

## FAQs for Detainees in Marine Pollution Prosecutions

### *Under what authority may the Coast Guard board a vessel?*

Under the United Nations Convention on the Law of the Sea, a coastal state has full and exclusive sovereignty over vessels in its waters. A foreign vessel in U.S. waters is therefore subject U.S. law.

As the United States' maritime law enforcement agency, the Coast Guard has broad authority to inspect vessels for pollution violations, health and safety violations, customs controls, or to investigate marine casualties. Pursuant to 14 U.S.C. § 89, Coast Guard commissioned, warrant, and petty officers are authorized to board any vessel subject to the jurisdiction of the U.S., make inquiries of those aboard, examine the vessel's documents and papers, and inspect or search the vessel for law enforcement purposes. The United States Department of Labor's Occupational Safety & Health Administration (OSHA) also has authority to board vessels for certain types of inspections with regard to workplace safety, and the agency often enlists the Coast Guard's help when investigating vessels.

The Clean Water Act (CWA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) require the Coast Guard to prepare for and respond to marine pollution incidents and to coordinate public and private response efforts. The Coast Guard has promulgated comprehensive shipboard and waterfront facilities pollution prevention regulations under the Act to Prevent Pollution from Ships (ratification of the international MARPOL 73/78 protocols) and the CWA.

In addition, the Ports and Waterways Safety Act of 1972 (PWSA) provides local Coast Guard Captains of the Port (COTP) with authority to control the activities of vessels and waterfront facilities.

*Source:* <http://www.uscg.mil/hq/g-m/nmc/pubs/msm/v1/c2.htm>

### *Why did the Coast Guard inspect my ship?*

Under several U.S. environmental laws, including the Act to Prevent Pollution from Ships, the Coast Guard may board and investigate a vessel if they have a reasonable suspicion that a vessel has engaged in activity in violation of US law. The Coast Guard also inspects vessels on a routine basis to assess the ships' operational condition and compliance with international safety and environmental protection standards. The Coast Guard uses a "Safety Targeting Matrix" to determine which non-U.S. ships the Port State control Officers should board. The Matrix uses five criteria:

- 1) Ship Management: whether an owner, operator, or charterer has been listed on the Coast Guard's "Ship Management List." The list includes those that have been associated with two or more safety detentions within the past twelve months.
- 2) Flag state: SOLAS Vessels. Higher points are assigned to flag states with higher detention than the overall average for all flag states

- 3) Classification society. Class societies are evaluated on their performance over the previous three years based on their detention ratio. Detention ratios are the total number of detentions, over a three-year period, that were directly associated with that class society, divided by the total number of distinct vessel arrivals that the class society had in the U.S. for that same three-year period.
- 4) Vessel history: A ship may receive varying points for certain activities. For instance, detention, denial or entry, or expulsion within the last 12 months is worth 5 points, while a casualty within the past 12 months is worth one point each.
- 5) Ship type: Various points are given for the type of ship. For instance, 1 point is assigned for passenger ships, 1 point for gas carriers, and 4 points for bulk freighters over 20 years old.

The points from all five criteria are added and the vessels are assigned a “priority” for examination by the Coast Guard. Please note, however, that even “non-priority” vessels may be examined by the Coast Guard through a random selection process.

Source: <http://www.uscg.mil/hq/g-m/pscweb/Boarding%20Matrix.htm> .

*What are US and international (MARPOL) marine pollution laws?*

- The Act to Prevent Pollution from Ships ratifies the MARPOL 73/78 and regulates the release of oily water and noxious liquid substances into the ocean. Pursuant to the APPS, the Coast Guard has implemented regulations with regard to oil abatement equipment, oil discharges allowed at sea, the construction of ballast tanks, crude oil washing systems, and inert gas systems. The Coast Guard must also ensure that the ships meet requirements for controlling pollution caused by noxious liquid substances carried in bulk.
- The Marine Plastic Pollution Research and Control Act of 1987, which implements MARPOL Annex V, prevents pollution by plastics and other garbage.
- The Marine Protection, Research, and Sanctuaries Act regulates the dumping of non-ship generated waste materials into ocean waters. Certain hazardous materials are banned and other materials require a permit. The Act is administered by the EPA, which must deal with permits, recordkeeping, and monitoring of the protection of the sea. The Coast Guard is charged with conducting surveillance and enforcement of activities permitted by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers.
- SOLAS - the International Convention for the Safety of Life at Sea include international standards for ship stability, structure, safety equipment, and machinery for certain ships. The Coast Guard inspects U.S. flagged ships and some foreign flagged ships to ensure compliance.
- The Clean Water Act (CWA) prohibits the discharge of oil or hazardous substances into the waters of the U.S. within 12 miles of the coast or where it may affect natural resources such as marine sanctuaries. The CWA requires the

reporting of and imposing liability for spills of oil and hazardous substances. 33 U.S.C. §§1251-1387 [www.epa.gov/watertrain/cwa/](http://www.epa.gov/watertrain/cwa/).

- The Ports and Waterways Safety Act ensures that vessels operating in U.S. ports and waterways meet standards for construction, equipment, manning, and operation. The Coast Guard controls vessel movement, directs the handling and movement of hazardous materials, and orders the emergency removal of dangerous cargos.
- Deep Water Port Act regulates the loading and unloading of oil on vessels.
- Oil Pollution Act of 1990 authorizes the Coast Guard to prevent and respond to catastrophic oil spills. Requires vessels to submit spill response plans.

*Source:* United States Coast Guard Marine Safety manual  
<http://www.uscg.mil/hq/g-m/regs/links.html>

*What does it mean to be a “whistleblower” when I see violations of these laws?*

“Whistleblowers” are employees who have initiated investigations of employers’ activities or who have otherwise cooperated with a regulatory agency in carrying out an inquiry or the enforcement of regulations. The Act to Prevent Pollution from Ships contains a provision providing that individuals who report pollution violations aboard ships may collect up to half of a criminal fine assessed to the ship owner. 33 USCS § 1908(a). To report a possible violation, contact the U.S. Coast Guard:

Assistant Commandant for Marine Safety, Security and Environmental Protection  
(G-M)

*Main Number (202) 267-2200, Fax Number: (202) 267-4839*

Coast Guard Headquarters  
Commandant, U.S. Coast Guard,  
2100 Second Street, SW,  
Washington, DC 20593

*Sources:*

[http://www.law.cornell.edu/uscode/html/uscode33/usc\\_sec\\_33\\_00001908----000-.html](http://www.law.cornell.edu/uscode/html/uscode33/usc_sec_33_00001908----000-.html)

*When may the Coast Guard detain my ship?* As discussed above, the Coast Guard may make inspections of ships for a broad variety of reasons. During an inspection, Coast Guard officers may “address inquiries to those on board, examine the ship’s documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance.” 14 U.S.C.A. § 89(a). If the Coast Guard officers have probable cause to believe that U.S. laws have been violated, they may arrest crew members and detain the vessel. 14 U.S.C.A. § 89(a).

*If I didn't have anything to do with the violation, why am I being held?* Although crew members may not have caused the violation, they may be important witnesses to the activities on board. In pollution cases, prosecutors must prove the violations beyond a reasonable doubt; therefore, they must thoroughly collect and review all evidence to ensure that they can meet the burden of proof. If foreign nationals leave the jurisdiction of the United States, they cannot be required to return to appear in court. To keep crew members here while they are waiting to give testimony before a Grand Jury, a prosecutor may obtain a material witness arrest warrant from a federal district judge. The court will hold a detention hearing. The witness has the right to be represented by counsel, to have counsel appointed if he is financially unable to obtain representation, and to present and cross-examine witnesses. 18 U.S.C. § 3142(f); 18 U.S.C. § 3006A(a)(1)(G). If the judge determines that the crew members should be detained, they may be kept in a detention facility. Sometimes, in lieu of a detention facility, crew members may be housed by the government in hotels.

Sometimes, material arrest warrants are not used to keep crew members in the country. If the government has reasonable cause that a vessel violated the Act to Prevent Pollution from Ships (APPS), it can revoke the ship's custom's clearance. However, the customs clearance may later be granted if the ship owner makes a surety agreement. Under a surety agreement, the ship owner may agree to hold relevant crew members in the US and pay for their expenses in return for the ship being allowed to leave the port.

*Source:* Pasfield, Bruce, and Jocelyn A. Steiner. "Crew Detention: What Can a Ship Owner Do?" 38 *Journal of Maritime Law and Commerce* 215 – 227 (2007). The article also discusses steps that ship owners can take to prevent or minimize such investigations.

*What are my rights while I am being held as a witness?*

If you are a witness, you will receive a witness fee for each day that you are required pursuant to 28 USCS § 1821. The present witness allowances under are generally acceptable to foreign nationals. As a general rule, witnesses are not permitted to watch court proceedings.

Additionally, you are permitted to discuss the case with defense attorneys and investigators, but you are not required to do so. The choice is entirely yours.

*Source:* Department of Justice, Victim/Witness brochure

<http://www.usdoj.gov/usao/nd/victimwitness/brochures/federalcourtsystem.html>  
[http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title3/19musa.htm#3-19.320](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title3/19musa.htm#3-19.320)

*What is a Grand Jury and what is my role in the proceeding?*

From the Department of Justice, Victim/Witness brochure:

A grand jury is a group of citizens who meet to examine the evidence against individuals who may be charged with a crime. Although a grand jury proceeding is not a trial, it is a serious proceeding. Witnesses are placed under oath, their testimony is recorded, and their testimony may be used later during the trial. It is important to carefully review what you remember about the crime before testifying before the grand jury. You must tell the truth. You should be aware that if you are testifying at trial, your statements made to the grand jury must be disclosed to the defendant.

*Is the information that I tell my lawyer confidential?* An attorney-client privilege prevents your lawyer from telling anything that you have told the lawyer in confidence while you were obtaining legal advice. Confidential communications are communications between a client and his or her attorney for the purpose of obtaining or providing legal assistance for the client. The privilege applies when four elements are met:

- 1.) The information must be communicated. A communication is considered any expression, including conversations, documents, or other records, by which a privileged person, such as your attorney, obtains information from you. Restat 3d of the Law Governing Lawyers, § 69
- 2.) The information must be made between privileged persons. "Privileged persons" would include the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them (such as a translator), and agents of the lawyer who facilitate the representation (such as a secretary.) Restat 3d of the Law Governing Lawyers, §70
- 3.) The information must be confidential. Communications are considered confidential if you reasonably believe that no one else, aside from you and your attorney or another privileged person, will learn of that information. Likewise, anything that your lawyer tells you in confidence while providing legal advice is subject to the privilege. If you later tell others this confidential information, the attorney-client privilege may no longer exist. Restat 3d of the Law Governing Lawyers, § 71
- 4.) The information must be given for the purpose of obtaining or providing legal assistance for the client. Restat 3d of the Law Governing Lawyers, §72