



May 3, 2010

MEMORANDUM FOR: Dr. Jane Lubchenco
Undersecretary for Oceans and Atmosphere

Ellen Moran
Chief of Staff, Office of the Secretary

FROM: Cameron F. Kerry

SUBJECT: Deepwater Horizon Event Documentation Hold

PLEASE RETAIN THIS MESSAGE FOR FUTURE REFERENCE

This memorandum is intended to provide guidance for staff who have been or will be involved with any aspect of the responses to or investigations of the explosion and fire that occurred at the Deepwater Horizon facility located about 50 miles from the Louisiana shore on or about April 20, 2010, the discharges of oil resulting from the explosion and fire, and any resulting damages, costs, or effects ("Deepwater Horizon Event").

One of many potential outcomes of the responses and investigations could be one or more lawsuits or enforcement actions. Accordingly, until you are notified otherwise, do not destroy potentially relevant information pertaining to the Deepwater Horizon Event. "Potentially relevant information" includes any tangible thing that relates to the explosion and fire and its aftermath, including the causes of the explosion, fire, and discharges of oil, responses to the fire, explosion, and discharges of oil, or the effects of the explosion, fire, or discharges.

Examples of such information might include but are not limited to equipment or materials salvaged during response actions, samples, and other physical things. Such information also includes documents such as inspection materials for the various facilities, including field notes and supporting documentation, analytical data for samples, internal communications regarding the explosion, fire, discharges, releases, responses, or investigations, and so on. Such information also includes electronic information. It is also important that you memorialize any oral instruction or guidance that is provided in connection with your involvement with the Deepwater Horizon Event.

The information below provides guidance on what needs to be preserved and steps to take to comply with the hold.

The Duty to Preserve Potentially Relevant Information

Because federal case law and the Federal Rules of Civil Procedure impose or may impose an obligation on this Agency and its employees to preserve potentially relevant information, you personally must take appropriate steps to preserve any such information that is in your possession, custody, or control. You must preserve this information even if it otherwise could be destroyed, deleted or overwritten in the normal course of Agency operations. If information that is subject to a hold is destroyed, a court in some circumstances may impose sanctions, exclude evidence, and/or dismiss a claim.

What Must Be Preserved

The information that must be preserved includes electronically stored information ("ESI"), hard copies of documents, and tangible things. ESI includes, but is not limited to, computer files of any type including word processing documents, e-mail messages, spreadsheets, calendar entries, digital photographs or other digital images, floppy discs, CDs, DVDs, and flash memory media, including USB drives and memory cards for cameras and cell phones. It includes not only information stored on Agency computers but can also include information stored on home computers, personal laptop computers, PDAs such as Palm Pilots and Blackberries, and mobile phones, if used for work. Examples of tangible things may include equipment salvaged from the facility, laboratory samples, specimens and photographs. All information, including privileged, protected, and confidential information, must be preserved.

What Needs to be Done

You must take the following steps with respect to the above described materials and take all reasonable steps to make sure those you supervise also comply with these instructions.

1. Do not delete, throw out, shred, or otherwise destroy potentially relevant information, or allow deletion to happen by automatic deletion operations.
2. Maintain potentially relevant ESI as described above. You should take steps to ensure that ESI is preserved in such a way as to preserve the "metadata" (internal computer data) embedded in the ESI. You should expeditiously identify to Justin Ehrenwerth in my office (202.482.4772) and your Agency's Chief Information Officer ("CIO") any critical databases that may contain potentially relevant information and which may be updated and cause the

information to be lost to determine what steps, if any, need to be taken to ensure the preservation of potentially relevant data without adversely disrupting Agency operations.

3. Take affirmative steps to prevent the destruction of any potentially relevant information that has been transferred to a Federal Records Center or any other location, including notifying your Records Officer of this hold.

4. Do not transfer any potentially relevant information to a Federal Records Center or any other location unless the information will be adequately preserved after being transferred and is not needed in its present location for purposes of this matter.

5. Before any computer or electronic system that contains potentially relevant information is retired or upgraded, or before an old computer or hard drive containing such information is retired or reimaged, whether because of a departing employee or otherwise, please take steps to ensure that the Agency retains access to potentially relevant information after the retirement or upgrade, including notifying your Agency's CIO that there may be material on the system that must be preserved in accordance with this hold.

6. If there are any staffing changes in your office that affect this matter, such as the retirement or departure of people who have done work related to this matter or new or additional people doing work relating to this matter, please ensure that any potentially relevant materials are appropriately preserved, including ESI.

7. Treat non-identical copies of documents (word processing files, spreadsheets, etc.) as if they were unique and save, at a minimum, the latest version and all versions that were shared with others.

8. If potentially relevant ESI has not been preserved, then immediately contact Justin Ehrenwerth and your Agency's CIO. Under some circumstances, IT staff may be able to recover information.

9. Maintain information subject to the hold in an orderly, readily retrievable manner, keeping confidential and/or privileged information separate from publicly releasable information. Contact your Agency's CIO if you need further assistance.

10. If you need to comply with an e-mail space quota, do not delete potentially relevant e-mail or move it from the e-mail system. You may move the potentially relevant information to an existing archive within the e-mail system if that archive exists on a network hard drive and will not be subject to accidental deletion. Contact your Agency's CIO if you need assistance.

In the future, you may receive additional instructions for preserving and producing this material. In the meantime, please carefully review this memorandum and preserve all materials in accordance with these instructions. If you have any questions regarding any of these instructions, please contact Justin Ehrenwerth in my office.

Remember that this is very important and failure to comply with these instructions may result in sanctions being imposed or exclusion of evidence at trial.

Thank you for your attention to this matter.

cc: Lois Schiffer, NOAA General Counsel