling Clients in Increasingly Stringent Maritime Environmental Requirements**

The April 2010 *Deepwater Horizon* incident in the US Gulf of Mexico has the potential to rewrite the books regarding oil spill liability, an issue of great importance to the worldwide maritime industry. The related litigation, which may stretch for years, will likely decide issues ranging from damages computation to how insurance works among potentially liable parties. Similar changes occurred in the interpretation of maritime law because of the 1989 *Exxon Valdez* spill in Alaska.

Most importantly, the *Exxon Valdez* spill spurred Congress to enact the Oil Pollution Act of 1990 (OPA 90), which enshrined the principle that the

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<sup>8</sup> 42 U.S.C. §§ 7401–71 (West).

<sup>9</sup> See n. 6.

<sup>10</sup> 33 U.S.C. §§ 1401–45 (West).

<sup>11</sup> See n. 3.

<sup>12</sup> 42 U.S.C. §§ 9601 *et seq.* (2002).

<sup>13</sup> 33 U.S.C. §§ 2701–61 (West).

“polluter pays” and where an attempt was made to improve on prior anti-oil pollution legislation. Among other things, OPA 90 set forth ground rules on who is a “responsible party” and increased the potential liability of such persons as well as substantially increasing criminal and civil penalties for oil pollution.

Ultimately, the *Exxon Valdez* spill resulted in a US Supreme Court decision regarding the proper scope of punitive damages. In that case, the Supreme Court reduced the judgment from \$5 billion (in the district court) to approximately \$500 million, deciding that maritime common law limited punitive damages to a one-to-one ratio with compensatory damages.

Although the *Deepwater Horizon* incident has not yet resulted in new legislation from Congress, it has resulted in litigation that could stretch for years. Among the issues that will be important for future pollution cases are the apportionment of liability among the potential parties involved and the contours of what constitutes “gross negligence.”

Another critical case affecting vessel owners was *Northwest Environmental Advocates v. EPA*.<sup>14</sup> Under that case, the EPA was required for the first time to regulate vessel discharges pursuant to the federal Clean Water Act.<sup>15</sup> The EPA reasoned it was an impossible task to attempt to issue individual permits to all vessels operating in, or visiting, the United States. Instead, the agency decided to develop a general permit to which vessels could subscribe by registering a notice of intent to comply with the general permit. The EPA ultimately developed the Vessel General Permit (VGP), which became effective December 19, 2008, with a period of validity of five years. On December 19, 2013, the new VGP will go into effect. The new VGP identifies twenty-seven types of discharges routinely carried out in the normal operation of vessels.

Establishment and enforcement of the VGP is an evolving area of vessel environmental regulation and will likely have a significant impact on vessels in US waters, both domestic and foreign. What is particularly concerning to vessel operators is the uncertainty inherent in the process that portends

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<sup>14</sup> *Nw. Envtl. Advocates v. U.S. E.P.A.*, 537 F.3d 1006 (9th Cir. 2008).

<sup>15</sup> *See* n. 6.



further and increasingly stringent standards applicable to all vessel discharges, potentially without sufficient regard to the cost of compliance or the effect on the water-borne transportation system. All clients are advised to stay in close contact with trade associations, such as the American Waterways Operators, and their counsel and advisors regarding developments and to provide input whenever possible on potential regulatory impacts.

### **Penalties Associated with Environmental Regulation Violations**

A substantial portion of maritime environmental investigations result in penalties. MARPOL fines have ranged from hundreds of thousands of dollars to millions of dollars depending on the nature of the offense and number of port calls the vessel has made in the United States. In March 2013, two ship management companies located in Germany and Cyprus pled guilty to violating US environmental laws and paid a penalty of \$10.4 million. The violations related to the intentional bypassing of required pollution prevention equipment aboard four vessels. The companies were placed on probation for four years, during which the companies must have environmental compliance programs that require outside audits by an independent company and oversight by a court-appointed monitor.

Clients are already aware that the penalties and sanctions for non-compliance can be severe and include the possibility of criminal penalties in the case of certain violations. Moreover, clients are also already aware that responding to a government investigation is expensive and diverts management attention from firm business, which is also costly. Therefore, robust internal compliance is the best course.

### **The Importance of Environmental Compliance Programs for Domestic and Foreign Vessels**

The preparation and implementation of fulsome compliance programs is essential in protecting clients from the penalties associated with environmental regulation violations. While past practices to encourage compliance are similar to those of today, there is currently more emphasis on regular training, fostering a compliance culture, and clearly communicating company expectations to employees. From vessel owners' and operators' perspectives,

compliance with environmental laws is a top priority because the monetary fines and resultant ship and crewmember detentions can have a crippling effect on shipping companies. Compliance-training programs manage a company's risk on the front end to decrease the likelihood of civil and criminal liability, both of which can be significant in the shipping industry. The importance of such programs is underscored by headline-making government enforcement actions resulting in million-dollar fines and jail time for some culpable parties. For example, many of the same laws that were applied to the *Deepwater Horizon* incident apply to vessels engaged in shipping. The significant fines that have been, and will be, imposed on parties involved in that incident demonstrate the enormous pollution risk the shipping industry may face. Compliance-training programs are extremely important to minimize the risk exposure to liability of that magnitude. Additionally, the existence of a compliance program is often used by law enforcement as a potentially mitigating factor in the exercise of prosecutorial discretion.

Compliance-training programs are also particularly important because of the current enforcement environment, which is characterized by a heightened focus on preventing pollution. Not only are US authorities promulgating new regulations for the shipping industry, they are also increasing their enforcement of the existing regulatory framework. An effective compliance-training program is essential to ensure all employees are aware of the new regulations and follow company policies to avoid violations. We encourage our clients to be vigilant and implement strict compliance plans to discover and correct problem areas.

### **Implementing a Comprehensive Environmental Compliance Plan**

In the maritime industry, the company's size is irrelevant as it pertains to the client's compliance strategy. Whether the company owns two ships or forty, the compliance requirements are all the same. All US vessels, and foreign vessels when in the navigable waters of the United States, must comply with US laws and regulations regardless of the company's size and resources.

Many shipping companies progressively have implemented comprehensive ECPs addressing the operational and technical details for maintaining environmental compliance. Companies utilize ECPs to encourage compliance

with regulatory and statutory requirements and reduce potential risk exposure. In addition to ECPs, companies commonly use compliance management systems that assist the company in educating employees at all levels about the company's compliance policies. Compliance management systems are a useful mechanism for developing a culture of compliance. While ECPs differ depending on the industry and statutory focus, maritime-related ECPs have many common elements, including clearly defined job position responsibilities, regular training programs, auditing processes (both scheduled and unannounced), technical procedures, a compliance manager, and open reporting systems. While there are some general standards and procedures that are commonly used in almost every compliance program, it is important for each company to structure a unique compliance plan tailored to the company's operations and regulatory requirements.

The attorney must be familiar with the relevant environmental treaties, statutes, and regulations that are applicable to the client's business operations. Additionally, the attorney is tasked with isolating the source of the noncompliance (i.e., equipment, crew, management, etc.) and structuring a compliance program targeted to eliminate the problem. For instance, when a company's environmental noncompliance stems from a lack of structured management and oversight, the use of an environmental compliance manager to administer and supervise employees to ensure compliance with applicable federal and state statutes and regulations is quite effective. On the other hand, when a company struggles with systematic personnel-related noncompliance, implementing frequent and thorough crew trainings may eliminate incidents of noncompliance. Attorneys can also leverage knowledge obtained from working with other clients to advise and assist a company in creating an effective compliance program.

A strong compliance program includes enhanced compliance training by in-house employees with or without the assistance of outside consultants such as lawyers or technical experts; high-level management oversight; defined shipboard responsibilities; internal auditing procedures, including regular and unannounced inspections; clear management systems; and third-party auditing procedures when necessary. Many companies use open reporting systems that provide direct lines of communication to shore-side personnel, open hotlines, and other anonymous reporting avenues. As a general

matter, companies should cultivate a culture of compliance by aligning company incentives with employee incentives. For example, some companies incentivize stringent compliance by implementing internal monetary reward systems for crewmembers who provide accurate information regarding instances of noncompliance. Dovetailing company and individual interests encourages conformity with company compliance policies and national and international laws.

The effectiveness of a compliance program is measured by the program's ability to educate employees about compliance procedures, detect nonconformities, and take the proper remedial action to correct identified nonconformities and prevent repeated incidents. Every act of noncompliance discovered through the administration of the ECP demonstrates the program's effectiveness. By the same token, every undiscovered or undetected nonconformity may highlight the deficiencies in the ECP. In the event the internal compliance program uncovers a possible MARPOL violation or any other environmental law violation, the company should consider engaging counsel to conduct an immediate, independent internal investigation to determine what happened on the vessel and provide legal advice regarding remedial actions and reporting obligations.

### **Implementing Effective Training Programs**

In the shipping context, an ideal compliance-training program involves all shore-side managers and ship crewmembers; however, because the "ideal" is not always efficient, attendance at training programs may be limited to only relevant officers and employees. The relevant officers and employees for a particular training program depend on the company's policies and particular training program at issue. For example, in a compliance-training program for APPS, the relevant officers and company employees may include vessel masters, engine crewmembers, and shore-side personnel with responsibility for the environmental components on the ship (such as environmental compliance managers). APPS does not allow the United States to prosecute a foreign vessel for a pollution incident that occurs on the high seas, but rather allows the United States to prosecute the presentment of a false oil record book in a US jurisdiction.<sup>16</sup> While vessel

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<sup>16</sup> See n. 5.

masters are responsible for signing off on the accuracy of the oil record book and could benefit from an APPS training program, the real focus is on the engine crewmembers who are responsible for operations of the ship's pollution-prevention equipment and are often the source of APPS violations. Some violations may be inadvertent and can likely be prevented with proper training. In contrast, intentional violations occur when engine crewmembers knowingly and deliberately make an illegal overboard discharge, for example, by using a "magic pipe" to bypass the vessel's pollution-prevention equipment and directly discharge oil overboard. Since crewmembers may face jail time in the United States and a fine for such actions, and their employer may face serious criminal fines, compliance-training programs are crucial to ensure crewmembers are knowledgeable about avoiding APPS violations.

### **Using Audits to Detect and Correct Violations**

Some companies have developed and implemented internal audits to assess their compliance plans, while others prefer third-party auditors. When dealing with repeated incidents, third-party auditors often provide a more objective assessment; however, internal audits are an incredibly useful tool for companies to police and oversee their own employees. Whether responding to a report of noncompliance or conducting an unannounced audit, internal auditing procedures provide the company with an opportunity to investigate the alleged wrongdoing, take appropriate measures to correct the wrongdoing, and implement new protocols to avoid repeated acts of noncompliance. In the context of MARPOL, many shipping companies have implemented compliance programs that include scheduled internal audits and random, unannounced audits conducted by in-house managers as a means of improving compliance on a day-to-day basis. Internal audits enable a company to uncover minor company policy violations, as well as international convention violations. The problems they uncover could be as inconsequential as a recordation deficiency and as serious as an unlawful discharge of oil.

The company must pinpoint and correct any wrongdoing or noncompliance uncovered due to an internal audit. Often, correcting a deficiency on a vessel—whether with equipment or the ship's crew—requires notification to the relevant flag state to evaluate proper corrective action. Attorneys should

heavily reinforce to their clients that once the client detects an issue, it must adhere to certain procedures to properly correct the wrongdoing and avoid repeated offenses.

### **Working with the US Government during Environmental Violation Investigations**

The Coast Guard and the EPA have been actively enforcing the provisions of MARPOL and the Clean Water Act<sup>17</sup>. Beginning in the early 1990s, APPS violations often involved bypasses of the pollution prevention system (the oily water separator) or overboard sludge discharges. APPS applies to all US-flagged vessels anywhere in the world and all foreign-flagged vessels operating in the navigation waters of the United States or while at port under US jurisdiction.<sup>18</sup> Most APPS prosecutions do not involve incidents of illegal discharges of oil *in* US waters; rather, the illegal discharge often occurs abroad and the APPS violation occurs upon the presentment of a false oil record book to the Coast Guard on arrival in a US port.<sup>19</sup> In addition to APPS violations, unlawful post-incident conduct may bring additional charges for obstruction of justice and false statements made to the Coast Guard.<sup>20</sup>

The Coast Guard conducts port state control inspections of many US- and foreign-flagged ships calling on US ports. The purpose of the inspections is to verify the competency of the master and officers on board, inspect the condition of the ship, and verify that its equipment and manning are in compliance with applicable international laws. Thus, if a company is not complying with an international convention such as MARPOL, it is subject to a potential investigation every time it interacts with a US port. The level of enforcement has been steady for MARPOL violations. Prosecutions for MARPOL offenses have been ongoing for the last decade and have been and continue to be incredibly serious. The increased fines for egregious MARPOL violations demonstrate that the Department of Justice is sending a message to ship owners and operators—both US and foreign—that they must be in compliance with all MARPOL requirements when calling on any

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<sup>17</sup> See n. 6.

<sup>18</sup> 33 U.S.C. § 1902.

<sup>19</sup> See n. 5.

<sup>20</sup> See generally 18 U.S.C. § 1519 & 18 U.S.C. § 1505 (West).

US port. Future enforcement is likely to focus on ballast water discharges and air emissions as those requirements become more stringent.

Typically, the Coast Guard boards a vessel to conduct a port state control inspection upon the vessel's arrival in a US port. If it is discovered, during the course of the investigation, that there are concerns of illegal discharges, the Coast Guard usually detains the ship, inspects all computer information and vessel records, and initiates a thorough analysis. During that time, the vessel owner or operator is required to fully cooperate and assist the Coast Guard, as well as arrange accommodations for the vessel's crew for the entire duration of the investigation, which typically is at least six months. The Coast Guard reviews all records and conducts interviews with crewmembers to determine if there were illegal discharges and the circumstances surrounding each. Once the Coast Guard has determined the basis for an indictment, it elevates the matter to the Department of Justice for enforcement.

Once a company learns the Coast Guard is investigating one of its vessels for MARPOL violations, the company should immediately engage counsel to manage interactions between the crewmembers and the Coast Guard and to ensure cooperation with both the Coast Guard and Department of Justice. Persons under investigation should cooperate with the Coast Guard, EPA, and Department of Justice during the course of any criminal investigation. If a company fails to do so, it risks additional charges for obstruction of justice and false statements.

The investigated company will be in the best position to respond to an investigation and limit its liability if it has an effective compliance plan. US Sentencing Guidelines provide for mitigation of criminal penalties in the event the sentencing court determines that the violations occurred despite a thorough compliance plan.

An effective maritime compliance plan has many elements, many of which—like clear guidance on the applicable law and company expectations, effective training, and internal auditing—are common to compliance plans in most if not every industry. Maritime compliance plans must also take into account that vessels are individual work sites and effectively moving “factories.” So, it is important that both environmental compliance responsibilities on board

the vessel are clear and that the relationship between the vessel and shore side management is clear. In this regard, maritime compliance plans often involve both the chief engineer and the vessel's master as a mechanism of double checking that company guidance is followed. Some companies also appoint a vessel's officer whose position is focused solely or primarily on environmental compliance as well as appointing a shore-side person whose job is overall company environmental compliance. It is important that the company also consider how the shore-side officer reports within the company—with companies with strong compliance plans usually having that officer report directly to the company's chief executive officer or board of directors or both.

It is also important for vessel-owning companies to have an established, trusted relationship with outside counsel who can assist the company both with ongoing compliance activities, such as with keeping the company abreast of developments and with training, but also assist the company in the event an investigation is initiated. Outside counsel should be experts in the investigative process and with dealing with investigators in a manner likely to achieve the best result for the company. Usually, but not always, in maritime environmental cases, that has involved an intensive internal investigation led by outside counsel and then negotiation with the US Government as to the appropriate course thereafter, whether it be to agree to settle or to go to trial.

## **Conclusion**

The most important trend with regard to the regulation of the maritime industry during the next few years will likely be the steadily increasing stringency of environmental regulation, particularly with respect to ballast water discharges and air emissions. The upcoming requirements in these two areas are increasingly stringent and companies will find compliance difficult, particularly since the technology to meet the standards is still catching up with the requirements.

In this environment, maritime companies cannot rest on their laurels. They should continually seek to improve their maritime environmental compliance efforts. In this regard, engagement of outside counsel who



represents a spectrum of maritime companies with differing needs and resources can be very helpful. Such outside counsel can provide a gauge for a client to determine whether they have a compliance program that is equal to or exceeding the industry standard.

## Key Takeaways

- The preparation and implementation of fulsome compliance programs is essential in protecting clients from the penalties associated with environmental regulation violations. Emphasize the importance of regular training, fostering a compliance culture, and clearly communicating company expectations to employees.
- Maritime-related ECPs have many common elements, including clearly defined job position responsibilities; regular training programs; auditing processes (both scheduled and unannounced); technical procedures; a shore-side compliance manager who reports directly to the senior management; and open reporting systems.
- Encourage your client to conduct regular outside training and auditing procedures, which provide your client with an opportunity to head off problems before they lead to an investigation, take appropriate measures to correct the wrongdoing, and implement new protocols to avoid repeated acts of noncompliance.
- If the Coast Guard is investigating one of your client's vessels for MARPOL violations, emphasize the importance of cooperating with the Coast Guard, EPA, and Department of Justice during the course of the investigation. If your client fails to cooperate, it risks additional charges for obstruction of justice and false statements.

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***Acknowledgment:*** *The author wishes to acknowledge the help of Brooke F. Shapiro for her invaluable assistance in preparing this chapter.*



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