



U.S. Department of Justice

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Re: Preservation of Evidence related to the Fire and Explosion
at the Deepwater Horizon Facility Operated by BP
Exploration & Production, Inc.

Dear Counsel:

Each of your agencies is involved in the important efforts to protect human health and the environment and minimize the damage caused by the fire and explosion at the Deepwater Horizon facility located about 60 miles from the Louisiana shore on or about April 20, 2010. Your priority is, and must be, the protection of human health and the environment, particularly in these difficult circumstances while the oil leak is continuing. However, because investigations into the incident are ongoing and litigation or enforcement action against one or more responsible parties or against the United States is possible, we believe it prudent to discuss with you the duty to preserve potential evidence, including electronic information.

A. The Preservation Obligation

Courts have recognized that parties have an obligation to preserve relevant information when litigation is reasonably anticipated. *See, e.g., Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001); *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988). This means that a party anticipating litigation must suspend the routine destruction of documents and put in place a "litigation hold" to ensure the preservation of potentially relevant documents. *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). Because one of many potential outcomes of the investigations is litigation, one might argue that litigation is now reasonably foreseeable. Therefore, we believe that now is the time to evaluate the litigation hold measures that have been and will be put in place.

We would like to emphasize that the preservation obligation falls primarily on each of the agencies involved in the investigation. The agencies will bear the expense and burden of any preservation measures taken, as well as the risk of consequences for inadequate measures. Nonetheless, we are available to work with each agency to assist in understanding the preservation obligation and to confer while you are deciding what will be preserved. In particular, our role is to provide counsel to each agency to help ensure that the decisions are informed, rational, and made in a good-faith effort to comply with the law. In addition, should litigation ensue, it will be our obligation to accurately represent to opposing parties and to the

court the facts relating to what has been preserved and to defend the actions and decisions of each agency in litigation.

As you probably already know, the scope of the duty to preserve evidence can be broad and difficult to define precisely. "Evidence" might include any tangible thing that relates to the subject matter of the contemplated litigation. "Evidence" may include physical materials such as laboratory samples and specimens, but usually the largest categories of evidence that must be preserved are "documents" and "electronically stored information." The definition of "document" can include any written material, whether final or in draft form, such as memoranda, e-mails, photographs, maps, diagrams, letters, databases, spreadsheets, presentation materials, notes, recordings, data, microfilm, and microfiche. The definition of "document" is not limited to federal records or official government files but includes personal files, including notebooks, calendars, and day planners. Generally, documents must be preserved even if privileged because the court may need to review documents *in camera* in order to evaluate claims of privilege. Relevant evidence also includes any type of information that is stored in an electronic form, including e-mails, word processing files, spreadsheets, databases, voicemail, geographic information system ("GIS") maps, computer-aided design ("CAD") files, scanned or digital photos, and scanned document images. The definition includes electronic information that employees may have stored on privately owned computers or in personal e-mail accounts. The definition may also include electronic files on out-of-date or "legacy" computer systems and on backup tapes.

All information related to the subject of the investigation, whether in paper or electronic form and wherever maintained, must be preserved. With respect to electronically stored information, it is imperative that such information be maintained and preserved in its original "native" format. These instructions should be interpreted broadly, because the knowing destruction of records in anticipation of a federal investigation could be considered criminal obstruction of justice, pursuant to 18 U.S.C. §§ 1505 and 1519.

While the scope of the duty to preserve evidence can be very broad, it does not require that parties preserve everything, as two of the most often cited cases in this area hold. *See, e.g., William T. Thompson Co. v. General Nutrition Corp.*, 593 F.Supp. 1443, 1445 (C.D. Cal.1984) ("While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request."); *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations . . . that are almost always involved in litigation").

The consequences of an overzealous litigation hold are obvious and include wasted resources and undue impairment of the agency's ability to function. The consequences of an inadequate litigation hold can be severe: exclusion of evidence, adverse inferences, and dismissal of claims. In light of this tension, meeting the preservation obligation requires the dedication of time and care toward implementing an appropriate litigation hold. We recommend an iterative process

starting with efforts to ascertain the universe of potentially discoverable materials, determine their location, and implement appropriate preservation methods. The process will also entail periodic efforts to remind agency employees of the duty to preserve evidence and documents (including electronically stored information), periodic reviews of the scope of the litigation hold as our knowledge of the issues in dispute changes, and confirmation of on-going compliance.

B. The Information that Must Be Preserved

To be ready to meet the requirements described above, one must first identify what information may be discoverable based on current information and then outline the steps necessary to identify and preserve this information. While the investigations are still in their formative stages, at this time one can state generally that relevant information and documents include those that relate to the following topics:

Any potential claims pursuant to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq., the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1333 et seq., the Clean Water Act, 33 U.S.C. §§ 1251 et seq., or any other law governing the fire and explosion, as well as the discharge of oil and related substances from the floating oil rig called the Deepwater Horizon located about 60 miles from the Louisiana shore, including, but not limited to:

- a. The causes of the fire, explosion and discharges;
- b. The steps necessary to abate the discharges and the costs associated with such steps;
- c. The damages caused by the discharges, including damages to natural resources;
- d. Any violations of federal law associated with the fire, explosion, or discharges;
- e. Any economic benefit derived from such violations;
- f. The financial status of any party who committed such violations;
- g. The good faith efforts of any such party to comply with the law;
- h. Any other factor we might argue is relevant to determining liability, damages, or penalties for the fire, explosion, or discharges; and
- i. Any potential defenses in an anticipated civil action pursuant to the listed statutes or otherwise. These defenses might include claim of “act of God,” “act of war,” or act of an unrelated third party.

C. Steps You Should Take

The most immediate actions to take are:

1. **Confirm the Subject Matter** – Confer with involved employees and counsel about the subject matters identified above and contact Sarah Himmelhoch or Stephen Campbell (contact information provided below) with any proposed additions or deletions to that list.

2. **Identify the People who May Have Custody or Control of Potentially Relevant Information** – Compile a list of all current and former agency employees or contractors (including names, current address, and phone numbers) with knowledge that may be relevant to the investigations or who may be the custodian of information that may be discoverable in any litigation resulting from the investigations.
3. **Notify these People of the Litigation Hold Obligation** – Send an initial notice in writing to the people you have identified, reminding them not to delete, destroy, overwrite or throw away potential evidence related to the subject matters identified above. Be sure to inform them that this includes any relevant information in personal files or on home computers or personal e-mail accounts. It may also be useful to contact your agency’s Custodian of Records, or FOIA coordinator. Ms. Himmelhoch and Mr. Campbell will work with you to develop appropriate written instructions for preservation of evidence and documentation of response actions and costs for this case, but do not delay your actions while that work is proceeding.
4. **Secure Any Evidence that is At Risk** – Consult with each person who may have custody or control of relevant information to determine whether there is any evidence at risk of being lost or destroyed in the near future and take immediate steps to delay or avoid that loss. Evidence at risk of being lost might include, but may not be limited to:
 - a. Backup copies of files where the original has been recently overwritten or deleted;
 - b. Records at a Federal Records Center that are approaching or have reached the end of their retention schedule;
 - c. Files on the hard drives of recently departed employees;
 - d. Files stored on individual hard drives, portable “flash” drives, discs, or any other electronic storage media.

After these initial steps, additional steps are necessary, including:

5. **Establish a Method of Storing Potential Evidence that Will Be Secure and Preserve Native Formats** – Working with your information technology staff, determine the best method to ensure that records, both paper and electronic, are stored safely and in a manner that does not alter relevant information.
6. **Identify a Person Responsible for Supervising the Preservation and Issuing Reminders** – Select an individual whose responsibility it will be to monitor and confirm the implementation of the preservation measures and the security of the preserved information.

7. **Establish a System of Periodic, Regular, and Meaningful Reminders** – The investigations and any resulting litigation are likely to take many months if not more. As a result, it is important to issue periodic reminders of the obligation to preserve evidence.
8. **Monitor Implementation of the Preservation Measures and Update the List of People who May Have Custody or Control of Potentially Relevant Information.** In addition to issuing the written instructions and reminders, the law imposes an obligation to take reasonable steps to make sure the instructions are being followed. Accordingly, you will need to establish some means of on-going monitoring of compliance with the preservation instructions. You will also need to ensure that you maintain a current list of people who may have custody or control of potentially relevant information, as those individuals may change as the investigation progresses.
5. **Ensure Documentation of Your Efforts.** You need to develop a system to document the steps you have taken to preserve potentially relevant information and the instructions and reminders that you provide to your employees.
6. **Acknowledge and Advise that the Litigation Hold has Been Put in Place.** After reviewing this letter and implementing your litigation hold, please notify Ms. Himmelhoch or Mr. Campbell that you have done so.

D. Conclusion

As stated above, the obligation to preserve evidence, and the associated burdens, fall predominantly on the agencies conducting the investigation. Nonetheless, we stand ready to assist in whatever ways are appropriate. For these reasons, we have assigned two people to assist you, discuss any questions you may have, and work cooperatively to develop a plan to meet our preservation obligations throughout the investigation and any ensuing litigation:

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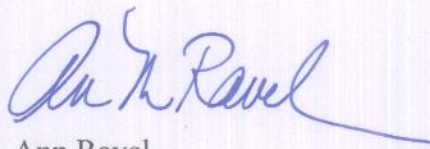
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Please feel free to contact either or both of them at your convenience.

Sincerely,



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