OIL POLLUTION CONTROL MECHANISMS—STATUTES AND REGULATIONS

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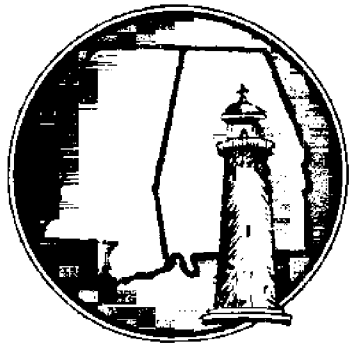

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I. INTRODUCTION

The purpose of this analysis is to provide a detailed picture of federal statutes and regulations, as well as case law, bearing on oil spill prevention and control. It is hoped that the following discussion will be of practical use to local and state government bodies, the petroleum industry and private citizens in sorting out the welter of statutory prohibitions, mandates, requirements, liabilities and penalties spawned by Congressional concern over oil pollution.

Emphasis has been placed on federal action occurring after a spill, although some effort is directed toward review of prevention statutes and regulations. No attempt is made here to clarify the law pertaining to compensation for damages caused by oil spill, since this is a complex, important topic deserving separate in-depth treatment. Suffice it to say here that compensation may be sought under a number of legal theories: federal maritime law - both statutory and common law; federal common law of nuisance; state statutory and common law, including nuisance, trespass, and strict liability; international law; and voluntary compensatory arrangements. In addition, a number of comprehensive compensation proposals have been introduced as bills in Congress.

In-depth consideration will be given the control of oil pollution under the Federal Water Pollution Control Act but this analysis will also touch lightly upon acts that have a lesser effect on oil pollution control. These acts being: The Refuse Act, the Ports

and Waterways Safety Act of 1972, the Outer Continental Shelf Lands Act, the Oil Pollution Act of 1961, the Deepwater Port Act of 1974, and the Fish and Wildlife Coordination Act.

On March 13, 1978, new rules and regulations on hazardous substances were issued by E.P.A. and printed in the Federal Register, 43 F.R. 10474 (March 13, 1978). Since this compilation and analysis was done prior to the issuance of these rules no discussion of these rules and regulations is made herein.

April, 1978

II. OIL POLLUTION CONTROL UNDER THE FEDERAL WATER POLLUTION CONTROL ACT:[1] PROHIBITIONS, PENALTIES AND CLEANUP.

A. BRIEF HISTORY

The primary federal statutory weapon in the battle against oil spills is the Federal Water Pollution Control Act (hereinafter at times referred to as the Clean Water Act, or the Act). It was originally enacted in 1948[2] and subsequently underwent numerous changes[3] which need not be retraced here. It is sufficient to note that the provision pertaining to oil spill regulation was first enacted as a section[4] of the Water Quality Improvement Act of 1970 (WQIA),[5] which was itself an amendment to the Clean Water Act. The WQIA was passed by Congress in the wake of two disastrous oil spills: the running aground of the tanker, Torry Canyon, off the Coast of England in 1967, and the Santa Barbara Channel drilling disaster in 1969.[6]

Although the Clean Water Act was reorganized and virtually replaced by amendment in 1972,[7] the oil spill provision was carried forward substantially unchanged except for the inclusion of "hazardous substances" within the provision's regulatory scheme. Comprehensive amendments to the Act in 1977[8] greatly expanded the territorial scope of the oil spill provision and lifted the limits of liability for clean-up of oil spills. Also, repayment of costs expended by the federal and state governments to restore and replace natural resources damaged by oil spills was authorized in the new law.[9]

B. HAZARDOUS SUBSTANCES

Designation of substances as "hazardous" is a matter delegated to the Environmental Protection Agency (EPA) by the 1972 Amendments.[10] However, five years after passage of the 1972 Amendments (as of January, 1978) the EPA had not yet promulgated rules and regulations of "hazardous substances" under the Clean Water Act. Although a voluminous set of four regulations was proposed by the agency in December of 1975,[11] no further action was taken.[12]

In the sole court decision discussing hazardous substance designation, a Louisiana Federal District Court stated flatly that no enforcement of the hazardous substance section is possible prior to promulgation of the EPA regulations. The practical effect of this is to nullify the Act as to hazardous substance control. The Court put it this way:

> But until a substance is designated as hazardous by the Administrator, none of the provisions of Section 311 apply. Congress emphasized this by inserting in Section 311(a) a new definition:
>
> > (14) 'hazardous substance' means any substance designated pursuant to subsection (b)(2) of this Section.
>
> The Administrator has not exercised his authority to designate hazardous substances. His only action has been to publish proposed rules on hazardous substances in the Federal Register. 39 Fed. Reg. 30465, August 22, 1974. At the time of the alcohol spill in the present case (March 18, 1974), not even this preliminary step had been taken. Thus, at the time of the spill, not only was alcohol not a hazardous substance, there was not even an official proposal to designate it as such. We decline to hold that the provisions of section 311 apply to alcohol.
>
> We hold that Congress understood that section 311 would remain ineffective as to hazardous substances until they had been so designated by regulation. The Committee Report accompanying H.R. 4148 recognized that the effect

of this approach would be to leave the bill's provisions entirely ineffective, except as to oil, until the administrative determination was made. In the words of the Committee:

> Subsection 17(a)(2) is a general definition of matter which would present an imminent and substantial hazard. The term could extend to more than 200 substances. The Secretary of the Interior is now reviewing a list of over 200 substances to determine what should in fact be held to be hazardous. Before this subsection can become meaningful, the Secretary will have to issue regulations, following the usual administrative procedure governing such issuance, identifying hazardous matter. [H. Rept. No. 91-127, reprinted in U.S. Code and Administrative News, 1970, P. 2692; emphasis added (by Court).][13]

Ironically, the court used these circumstances to impose a penalty rather than to free the polluter from liability (See text, page 11, infra, and footnote 78, infra).

Since the law with respect to hazardous substances remains unenforceable, this analysis will focus almost exclusively on oil spill control under the Clean Water Act. Nonetheless, the reader should be alert to ultimate extension of section 311 to hundreds of substances other than oil. That event will represent, in the words of Professor William H. Rodgers, Jr., "a quantum leap in environmental law."[14] Section 57 of the 1977 Amendments added a paragraph to the "hazardous materials" provision permitting EPA to mitigate damage caused by a discharge of any hazardous material. However, employment of this provision must also await promulgation of the necessary EPA regulations.

C. SCOPE OF THE CLEAN WATER ACT OIL SPILL PROVISION

At the outset it should be cautioned that despite the broad sweep of the oil spill provision, section 311, it by no means pro-

vides a complete answer to the problem of oil spills. While it sets forth civil[15] and criminal[16] penalties and allows recovery of clean-up costs incurred by state and federal authorities,[17] it does not compensate in damages for injury to either public or private property. There is no provision for compensation of damages to oyster or clam beds, shrimp fisheries, or other damage to fishermen's livelihoods. Nor is there compensation for damages and economic losses resulting from oil slicks washing up on public or private beaches. Tourist industries harmed by spoiled beaches will find no remedy under the Act; nor will boatowners whose boat hulls are damaged by corrosive hydrocarbons.

However, this is not to say that such injuries must go uncompensated. Subsection (o) expressly preserves other independently existing legal remedies available to public and private interests for damages caused by oil spills.[18] Such remedies as now exist will be discussed in following studies. Also relief may be imminent in the form of Congressional action. A number of comprehensive oil spill liability and compensation bills were introduced in Congress after a rash of major tanker spills during the winter of 1976-77, and are currently in various stages of consideration. A bill submitted by the Carter Administration[19] would impose strict liability for oil spills, replace the present fragmented, overlapping systems of federal and state liability laws and compensation funds, create a $200 million fund to clean up oil spills, and compensate victims of oil pollution damages. Eligible claimants would include fishermen whose usual fishing grounds are polluted and resort communities whose peak vacation seasons are ruined by oil-slicked beaches. But

as noted above, no single law yet provides a complete regulatory scheme for assessing liability and providing compensation for oil spills. Recourse must be had, then, to the confusing welter of federal, state and common law remedies.

What is the role of the Clean Water Act within the federal regulatory scheme? Basically, it promotes two policies: discouraging negligent or intentional discharges by threat of stiff civil and criminal penalties; and providing for swift cleanup action at the polluter's expense.

These burdens reflect the strong Congressional declaration of policy which prefaces the Clean Water Act 1972 Amendments.

> The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. In order to achieve this objective, it is hereby declared that, consistent with the provisions of this Chapter -
>
> (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985. (emphasis added)[20]

The specific oil spill provision of the Clean Water Act, § 311, also includes a buttressing policy statement calling for absolute elimination of discharges of oil or hazardous substances:

> The Congress hereby declares that it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone (emphasis added).[21]

This uncompromising policy declaration rests on a clearly stated congressional belief that oil spills are destroying our oceans. In the House Report[22] accompanying the bill, later to become the 1972 Amendments to the Clean Water Act, the House Committee on Public

Works underlined its concern:

> In addition to its contamination of water, shoreline, and beaches, oil often has severe effects on fish and wildlife, shellfish, and recreation. Untold ecological damage can result not only from the oil itself but also from chemicals used in attempting to deal with the oil. We must be able to combat this type pollution and prevent, wherever possible, catastrophies like these.[23]

The Act's definitions of "oil" and "discharge" are equally broad: "'Oil' means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil,"[24] and "'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping."[25]

The Congressional policy is given teeth by the Act's penalty provisions. There will be imposed a criminal fine of up to $10,000 with a possibility of one year's imprisonment for failure promptly to notify appropriate authorities of oil or hazardous substance discharges.[26] A civil penalty of up to $5,000 may be imposed for the occurrence of any spill, regardless of fault.[27] A separate civil penalty of up to $5,000 per offense may be assessed for failure to comply with agency regulations involving oil spill cleanup operations and tanker standards.[28] However, actual penalties assessed against polluters generally have been considerably lower than the permissible maximum discussed infra.

Cleanup operations are conducted at the polluter's expense by either the polluter, a third party with cleanup capability, or a Coast Guard oil spill task force.[29] If the polluter is a "vessel", it is liable as a result of the 1977 Amendments for cleanup costs in the case of an inland oil barge of $125 per gross ton, or $125,000, whichever is greater, and in the case of any other vessel, $150 per

gross ton (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater.[30]

This new system of assessing penalties removes the prior liability ceiling of $14 million.

The Senate Committee Report on S. 1952,[31] the Senate's version of the Clean Water Act of 1977, noted that the prior ceiling "served no useful purpose, inadvertently subsidizing large tankers and thus enhancing their competitive position over smaller vessels.[32] The Senate Committee felt that the $150 per ton limit should be adequate for cleanup of "all but the most catastrophic spills"[33] and further noted that the prior $14 million limit was "totally inadequate"[34] to deal with an oilspill of any magnitude from the size of tanker that is expected to be plying United States waters.

If the polluter is a "facility" it is liable for costs up to $50 million under the 1977 Amendments[35] - a $42 million increase in liability! But unlimited liability for cleanup costs will follow in the case of either a vessel or a facility if the government can prove "willful negligence or willful misconduct."[36] On the other hand, if the polluter can prove that the discharge was caused by an act of God, an act of war, the negligence of the United States, or the act of a third party, recovery of cleanup costs incurred by the polluter may be had in the United States Court of Claims.[37]

D. HOW GREAT IS THE REACH OF THE CLEAN WATER ACT? JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS.

The prohibition under the Clean Water Act against discharge of oil or hazardous substances is practically absolute, extending to tributaries of navigable streams as well as to larger watercourses

and other bodies of water,[38] and to all discharges in "harmful quantities" as determined by E.P.A. regulations.[39]

As regards the former prohibition, the Court of Appeals for the Sixth Circuit declared in United States v. Ashland Oil and Transportation Co.[40] that:

> . . . Congress' clear intention as revealed in (the Clean Water Act 1972 Amendments) was to effect marked improvement in the quality of the total water resources of the United States, regardless of whether that water was at the point of pollution a part of a navigable stream.

The Court went further and quoted with approval a remark by Representative Dingell made during consideration of S. 2770, which was incorporated in the 1972 Amendments, to the effect that the term "navigable waters" for purposes of the Act means ". . . the waters of the United States, including the territorial seas."[41] The new 1977 Amendments[42] make it clear that the reach of the oil spill provision now extends to the 200 mile limit set by the Fishery Conservation and Management Act of 1976.[43]

Several federal district courts have followed the Ashland decision and accepted the broad definition of navigable waters in the statute at face value.[44] For example, an Arizona Federal District Court interpreted the prohibition to include discharges into a normally dry arroyo.[45] Obviously, the courts intend to halt oil pollution at the source no matter how remote from large bodies of water. No decisions attempting to limit the geographical reach of the statute were uncovered.

As for the amount of spillage cognizable under the Clean Water Act, the reach of the statute is equally great. In one recent instance a barge company was assessed a $500 civil fine for a spill of 25-30 gallons of oil into a river despite the fact that

the company successfully contained the oil with a boom and later completely removed it from the water.[46] The court observed that § 311(b)(1) appears to be "aimed at preventing any discharges, rather than preventing only those discharges not removed."[47] In another case, prosecuted under the Refuse Act (see discussion, infra) rather than the Clean Water Act, a spill of one barrel of alcohol led to a criminal fine of $1000.[48] In summary, it is apparent that the courts will find nearly all discharges to be "harmful to the public health or welfare." Section 110.3 of the EPA regulations[49] gives this phrase concrete meaning.

> Under [§ 311(b)(4)] a discharge of oil into navigable waters or onto adjoining shoreline is harmful to public health or welfare if it (a) violates applicable water quality standards, (b) causes a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or causes a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.[50]

The constitutionality of this "sheen standard" was tested and upheld in a 1976 district court decision, Ward v. Coleman.[51] The only exception to the sheen standard permitted by the E.P.A. regulations is oil discharged by "a properly functioning vessel engine."[52] This exception withstood an "equal protection" constitutional challenge in Ward. The Court adopted a balancing test in which environmental protection was weighed against unrestricted passage on navigable waters, and the environmental needs were found to be greater.[53] In addition, the Clean Water Act, itself, expressly exempts discharges permitted under the International Convention for the Prevention of Pollution of the Sea by Oil, 1954,[54] to which the United States is a party. Article IV of the Convention exempts discharges under the three following circumstances:

(a) discharges occurring during rescue operations, (b) discharges due to unavoidable leaks from damaged vessels, provided appropriate containment measures have been taken, and (c) discharges arising from purification or clarification of fuel oil or lubricating oil, provided the discharge is made "as far from land as is practicable."

The single instance in which Congress backed off from the nearly absolute anti-discharge policy of section 311 involved the definition of "harmful discharges" within the contiguous zone. The contiguous zone is that belt of coastal waters extending seaward from the three nautical mile outer limit of our territorial waters out to a distance of twelve nautical miles from shore.[55] Congress, in subsection (b)(4), limited the President's power to define "harmful discharges" occurring in this zone. Only such discharges of oil "which threaten the fishery resources of the contiguous zone or threaten to pollute or to contribute to the pollution of the territory or the territorial sea of the United States may be determined to be harmful." The effect was, of course, to permit greater amounts of oil to be discharged in this zone. Although the Legislative History is silent on the rationale for this brake on executive discretion, the provision probably was a tacit concession by Congress that United States sovereignty within the contiguous zone extended to the protection of fishery stocks but not to protection of lesser resources or water quality per se.

However, with passage of the 1977 Amendments, Congress adopted the assertive position already taken in the 1976 Fishery Conservation and Management Act, supra, and extended the 12-mile jurisdiction of the Clean Water Act out to the 200-mile limit of the Con-

tinental Shelf. A violator, found within this limit, to be prosecuted must, however, be otherwise subject to the jurisdiction of the United States.

E. PENALTIES

1. Criminal Penalties Under § 311(b)(5).

a. Generally

As noted above, the oil spill section of the Clean Water Act provides for both civil[56] and criminal penalties[57] for oil discharges. Each of these has provoked considerable litigation. Under § 311(b)(5) "any person in charge of a vessel or of an onshore or an offshore facility" will be held criminally liable and fined up to $10,000 with possibility of one year's imprisonment if he fails to "immediately notify the appropriate agency" of the oil spill. However, the same subsection also includes an immunity clause which prohibits the government from using in a criminal prosecution against a polluter any evidence received from the polluter as a result of his attempt to comply with the reporting requirements of the statute. The immunity avoids any Fifth Amendment problem of coerced self-incrimination.

The language of § 311(b)(5) creates at least as much ambiguity as it dispels. For example, who is a "person in charge"? What is an "appropriate agency"? How soon is "immediately"? It was left to the courts to define these terms on a case by case basis.

b. Person in Charge

The legislative history of the oil spill provision sheds some light on the meaning of "person in charge." The Report by the House Committee on Public Works states that:

> The requirement that notice of discharge of oil or hazardous matter be given to appropriate authority . . . is essential to expeditious and efficient clean-up action. It is a requirement placed upon the individual who is operationally responsible for the vessel or facility involved. It is not intended to include seamen, in the case of a vessel, for example, or a night watchman or janitor in the case of a facility.[58]

The few courts which have dealt with the matter hold almost unanimously that a corporation may be a "person in charge" for purposes of the Act.[59] The sole jurisdiction holding to the contrary[60] asserted that only an individual may be a "person in charge."

The Act, itself, does not define "person in charge," but most courts have concluded that the word "person" as used in this term carries over the meaning assigned by subsection (a)(7) to the word, "person", standing alone: "'Person' includes an individual, firm, corporation, association, and a partnership." In summary, § 311(b)(5) apparently is intended to hold corporations and other businesses, as well as their supervisory officials, responsible for unauthorized discharges of oil and hazardous substances. The responsible official need not be a top management official, but may be anyone "operationally" in charge. Congress did not intend to burden subordinate employees personally.

c. "Immediately" and "Appropriate Agency."

To avoid a criminal fine or even imprisonment following a discharge of oil or other hazardous substance, a polluter must "immediately" notify the "appropriate agency." Confusion has arisen in the past over the meaning of these two terms. After considerable

early doubt as to whether the E.P.A. or the Coast Guard was the "appropriate agency" for receiving notice of oil spills,[61] President Nixon in 1973 designated the Coast Guard as the sole agency to receive notice.[62] Under the Coast Guard regulations implementing his Presidential Order[63] any discharge violation must be reported immediately:

> . . . by telephone, radiocommunication, or a similar means of rapid communication[64] to the Duty Officer, National Response Center, United States Coast Guard, 400 Seventh Street, SW, Washington, D.C. 20590, toll free telephone number 800-424-8802, or, in order of priority, to (1) the On-Scene Coordinator of the Coast Guard district where the discharge occurs,[65] (2) the Commanding Officer or Officer-in-Charge of the Coast Guard unit in the vicinity of the discharge, or in the case of a discharge into the Panama Canal Zone, the Marine Traffic Control in Cristobal or Balboa, (3) the Commander of the Coast Guard district in which the discharge occurs.[66] For discharges occurring in Alaska or Hawaii, notice to the same officials mentioned above but without any requirement of priority.[67]

As implied in the requirement that notice be given by telephone or similar means of rapid communication, the Coast Guard construes "immediately" in a literal fashion. Likewise, those few courts which have had the issue of time lapse before them have adopted a strict construction of "immediately." In United States v. Kennecott Copper Corp.[68] a pipeline break resulting in a discharge of over 173,000 gallons of diesel oil was discovered one evening, but was not reported until three days later, despite availability of a 24-hour answering service at the office designated to receive notice of discharges. The Court of Appeals for the Ninth Circuit held the polluter in violation of the notice requirement. In United States v. Ashland Oil and Transportation Co.[69] discovery of a break in a crude oil pipeline resulting in a 3,200 gallon

spill was made at 7 p.m. one evening and notice was given at 10:10 a.m. the following morning. The polluter was found guilty of failing to immediately notify the appropriate authority and was fined $500.

In summary, a discharge of oil (or other hazardous substance upon promulgation of the necessary regulations by the E.P.A.) at any location where it could conceivably start on a course toward navigable or larger bodies of water, and in an amount great enough to cause a sheen on the water's surface could lead to assessment of a criminal fine of up to $10,000 with possibility of one year in prison unless the spill is immediately reported by telephone to the proper Coast Guard officials. However, actual fines assessed in the past have averaged much below the maximum permissible fine.

d. Immunity

The criminal penalty provision includes a grant of immunity in most instances from the use in a criminal prosecution of any evidence received from a polluter attempting to comply with the notice requirement.[70] This grant of immunity from criminal prosecutions may appear redundant since usually a report of a discharge filed with the Coast Guard will avert criminal liability under the Act in any event. However, the immunity does become critical when a prosecution is brought under a different law, such as the Refuse Act,[71] or when the issue is whether notice was given immediately. For even though notice is delayed, and the polluter is thus exposed to theoretical criminal liability, no prosecution can proceed under the Clean Water Act if notice of the discharge comes exclusively from the polluter. Absent a showing of independent information,

the Government's case will fail for lack of admissible evidence.

The basis for the immunity grant is, of course, Constitutional -- that is, it is an attempt to avoid violation of the polluter's Fifth Amendment privilege against compelled self-incrimination. However, the grant has other significance, as well. It can also undercut enforceability of another federal water pollution statute, § 407 of the Rivers and Harbors Act of 1899, or as it is generally known - The Refuse Act.[72] During the late 1960's and early 1970's prior to passage of the Clean Water Act 1972 Amendments, this relic of the McKinley Administration was exhumed and pushed into service as the only effective federal water pollution control statute.[73]

Under § 411 of the Rivers and Harbors Act of 1899, a violation of § 407 is made a misdemeanor, carrying a criminal fine of $500 to $2500 for each occurrence. There is also an additional possibility of thirty days to one year's imprisonment.[74] But since the use of immunity under the Clean Water Act precludes any criminal prosecution for discharges of oil or "hazardous substances" based upon evidence from the polluter's own report, the Refuse Act is of no avail unless an independent source of evidence exists.[75]

It should be noted that the immunity grant of § 311(b)(5) actually affords greater protection to the corporate polluter than does the United States Constitution. The Court of Appeals for the Fifth Circuit in United States v. Mobil Oil Corp.,[76] a prosecution of a corporation for violation of the Refuse Act, declared that corporations do not enjoy a Fifth Amendment privilege against self-incrimination, but noted that the Clean Water Act does provide the

privilege. The court then went on to explain the utility of the greater statutory protection:

> Immunity insulates enforcement of the statutory duty from the operation of the constitutional privilege, but it also provides a valuable incentive for disclosure in the first instance. Thus, even where the constitution would permit the prosecution of a corporate owner on the basis of information the owner was compelled to disclose, the statute provides the assurance that the owner will not be harmed by incriminating evidence which the government obtains by exploiting the mandatory notice.[77]

Finally, the language of the immunity clause would seem to clearly state, and it has been held,[78] that the immunity is a "use" immunity, not a full, or "transactional" immunity to prosecution. That is, the polluter is immune to criminal prosecution only when that prosecution would necessarily rely wholly on information provided by the polluter. But if independent evidence comes to the attention of the regulator, then a prosecution may proceed.[79]

e. A New Direction?

What happens when a party spills a petroleum product which is not expressly mentioned in § 311? Take gasoline, for example. It cannot be dealt with as a "hazardous substance" because the E.P.A. has not promulgated the necessary regulations to enforce that part of § 311 (see discussion, supra). Until recently, only two possible alternative approaches to prosecution were apparent: Prosecution under the Refuse Act, or under § 311, by implication. Now there appears to be a third approach.

The Court of Appeals for the Sixth Circuit in United States v. Hamel (1977)[80] reaffirmed its liberal interpretation of the Congressional intent to stop water pollution (see United States v. Ashland Oil and Transport Co., supra), and at the same time apparently found a means to indirectly accomplish the purpose of the

"hazardous substance" provision of § 311, despite E.P.A. delay in drafting implementing regulations (see discussion, supra).

Hamel was a criminal prosecution of the foreman of a lakeside marina who intentionally pumped 200-300 gallons of gasoline onto the frozen lake, and failed to report the discharge to the proper authorities.

Prior to this case prosecution might have been expected in such a situation to be based on either § 311 or the Refuse Act. However the government in Hamel advanced a novel theory of criminal liability which was accepted by both the district court and the appeals court.

There was no attempt to include gasoline within the coverage of § 311. Section 311 does not expressly include gasoline within the definition of oil, although it may be argued that gasoline is includable by implication since it is a petroleum product and "petroleum" is included. The definition also includes "oil of any kind or in any form."[81] Nonetheless, the government attorneys shunned § 311. They also ignored the Refuse Act although that law clearly applied. Instead, they chose to rely on the Clean Water Act's general criminal liability provision, § 309(c)(1),[82] which contains a harsher penalty than does the Refuse Act (a fine of not less than $2,500 nor more than $25,000 per day of violation and/or imprisonment for as much as a year).

In relying on § 309(c)(1) liability the government impliedly assumed that gasoline is a pollutant within § 502(6),[83] the general definitional section of the Clean Water Act:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radio-active materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal

and agricultural waste discharged into water . . .

The district court accepted the government's view that gasoline could be included under "biological materials" and thus is a pollutant, a willful discharge of which is criminally punishable under § 309(c)(1).

In affirming the district court's holding, the Court of Appeals, however, chose to rely on expressed Congressional intent rather than upon the argument that gasoline is within the term "biological materials." Citing the Senate Report[84] on the 1972 Amendments, the Court held that Congress expressly intended the definition of pollutant in the Clean Water Act to be as broad as the coverage of the Refuse Act. Since the United States Supreme Court has previously held gasoline to be covered by the Refuse Act,[85] the Court of Appeals concluded that gasoline was also covered by the Clean Water Act.

The Court added that although the government could have prosecuted the case under the Refuse Act, it was free to prosecute instead under § 309(c)(1), which provides a heavier penalty.

The Hamel decision may have far-reaching consequences. The court has interpreted the Clean Water Act to apply to the full range of pollutants, the discharge of which is actionable under the Refuse Act. Consequently, it appears that pollutants which do not fit neatly within § 311 can often be made to fit under the definition of § 502(6) and liability will then follow under § 309(c)(1). Apparently, most conceivable pollutants which could be listed by the E.P.A. as "hazardous substances" will fit just as easily under the § 502(6) definition of "pollution" as construed in the Sixth

Circuit. Thus the court of appeals has found the means, at least temporarily, to deal effectively with the problem of water pollution by substances other than oil, narrowly defined.

The Refuse Act remains an important enforcement tool, however, since it imposes strict criminal liability and § 309(c)(1) imposes criminal liability only in instances of willful acts.

The Hamel rationale appears to sidestep the view taken by a Louisiana district court in United States v. Ohio Barge Lines[86] that discharges of "non-oil" substances may not be prosecuted under § 311 until their designation as "hazardous substances" by the E.P.A.

Another interesting aspect of the Hamel decision is the court's narrow view of the scope of § 311. The court interprets the Congressional intent to have been directed primarily to control of major tanker disasters rather than to oil discharges generally. There is no clear justification for such a narrow view, however, in light of the broad policy statement incorporated in § 311[87] as well as the numerous broad interpretations of § 311 applicability in numerous other court decisions.

2. Civil Penalties Under § 311(b)(6).

a. The civil penalty for discharge of oil, which may go as high as $5,000 per violation, has provoked more litigation than has the criminal penalty. It is basically a device to impose strict liability upon the polluter.[88] That is, the mere occurrence of an unauthorized discharge will result in assessment of a fine regardless of questions of fault. Thus, the polluter is caught in a squeeze. If he fails to report a spill, or even hesitates to pick up the

phone, he will be criminally liable. But if he does immediately notify the Coast Guard, he will nonetheless be subject to a civil fine. The immunity grant does not extend to the civil penalty as there is no constitutional self-incrimination problem involved in a civil case. Generally, the courts have said that the reporting requirement is aimed mainly at ensuring swift cleanup of oil spills and thus is not primarily punitive in nature.[89] The court in Ward v. Coleman noted that the privilege against self-incrimination may be asserted only in criminal cases[90] and declared that the Clean Water Act civil penalty is not only nominally civil, but civil in fact. In a Fifth Circuit decision which the United States Supreme Court recently allowed to stand[91] the Court of Appeals reversed a lower court in holding that the civil penalty does not trigger the immunity provision.

In United States v. Eureka Pipeline Co.[92] the civil penalty provision withstood an equal protection challenge based on discretion allowed the Coast Guard in assessing fines. The provision permits the Coast Guard to weigh (1) the size of the business, (2) the effect on the business' ability to continue operation, and (3) the gravity of the violation.[93] The polluter claimed that such discretion amounts to unequal treatment under the law and disproportionately penalizes large businesses, but the court dismissed the argument and held that the government may constitutionally relate a penalty to the violator's ability to pay.

In Matter of Vest Transp. Co., Inc.[94] a Mississippi Federal District Court upheld a maximum civil penalty of $5,000 assessed

by the Coast Guard against a barge company as the result of spillage of 12,000 barrels of diesel fuel into the Mississippi River. The barge struck a bridge and sank. In determining the amount to be assessed, the Coast Guard took into account the three factors above. The maximum civil penalty was also assessed on the basis of "the gravity of violation" in Tug Ocean Prince, Inc. v. United States.[95] However, in that case the polluter was held blameless for the discharge. The district court declared that absence of culpability will mitigate a civil fine and remanded to the Coast Guard to set a fine consistent with the degree of culpability attributable to the barge owner.

It has also been held, with regard to a separate, but virtually identical civil penalty[96] imposed under the Clean Water Act, that each day of pollution constitutes a separate offense. Thus, a new penalty probably may be assessed each day,[97] although this precise question has not arisen in the courts.

In United States v. General Motors Corp.[98] a federal district court held that since the act imposes strict liability for the occurrence of oil spills, the acts of third parties, such as vandals, will not relieve the owner/operator of the facility or vessel of liability. (Note that this is not true in the matter of recovering cleanup costs.)

Finally, no civil penalty can be assessed without prior notice to the violator and opportunity afforded for a hearing.[99]

b. As was previously noted, a second civil penalty of up to $5,000 per offense may be assessed for failure to comply with agency regulations involving oil spill cleanup operations and tanker in-

spections under subsection (j). By executive order of August 3, 1973[100] President Nixon delegated to the E.P.A. and the Coast Guard authority to establish methods and procedures for the removal of discharged oil and hazardous substances,[101] and to establish criteria for the development and implementation of local and regional oil and hazardous substances removal contingency plans,[102] The Coast Guard, alone, received authority to establish procedures, methods and equipment to prevent discharges of oil and hazardous substances from vessels and transportation-related onshore and offshore facilities, and to contain those discharges,[103] and to inspect vessels carrying cargoes of oil and hazardous substances.[104]

F. E.P.A. OIL POLLUTION PREVENTION REGULATIONS

The E.P.A.'s oil pollution prevention regulations are limited in application to non-transportation related onshore and offshore facilities.[105] Federal agencies, as well as private entities are subject to the regulations, except that the former are not subject to the civil penalty imposed by subsection (j).[106] The E.P.A. regulations do not apply to certain transportation-related onshore and offshore facilities within the jurisdiction of the Department of Transportation (DOT) and which are defined in a Memorandum of Understanding between the Secretary of Transportation (acting through the Coast Guard) and the Administrator of the E.P.A.[107] Certain relatively small facilities are also exempted from E.P.A. regulations.[108]

The division of responsibility effected by the Memorandum between the Coast Guard and the E.P.A. is well summarized by one commentator, C. Deming Cowles IV:

> In general, the Department of DOT (through the Coast Guard) is responsible for regulating (1) the transfer of oil to or from a vessel at any facility and (2) the transportation of oil by pipeline or vessel. The EPA is generally responsible for regulating drilling and producing operations, and transfer operations within a nontransportation related facility. Mobile offshore oil drilling platforms, barges or other mobile facilities fixed in position for the purpose of drilling for exploratory or development wells are defined as nontransportation related offshore facilities. EPA's authority over fixed drilling facilities as nontransportation related does not extend to any terminal facility, unit, or process integrally associated with the handling or transfer of oil in bulk to or from a vessel. Thus for the transfer of fuel in bulk, only the Coast Guard has jurisdiction.[109]

The purpose of the EPA Oil Pollution Prevention Regulations is to set out the requirements for preparation and implementation of Spill Prevention Control and Countermeasure (SPCC) Plans. Under its interim regulations on civil penalties for violations of the oil pollution regulations, the E.P.A. may assess a fine of any one of ten named infractions,[110] ranging from failure to prepare an SPCC Plan to failure of the facility owner or operator to review its plan every three years. SPCC Plans are extremely detailed plans for dealing with oil spill emergencies and for preventing such emergencies.[111]

Initial approval of an SPCC plan by EPA is unnecessary. However, if a facility discharges more than a thousand gallons of oil in any single spill, or if oil is discharged in harmful quantities in two spills within twelve months, the facility operator must then submit an SPCC plan to the EPA. Following review, EPA may require amendments to the plan. The EPA is permitted by regulation to consider two factors in determining the amount of the penalty to be assessed:[112] (1) Gravity of the violation, and (2) Demonstrated good faith efforts to achieve rapid compliance after notification

of a violation. The regulations also provide for notice[113] and hearing[114] before assessment of a penalty, and appeal of the decision may be made to the EPA Administrator.[115]

G. COAST GUARD OIL SPILL REGULATIONS

The Coast Guard regulations on oil spills, violation of which could lead to fines of up to $5,000, are gathered in 33 Code of Federal Regulations 153 through 157.[116] Part 153, subpart C lays out the procedures and methods to be used in the removal of oil slicks. Subpart D, deals with the administration of the Pollution Fund created by subsection (k) of the Clean Water Act, including a list of reimbursable costs to state and federal agencies. Requests for reimbursement must be made within sixty days after completion of the cleanup action.[117]

Part 154 regulates operations and equipment of large oil transfer facilities (those transferring more than 250 barrels of oil in bulk to or from any vessel). Part 155 sets minimum standards for vessel design and operations.

Part 156 regulates the details of oil transfer operations to or from vessels of 250 or more barrels of oil. Part 157 applies to oil tanker design. Under pressure from President Carter, the Coast Guard has published new proposed rules for vessel design, which would improve safety features, including requirements for segregated ballast, double bottoms, improved emergency steering standards, backup radar systems, and inert gas systems to reduce chances of in-tank explosions on board tankers.[118]

H. CLEANUP:

Section 311 has four provisions relating to oil spill cleanup:

(1) Implementation of a National Contingency Plan for removal and prevention of spills,[119] (2) Authorization for the government, in the event of a marine disaster, to take summary action, including, if necessary, destruction of any vessel which

> . . . has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish and wildlife and the public and private shorelines and beaches of the United States. . . .[120]

(3) Authorization for the President to require the United States Attorney of the district in which the threat occurs to seek judicial relief to abate an "imminent and substantial" threat. (Coupled with the authority is an express grant of jurisdiction to the federal district courts to entertain such suits and "grant such relief as the public interest and the equities of the case may require."[121] (4) Imposition of costs, upon the responsible owner or operator.[122]

The purpose of the National Contingency Plan, as stated in the Act is to

> . . . provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal and removal of oil and hazardous substances . . .[123]

Authority to devise the plan was delegated by the President to The Council on Environmental Quality (CEQ),[124] which accordingly wrote a plan,[125] later amended,[126] providing for "a pattern of coordinated and integrated response by the Departments and Agencies of the Federal Government to protect the environment from the damaging effects of pollution discharges . . . ." The Plan "promotes coordination and direction of Federal and State response systems and encourages the development of local government and private

capabilities to handle such discharges."[127] It applies to shorelines as well as the navigable waters of the United States and to the contiguous zone and the high seas where a threat to the United States waters, shoreface or shelf-bottom exists.[128]

The authority to dispose of ships posing a threat to the environment recently was relied upon by a federal district court in confirming the forced sale of a ship's cargo.[129]

I. LIABILITY FOR CLEANUP COSTS.

The ultimate burden of paying oil spill cleanup costs rests on the polluter absent a showing that the spill resulted from an act of God, an act of war, negligence by the United States government or an act or omission of a third party.[130] The maximum liability differs according to whether the violator is a vessel or a facility.

The Act defines a "vessel" as including "every description of watercraft or other artificial contrivence used, or capable of being used, as a means of transportation on water other than a public vessel."[131] An "onshore facility" is "any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on or under, any land within the United States other than submerged land."[132] An "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States other than a vessel or a public vessel."[133]

Vessels are liable for oil spill cleanup costs up to $150 per gross ton of the vessel.[134] A facility, whether onshore or offshore, is liable for up to $50,000,000.[135] But in any instance a

showing of "willful negligence or willful misconduct within the privity and knowledge of the owner" [136] will result in full liability. To relieve smaller businesses the Act authorizes the Administrator of the Environmental Protection Agency to establish "reasonable and equitable classifications" of onshore facilities with total storage capacity of 1,000 barrels or less for the purpose of limiting their liability even more.[137] The EPA accordingly promulgated regulations[138] establishing four classes of aboveground, and four classes of belowground facilities with corresponding limitations of liability for cleanup costs incurred by the government. The limitations range from $4,000 for an aboveground facility with a storage capacity of ten barrels or less to $260,000 for a belowground facility with a 501-1,000 barrel capacity.[139] Again, however, "willful negligence or misconduct" will result in full liability.[140]

Depending on the immediate circumstances, the government may clean up a spill, require the polluter to do so, or arrange for cleanup by a third party.[141]

If the owner or operator of a vessel or facility from which oil is illegally discharged can prove that the discharge was caused by a third party, the third party will be held liable for the cleanup costs.[142] The third party will have the same defenses available to the polluting vessel or facility, and the same maximum liability. In addition the right of the owner or operator to pursue a private cause of action against such third persons is preserved by subsection (h).

If the owner or operator of a polluting vessel or facility

undertakes to remove the discharge, and is able to prove that the discharge is due to an act of God or war, negligence of the United States, or act or omission of a third party, he may recover reasonable removal costs in the United States Court of Claims.[143]

The Court of Claims, in Yankee Metal Products, Inc. v. United States,[144] set out four essential elements of a claim for relief under § 311(i)(1): (1) A discharge of a harmful quantity of oil from a facility owned or operated by the plaintiff; (2) a discharge caused solely by . . . an act or omission of a third party; (3) removal of the oil in accordance with regulations; and (4) expenditure by the plaintiff of monies to remove the oil.

The fourth element was at issue in Quarles Petroleum Co., Inc. v. United States.[145] In that case an oil company sought to recover on behalf of its insurer costs incurred by the latter in cleaning up an oil spill. The government moved to dismiss the claim on the ground the costs were incurred not by the plaintiff, but by its insurer. The court rejected the argument, saying:

> Section [311(i)(1)] speaks in terms of the owner-operator recovering from the United States 'the reasonable costs incurred in such removal.' To incur means to become liable for or subject to; it does not mean to actually pay for.

In Complaint of Stewart Transportation Company[146] a Virginia Federal Court grappled with the problem of limiting a polluter's liability for cleanup costs when the combined costs of cleanup to the federal government and to the state exceeded the limitation for non-willful pollution under § 311(i)(1). The court held that the Clean Water Act ceiling applies only to federal cleanup costs. The state may recover cleanup costs incurred by it in excess of

the Act's limitation.[147]

In another recent case[148] involving cleanup costs a Massachusetts Federal Court held that an insured polluter may recover from its insurer where the insured chose to clean up a spill using its own resources in order to keep the cleanup costs within its policy limits. If the cleanup operation had been contracted to a third party, the cost would have exceeded policy limits.

J. ENFORCEMENT OF SECTION 311.

EPA and the Coast Guard are the federal agencies with primary enforcement responsibility under the oil spill provision of the Clean Water Act. Between December, 1974, and December, 1975, EPA referred more than 1100 oil spill cases to the Coast Guard for civil relief, and thirty cases to United States Attorneys for assessment of criminal penalties.[149] In addition, to achieve compliance with Spill Prevention, Control, and Countermeasure (SPCC) regulations, EPA is charged with inspection to confirm the implementation of SPCC plans, followed by the issuance of Notices of Violation in appropriate cases, and the scheduling of informal hearings for the imposition of civil penalties of up to $5,000 per violation. EPA refers cases to United States Attorneys for the collection of the penalties where there is refusal to pay. During the one year period between December, 1974, and December, 1975, EPA dealt with 1114 SPCC violations.[150]

As has been noted earlier in this analysis, failure by EPA to promulgate regulations concerning "hazardous substances" has effectively precluded all possibility of enforcement under § 311, with regard to pollutants other than oil. These violations must

be prosecuted, if at all, under alternative legal authority, such as the Refuse Act, discussed above.

The Coast Guard role in tanker oil spill enforcement was summarized by Rear Admiral William M. Benkert in testimony before a subcommittee of the House Committee on Government Operations:

> The Coast Guard, as an executive agency, does not have the authority to assess fines. The Coast Guard does assess civil penalties under the Federal Water Pollution Control Act for illegal discharges of oil into waters of the United States or the contiguous zone. During calendar year 1973 through 1975, 10,457 civil penalties were assessed for a total of $9.4 million, and $4.3 million were collected after mitigation hearings. . . .
>
> The penalty assessed is discretionary and is assessed on the basis of the severity of the violation and the past history of the vessel. No penalty is assessed until that person is given an opportunity to present his side of the case and present any matter to be considered in extenuation. When a penalty is assessed by the Coast Guard district commander, it may be appealed to the Commandant. If the penalty is not paid, the case is referred to the appropriate United States Attorney for collection.[151]

A comparison of the Coast Guard figures for civil penalties assessed and number of spill incidents reported indicates a strong policy of enforcement, regarding percentage of reported violations leading to sanctions. However, the size of assessed penalties is generally much lower than the permissible maximums. The number of spills reported from all sources in 1975 was 10,538 (see Appendix I). This figure nearly coincides with the 10,457 civil penalties assessed, according to the figures introduced at the House Oil Spill Hearings in March, 1977.[152] These figures do not, however, take into account an undetermined number of unreported oil spills occuring each year. Responding to Executive Department pressure[153] to

step up its oil spill prevention and detection capabilities, the Coast Guard has proposed new rules applying to oil tankers,[154] and has developed new oil spill detection techniques. The proposed regulations address problems of tanker construction, such as segregated ballasts, double bottoms, improved steering, back-up radar and collision avoidance equipment and inert gas systems to reduce threat of in-tank explosions.

An example of a new detection technique was included in the Seventh Annual Report of the Council on Environmental Quality at page 25 (1976).

> An important and encouraging event during the year was the successful tracking of an oil spill to the responsible ship by an oil 'fingerprinting' process developed by the U. S. Coast Guard. By determining the chemical composition of oil in a spill off Key Largo, Florida, the Coast Guard was able to trace the spill to a ship docking in Philadelphia. The ability to identify any offending ship should provide a significant deterrant against deliberate spills.

During the fiscal years 1971-1976 the United States Coast Guard assessed a total of 17,493 fines and penalties amounting to $10,137,026 for an average fine of $579.00. While the number of assessments has increased dramatically each year (see Appendix II), the size of the average fine decreased from $683 in 1974 to $558 in 1975 and to $515 in 1976). This is reflected in the figures for fines actually collected. Out of the 17,493 fines assessed, a total of 14,879, or 85 percent were actually collected. The average amount of the fine collected was $491, or 72 percent of the amount assessed. From 1971 to 1976 the amount collected has steadily decreased in proportion to the amount assessed. In 1976 the percentage of assessed fines actually collected was only 67 percent. Whether this decrease indicates a more lenient policy

of fine collections, or greater difficulty of collection, or a combination is not indicated in the Coast Guard tables. The average length of time between Coast Guard assessment and referral to the Department of Justice for collection ranged from 240 days in the Coast Guard Third District to 294 days in the Coast Guard Eighth District.[155]

In a letter [156] to Congressman John L. Burton, Assistant Attorney General Patricia M. Wald reported that the Justice Department acted on all but four percent of the penalties assessed by the Coast Guard under section 311(b)(6) of the Federal Water Pollution Control Act. As of March 22, 1977, the Justice Department had processed approximately 64 percent of referrals resulting in the collection of $464,342.00, or 44 percent of the total assessed.

Ms. Wald also noted that between January 1974 and February, 1977, 45 referrals involving expenditures of $16 million of federal funds to clean up oil discharged from vessels had been processed as well as 45 referrals involving discharges from onshore and offshore facilities totalling nearly $2.8 million. None of the cleanup costs for vessel discharges had been collected although no referrals were declined. About one-fifth of the cleanup costs involving facilities had been recovered, even though about ten percent of the cases referred to the Justice Department were declined.

The difference in collection success may be due to the greater ease of dealing with a fixed source of pollution than with pollution from a highly mobile vessel.

FOOTNOTES - PART II

1. 33 U.S.C. § 1251 et seq. (Supp. 1977).

2. 62 Stat. 1155.

3. 66 Stat. 755; 70 Stat. 498; 73 Stat. 141; 74 Stat. 411; 75 Stat. 204; 79 Stat. 903; 80 Stat. 1246; 84 Stat. 91; 84 Stat. 1818; 85 Stat. 124; 86 Stat. 379; 86 Stat. 47.

4. 33 U.S.C. § 1161 (1970).

5. 33 U.S.C. §§ 1151, 1155, 1156, 1158, 1160 to 1172, 1174 (1970).

6. Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907, 922 (S.D.N.Y. 1977).

7. FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 33 U.S.C. § 1251 et seq. (Supp. 1977).

8. CLEAN WATER ACT OF 1977, Pub. L. 95-217, 91 Stat. 1167, Dec. 27, 1977 [hereinafter referred to as the 1977 Amendments].

9. Id., § 58.

10. 33 U.S.C. § 1321(b)(2) (Supp. 1977).

11. Designation of Hazardous Substances 40 Fed. Reg. 59960; Determination of Removability of Hazardous Substances, 40 Fed. Reg. 59977; Determination of Harmful Quantities for Hazardous Substances, 40 Fed. Reg. 59982; Determination of Units of Measurement and Rates of Penalty for Hazardous Substances, 40 Fed. Reg. 59999, Dec. 30, 1975. In addition to these four proposed regulations the Act requires the E.P.A. eventually to promulgate another four, for a total of eight, having to do with hazardous substances. (see following note).

12. This delay in promulgating rules for the regulation of hazardous substance pollution provoked a sharp letter to the E.P.A. from the House Committee on Government Operations. Noting that the delay was hampering the Federal Maritime Commission in promulgating regulations of its own concerning financial responsibility of tankers and which are dependent on prior action by the E.P.A., committee members Leo J. Ryan and John L. Burton wrote:

> . . .[M]ore than four years have passed since the requirement of section 311(b) [§ 1321(b)] was enacted. Meanwhile the FMC remains unable to impose financial responsibility requirements on vessels with respect to carriage of hazardous substances. * * *
>
> We do not understand why there should have been the long delay in issuance of the hazardous substances list. Frankly, we find this continued procrastination intolerable.

(exerpt of letter to Douglas M. Castle, Administrator, E.P.A., March 31, 1977, reprinted as Appendix 4 to Coast Guard Efforts to Prevent Oil Pollution Caused by Tanker Accidents: Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, 95th Cong., 1st Sess., at 548.

13. United States v. Ohio Barge Lines, 410 F. Supp. 625 at 628 (D.C.La. 1975) aff'd mem. 531 F.2d 574 (5th Cir. 1976).

14. WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 506 (1977).

15. 33 U.S.C. § 1321(b)(6) (Supp. 1977).

16. 33 U.S.C. § 1321(b)(5) (Supp. 1977).

17. 33 U.S.C. § 1321(f)(1), 33 U.S.C. § 1321(c)(2)(H) (Supp. 1977).

18. 30 U.S.C. § 1321(o). (1) Nothing in this section shall affect or modify in any way the obligations of any owner

or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section."

19. See n. 153, infra.

20. 33 U.S.C. § 1251 (Supp. 1977.

21. 33 U.S.C. § 1321(b)(1)(Supp. 1977).

22. H.R. REPORT NO. 127, 91st CONG., 2nd Sess. 1970, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 2691.

23. Id.

24. 33 U.S.C. § 1321(a)(1).

25. 33 U.S.C. § 1321(a)(2) (Supp. 1977).

26. 33 U.S.C. § 1321(b)(5) (Supp. 1977), as amended by Pub. L. 95-217 (Dec. 27, 1977).

> "Any person in charge of a vessel or of a onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

27. 33 U.S.C. § 1321(b)(6) (Supp. 1977), as amended by Pub. L. 95-217 (Dec. 27, 1977).

> "Any owner or operator of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense . Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) who is otherwise subject to the jurisdiction of the United States, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice

and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary."

28. 33 U.S.C. § 1321(j)(1) and (2) (Supp. 1977), as amended by Pub. L. 95-217 (Dec. 27, 1977).

29. Id., (c), (f), (g), and (i).

30. Id. (f)(1).

31. SEN. REPORT NO. 370, 95th Cong. 1st SESS. 1977, reprinted in 1977 U.S. CODE CONG. and AD. NEWS, 6534, 6597.

32. Id.

33. Id.

34. Id.

35. 33 U.S.C. § 1321(f)(2) (Supp. 1977) as amended by Pub. L. 95-217 (Dec. 27, 1977).

36. Id. (f)(1) and (2).

37. Id. (i)(1).

38. United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974), followed in United States v. G.A.F. Corporation, 389 F.Supp. 1379 (S.D. Tex. 1975); United States v. Phelps Dodge Corporation, 391 F. Supp. 1181 (D.C. Ariz. 1975); Sun Enterprises, Ltd. v. Train, 394 F. Supp. 211 (S.D. N.Y. 1975), aff'd 532 F.2d 280

(2nd Cir. 1976); and Conservation Council of North Carolina v. Costanzo, 398 F. Supp. 653 (E.D. N.C. 1975), aff'd, 528 F.2d 250 (4th Cir. 1975).

39. Environmental Protection Agency Regulations on Discharge of Oil, 40 C.F.R. § 110(1977). The statutory authority for these regulations is 33 U.S.C. § 1321(b)(3). See Executive Order No. 11735, 38 Fed. Reg. 21243 (Aug. 3, 1973). Assignment of Presidential Functions, sec. 1(1).

40. 504 F.2d 1317, 1323, n. 14 (1974).

41. Id.

42. § 58(a)(4).

43. Pub. L. 94-265, 90 Stat. 331. 16 U.S.C. § 1801, et seq. (Supp. 1977).

44. See n. 38, supra.

45. United States v. Phelps Dodge Corporation, 391 F. Supp. 1181, 1187 (D.C. Ariz. 1975).

46. United States v. W. B. Enterprises, Inc., 378 F. Supp. 420, 421 (S.D.N.Y. 1974).

47. Id., at 422.

48. United States v. Ohio Barge Lines, 410 F. Supp. 625 (D.C. La. 1975), aff'd 531 F.2d 574 (5th Cir. 1976). See n. 71, infra.

49. See n. 39, supra.

50. 40 C.F.R. § 110 (1977).

51. 423 F. Supp. 1352 (W.D. Okla. 1976). See also United States v. Beatty, Inc., 401 F. Supp. 1040 (D.C. Ky. 1975).

52. Supra, n. 39, section 110.6.

53. 423 F. Supp. 1352, 1358, n. 17.

54. International Convention for the Prevention of Pollution of the Sea by Oil, Art. IV, 12 U.S.T. 2989, T.I.A.S. 4900, 327 U.N.T.S. 3 (1954) as amended by 17 U.S.T. 1523, 1528; 600 U.N.T.S.332 (1962). The original treaty entered into force as to the United States in 1961. The amended version entered into force as to the United States in 1967. The full text of Article IV, as amended, reads:

> Art. III shall not apply to:
>
> (a) the discharge of oil or of oily mixture from a ship for the purpose of securing the safety of a ship, preventing damage to a ship or cargo, or saving life at sea;
>
> (b) the escape of oil or of oily mixture resulting from damage to a ship or unavoidable leakage, if all reasonable precautions have been taken after the occurrence of the damage or discovery of the leakage for the purpose of preventing or minimizing the escape;
>
> (c) the discharge of residue arising from the purification or clarification of fuel oil or lubricating oil, provided that such discharge is made as far from land as is practicable.

55. 33 U.S.C. § 1321(a)(9) (Supp. 1977).

56. See n. 27, supra.

57. See n. 26, supra.

58. H.R. REP. No. 91-127, 91st Cong., 2nd Sess., reprinted in 1970, U.S. CODE CONG. & AD. NEWS, VOL. 2, 2692.

59. United States v. Mackin Construction Company, Inc., 388 F. Supp. 478 (D.C. Mass. 1975); United States v. General American Transportation Corporation, 367 F. Supp. 1284 (D.C. N.J. 1973); United States v. Messer Oil Corp., 391 F. Supp. 557 (W.D. Pa. 1975); United States v. Hougland

Barge Line, Inc., 387 F. Supp. 1110 (W.D. Pa. 1974); Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976).

60. United States v. Skil Corp., 351 F. Supp. 295 (D.C. Ill. 1972).

61. On July 20, 1970, President Nixon issued Exec. Order No. 11548, 3 C.F.R. 1966-1970 Compilation 949, 951, delegating the functions of the President under the Federal Water Pollution Control Act to the Coast Guard:

> Sec. 6: Agency to Receive Notice of Discharges of Oil or Hazardous Substances. The Coast Guard is hereby designated the "appropriate agency" for the purpose of receiving the notice of discharge of oil required by subsection (b)(4) of section 11 of the Act and for the purpose of receiving the notice of discharge of any hazardous substance required by subsection (c) of section 12 of the Act. The Commandant of the Coast Guard shall issue regulations implementing this designation.

However, the Coast Guard, acting under authority of 14 U.S.C. § 141(b), redesignated the regional of the Federal Water Quality Administration, among others, as an official authorized to receive notice of discharges. Then on December 2, 1970, Reorganization Plan No. 3 of 1970 established the new Environmental Protection Agency, which, under section 2 of the Plan, took over the functions of the FWQA. Consequently, for a period it appeared that both the Coast Guard and the E.P.A. were "appropriate agencies" to receive notification of discharges under the Act.

But the EPA handed the ball back to the Coast Guard in 1971 (40 C.F.R. § 110.9). Thereafter, the exclusive province of the Coast Guard was recognized by a federal district court in United States v. Messer Oil Corp., 391 F. Supp. 557, 561 (W.D. Pa. 1975). The reviewing judge in that case does a laudable job of following the delegated authority through the thicket of executive orders, reorganization plans and agency redesignations. Section 110.9 of the E.P.A. regulation merely states that the "appropriate agency" is determined under Coast Guard Regulations, 33 C.F.R. § 153, subpart B.

Finally, after the E.P.A. passed its share of authority back to the Coast Guard, President Nixon, by a second presidential order, Exec. Order No. 11735 § 7, issued pursuant to the 1972 Clean Water Act Amendments, 33 U.S.C. § 1321(c)(2)(E), designated the Coast Guard as the sole agency to receive notice of discharges. This is where the matter currently stands.

62. Exec. Order No. 11735, 3 C.F.R. 793 (1971-1975 Compilations), superceding Exec. Order No. 11548, 3 C.F.R. 949 (1966-1970 Compilation).

> Section 7. Agency to Receive Notices of Discharges of Oil or Hazardous Substances.
>
> The Coast Guard is hereby designated the "appropriate agency" for the purpose of receiving the notice of discharge of oil or hazardous substances required by subsection (b)(5) of section 311 of the Act. The Commandant of the Coast Guard shall issue regulations implementing this desianation.

63. 33 C.F.R. § 153. 203(b) (1977).

64. Id.

65. The districts, with headquarters addresses, are listed in C.F.R. § 153.205 (1977).

66. 33 C.F.R. § 153.203(c) (1977).

67. Id., § 153.203(d).

68. 523 F.2d 821 (9th Cir. 1975).

69. 504 F.2d 1317 (6th Cir. 1974).

70. § 311(b)(5); 33 U.S.C. § 1321(b)(5).

> Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

71. 33 U.S.C. § 407.

> § 407. Deposit of refuse in, navigable waters generally.
>
> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer or procure to be deposited material of any kind in any place on the bank of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: Provided, That nothing herein contained shall extend to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage or navigation will not be in-

jured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material: and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

72. Id.

73. See Druley, Ray M. "The Refuse Act of 1899", Environment Reporter, Vol. 2, No. 39, Monograph No. 11, January 28, 1972, for a comprehensive discussion of water pollution control under the Refuse Act. This discussion and cases cited therein indicates that not only fines but also injunctions are available enforcement tools under the Refuse Act.

74. § 411. Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500 or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

Note that the Refuse Act makes the act of polluting a crime. Thus, it goes much further than the Clean Water Act, which assesses criminal liability only for failure to report an unauthorized discharge.

75. Ward v. Coleman, 423 F. Supp. 1352 (W.D. Okla. 1976) at 1357:

> The spilling of oil could be punished criminally. Rivers and Harbors Act, 33 U.S.C. §§ 407, 411. However, one who reports a spill would be entitled to invoke the immunity provision of § 1321(b)(5) (of the Clean Water Act - ed. note).

See also United States v. Mobil Oil Corp., 464 F.2d 1124 (5th Cir. 1972), and United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D.W.Va. 1975) at 939.

76. 464 F.2d 1124 (5th Cir. 1972).

77. Id., at 1128. See also United States v. General American Transportation Corporation, 367 F. Supp. 1284 (D.C.N.J. 1973).

78. United States v. General American Transportation Corporation, 367 F. Supp. 1284 (D.C.N.J. 1973). See also Kastigar v. United States, 406 U.S. 441 (1972).

79. Although the grounds for prosecution in Ohio Barge Lines, see notes 13 and 71, are not stated by the court, the action apparently was brought under the Refuse Act. Since the court held that the Clean Water Act did not apply in this instance (the pollutant was neither oil nor a "hazardous substance" within the Act), the polluter was under no legal obligation to report the spill despite its belief that it was so obligated. Consequently, the use of its report for purposes of a criminal prosecution does not raise a question of coerced self-incrimination under the Fifth Amendment. There was no actual coercion, but only a mistake by the polluter. As a result, the government was able to use the polluter's own report as evidence against it in a Refuse Act prosecution.

80. 551 F.2d 107.

81. See n.21 supra.

82. 33 U.S.C.A. § 1319(c)(1) (Supp. 1977).

83. 33 U.S.C.A. § 1362(6) (Supp. 1977).

84. S. REP. NO. 92-414, 1972 U. S. Code Cong. and Admin. News 3642.

85. United States v. Standard Oil Company, 384 U.S. 224, 86 S.Ct. 1427, 16 L. Ed.2d 492 (1966).

86. See n. 13 and related text, supra.

87. See n. 21 and related text, supra.

88. United States v. W.B Enterprises, Inc., 378 F. 420, 422 (1974).

89. See, e.g., United States v. Atlantic Richfield Co., 45 U.S.L.W. 1158 (E.D.Pa.March 29, 1977).

90. 423 F. Supp. 1352 (W.D. Okla. 1976).

91. United States v. LeBoeuf Bros. Towing Co., Inc., 537 F.2d 149 (5th Cir. 1976), cert. den. 9 E.R.C. 1118, No. 76-1076, April 25, 1977. See also United States v. Eureka Pipeline Co., 401 F. Supp. 934 (N.D.W.Va. 1975), at 940 for a good discussion of why the penalty is in fact civil in nature. Also, Kennedy v. Mendoza Martinez, 372 U.S. 168-9 presents the test to determine whether a penalty is civil or criminal.

92. 401 F. Supp. 934 (N.D.W.Va, 1975).

93. § 311(b)(6); 33 U.S.C. § 1321(b)(6) (Supp. 1977). The Coast Guard Policy for the Application of Civil Penalties under § 311(b)(6), FWPCA, is printed as an appendix to United

States v. LeBoeuf, 377 F. Supp. at 569-70.

94. 434 F. Supp. 748 (N.D. Miss. 1977).

95. 436 F. Supp. 907 (S.D.N.Y. 1977).

96. 33 U.S.C. § 1319(d) (Supp. 1977).

97. United States v. Detrex Chemical Industries, 393 F. Supp. 735 (N.D. Ohio E.D. 1975), citing A Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1, p. 315.

98. 403 F. Supp 1151 (D.C. Conn. 1975).

99. § 311(b)(6); 33 U.S.C.A. § 1321(b)(6) (Supp. 1977). United States v. Independent Bulk Transport, Inc., 394 F. Supp. 1319 (S.D.N.Y. 1975). The interim procedures followed by E.P.A. in assessing civil penalties are set out at 40 C.F.R. § 114 (1974). By EXEC. ORDER NO. 11735, § 5(c) (Aug. 3, 1973), the President delegated his power under § 311(j)(2) to assess and compromise civil penalties to both the E.P.A. and the Coast Guard, even though the Coast Guard was designated in Sec. 7 as the sole agency for receiving notice of discharges. Unlike the E.P.A., the Coast Guard has not promulgated regulations for assessing and compromising civil penalties, although apparently it could do so. The interim E.P.A. regulations apply only to facilities. They provide for a hearing upon assessment of a civil penalty if request is made within 30 days (Sec. 114.5).

100. EXEC. ORDER NO. 11735, 3 C.F.R. 793 (1971-1975 Compilation) reprinted in 33 U.S.C. § 1321 at 230 (Supp. 1977).

101. Id., § 5(b)(3).

102. Id., § 5(b)(4).

103. Id., § 2(2).

104. Id., § 2(3). Only one reported case discussing the content of regulations promulgated under authority of subsection (j) was found, United States v. Ira S. Bushey and Sons, Inc., 363 F. Supp. 110 (D.C.Vt. 1973), and it involved the now unimportant issue of whether a court should have taken the regulations into consideration although the cause of action arose before the regulations were to take effect.

105. E.P.A. Regulations on Oil Pollution Prevention, 40 C.F.R. § 112 (1973); E.P.A. Interim Regulations on Civil Penalties for Violations of Oil Pollution Prevention Regulations, 40 C.F.R. § 114 (1974).

106. 40 C.F.R. § 112.1(c)(1977).

107. 36 Fed. Reg. 24000, (1971). Also found as appendix to 40 C.F.R. § 112 (1977)

108. 40 C.F.R. § 112.1(d)(2)(A) (1977): A facility with no more than 42,000 gallons underground buried storage capacity of oil. And (B): A facility with no more than 1,320 gallons storage capacity, not buried, provided no single container has a capacity of more than 660 gallons.

109. Cowles, C. Deming, IV, Environmental Regulations of Offshore Exploration, Production and Development, 37th Annual Institute on Oil and Gas Law and Taxation 53, 72 (1976).

110. 40 C.F.R. § 114.2 (1977).

111. 40 C.F.R. § 112.7. (1977).

112. 40 C.F.R. § 114.3 (1977).

113. Id., § 114.4.

114. Id., § 114.5.

115. Id., § 114.11.

116. Control of Pollution by Oil and Hazardous Substances, Discharge Removal 33 C.F.R. § 153(1977); Large Oil Transfer Facilities, 33 C.F.R. § 154 (1977); Vessel Design and Operations, 33 C.F.R. § 155; Oil Transfer Operations, 33 C.F.R. § 156; Tank Vessels Carrying Oil in Domestic Trade, 33 C.F.R. § 157 (1977).

117. 33 C.F.R. § 153.417 (1977).

118. 42 Fed. Reg. 24868 (1977).

119. Sections 311(c) and (j); 33 U.S.C. § 1321(c) and (j) (Supp. 1977).

120. Section 311(d); 33 U.S.C. § 1321(d) (Supp. 1977).

121. Section 311(e); 33 U.S.C. § 1321(e) (Supp. 1977).

122. Section 311(f) and (g); 33 U.S.C. § 1321(f) and (g) (Supp. 1977), as amended by Pub. L. 95-217 (December 27, 1977).

123. § 311(c)(2); 33 U.S.C. § 1321(c)(2) (Supp. 1977).

124. EXEC. ORDER NO. 11735, § 4, 3 CFR 793 (1971-1975 Compilation), reprinted in 33 U.S.C. § 1321, app., at 230 (Supp. 1977).

125. Council on Environmental Quality National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 1510 (1976).

126. 41 Fed. Reg. 12658 (1976).

127. 40 CFR § 1510.2 (1977).

128. Id., § 1510.3.

129. Fair Ocean Company, Ltd. v. Cargo of the Permina Samudra XII, 423 F. Supp. 1037 (D. Guam 1976).

130. Section 311(f)(1), (2), and (3); 33 U.S.C. § 1321(f)(1), (2), and (3) (Supp. 1977), as amended by Pub. L. 95-217 (December 27, 1977).

131. Section 311(a)(3); 33 U.S.C. § 1321(a)(3) Supp. 1977).

132. Section 311(a)(10); 33 U.S.C. § 1321(a)(10) (Supp. 1977).

133. Section 311(a)(11); 33 U.S.C. § 1321(a)(11) (Supp. 1977).

134. § 311(f)(1); 33 U.S.C. § 1321(f)(1) (Supp. 1977), as amended by Pub. L. 95-217 (December 27, 1977).

135. § 311(f)(2) and (3); 33 U.S.C. § 1321(f)(2) and (3), as amended by Pub. L. 95-217 (December 27, 1977).

136. § 311(f)(1), (2) and (3); 33 U.S.C.§ 1321(f)(1), (2) and (3) (Supp. 1977), as amended by Pub. L. 95-217 (December 27, 1977).

137. § 311(f)(2); 33 U.S.C. § 1321(f)(2) (Supp. 1977), as amended by Pub. L. 95-217 (December 27, 1977).

138. Environmental Protection Agency Regulations on Liability Limits for Small Onshore Oil Storage Facilities, 40 C.F.R. § 113 (1973).

139. Id., § 113.4.

140. Id.

141. § 311(c)(1); 33 U.S.C. § 1321(c)(1)(Supp. 1977). Of course, it sometimes happens that the pollution source cannot be determined. Section 311(k) authorizes a $35,000,000 re-

volving fund to cover cleanup costs as needed by the various agencies. Pollution fund expenditures on unknown sources for the years 1973-1975 were: 1973 - $854,000; 1974 - $2,500,000; 1975 - $677,040. United States Coast Guard figures provided to the House Subcommittee on Government Activities and Transportation of the Committee on Government Operations at a hearing on March 21, 1977, reprinted in Coast Guard Efforts to Prevent Oil Pollution Caused by Tanker Accidents: Hearings Before a Subcommittee of the Committee on Government Operations, 95th Cong., 1st Sess., at 257 [hereinafter referred to as House Oil Spill Hearings].

142. § 311(g); 33 U.S.C. § 1321(g) (Supp. 1977).

143. § 311(i); 33 U.S.C. § 1321(i) (Supp. 1977).

144. 538 F.2d 347, 209 Ct.Cl. 770 (1976), unpublished; cited in Quarles Petroleum Co., Inc. v. United States, 551 F.2d 1201 (Ct.Cl. 1977).

145. 551 F.2d 1201 (Ct.Cl. 1977).

146. 435 F. Supp. 798 (E.D.Va. 1977).

147. The Court found only one other case in point: Accord Portland Pipe Line Corp. v. Environmental Improvement Comm., 307 A.2d 1, 1973 A.M.C. 1341 (Me. 1973).

148. Chemical Applications Company, Inc. v. Home Indemnity Company, 425 F. Supp. 777 (D. Mass. 1977).

149. Federal Water Pollution Enforcement Actions (compiled by Environmental Protection Agency) ENVIR. REP. (B.N.A.) Federal Laws 41:2201.

150. Id.

151. Testimony of Rear Admiral William M. Benkert, Chief, Office of Merchant Marine Safety, U. S. Coast Guard, before a subcommittee of the Committee on Government Operations, House of Respresentatives, reprinted in House Oil Spill Hearings, supra, note 140.

152. Id.

153. President Carter's Message Transmitting to Congress Recommendations for Reducing Oil Spills by Tankers. Dealing with Oil Spills and Providing Compensation to Victims of Oil Spills, March 18, 1977, ENVIR. REP. (B.N.A.) 21:0141.

154. Tank Vessels Carrying Oil in Trade. Coast Guard proposed rule 33 CFR § 157, (1977) and Inert Gas System, Coast Guard proposed amendment 46 CFR § 30, 32 (1977).

155. House Oil Spill Hearings, supra, note 140, at 498.

156. Id. at 512.

III. THE PORTS AND WATERWAY SAFETY ACT OF 1972[1]

The 1972 Ports and Waterways Safety Act authorized the Coast Guard to establish comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards of oil spills from vessels or structures in United States waters. The Act provides authority to establish whatever operating procedures and construction standards are needed to prevent oil discharges, deliberate or accidental, from tankers and offshore oil rigs.[2] Nonetheless, the Coast Guard regulations issued under authority of this Act have not heretofore reached the fleets of small, old tankers that have been the prime source of pollution.[3]

However, on March 17, 1977, President Carter sent a message to Congress announcing a series of measures designed to reduce the risks of oil spills associated with marine transportation, including an instruction to the Secretary of Transportation to take immediate steps to tighten the Coast Guard regulations[5] issued pursuant to the Ports and Waterways Safety Act. Specifically the President called for the development of new rules for all oil tankers of 20,000 deadweight tons (DWT) or more, United States and foreign, that call at American ports. Included were requests for new rules requiring double bottoms on future tankers to avoid loss of oil from groundings,[6] segregation of ballast to avoid intentional flushing of oily water,[7] installation of inert gas systems on all tankers to reduce risk of on-board explosives, backup radar systems, including collision-avoidance equipment, on all tankers, and improved emergency steering standards for all tankers. These proposed requirements

would become effective within five years.

Under the current set of Coast Guard regulations segregated ballast is required only on vessels of 70,000 DWT or more[8] and double bottoms are not required at all.

During a Congressional hearing[9] provoked by the same series of oil tanker spills which prompted the President's message, Representative Charles Thone (Nebraska) reported that over the last ten years 500 million gallons of oil have been lost from tankers at sea. He also noted that there are currently 4,500 oil tankers on the high seas, of which ten are involved in accidents daily.

In response to the President's instruction the Coast Guard has published a new set of proposed rules[10] which would require all oil tankers of 20,000 tons DWT or more, United States and foreign, that call at American ports to have double bottoms and segregated emergency steering systems to reduce the probability of collision and grounding of oil tankers.[11]

Also, the proposed rules include a requirement that all vessels of 10,000 gross tons[12] or more have a second radar system and collision avoidance equipment.[13] Expected benefits of such equipment cited by the Coast Guard are less vessel damage or loss, and lower investigation, search and rescue and pollution clean-up costs.[14] The Coast Guard predicts that 2,000 foreign and 400 United States vessels might be affected if this latter proposal is adopted. Average cost of installation is projected to be $120,000 per vessel.

Finally, the Coast Guard proposes to extend requirements for

inert gas systems (IGS) to all vessels of 20,000 DWT or more,[15] a requirement which until now has applied only to the largest ships - 100,000 DWT and more. The purpose of the system is to reduce risk of in-tank explosions on board tankers, caused by static electricity generation igniting flammable vapors during tank cleaning activity.

The Coast Guard estimates that in the period between 1950 and 1973, there were 515 fires and explosions on board vessels that occurred either in the cargo tanks or outside of them. Of that 515, approximately 243 (47 percent) occurred inside the cargo tanks. Vessels of 20,000 DWT or more accounted for over 50 percent of the intank fire and explosions.[16] The Coast Guard expects that approximately 1000 foreign flag and 250 United States flag tank vessels would be affected by the inert gas systems requirement.[17]

FOOTNOTES - PART III

1. 86 Stat. 427, 33 U.S.C. § 1221 et seq., 46 U.S.C. § 391(a) (Supp. 1977).
2. 46 U.S.C. § 201, 46 U.S.C. § 391a (Supp. 1978).
3. The Coast Guard's failure to write tighter regulations has provoked state attempts to deal locally with the tanker problem. Thus raising the issue of whether the federal regulations preempt the field. In Evans v. Atlantic Richfield Company, 429 U.S. 1334, 50 L. Ed.2d 441, 97 S. Ct. 544 (1976), oil companies brought an action against the State of Washington challenging the constitutionality of a newly enacted state statute regulating certain oil tankers for the purpose of controlling oil spills on Puget Sound. The Federal District Court found that the statute was pre-empted by the federal regulations promulgated by the Coast Guard under the Ports and Waterways Safety Act and enjoined enforcement of the state statute. The State then applied to the Circuit Justice for a stay of the court's injunction, pending consideration by the full United States Supreme Court. The stay was granted and the case was still pending before the Court as of November, 1977.
4. BNA ENVIR. REP., Fed. Laws 21:0141.
5. Rules and Regulations for Protection of the Marine Environment Relating to Tank Vessels Carrying Oil in Domestic Trade, 33 CFR § 157 (1975) [hereinafter referred to as Coast Guard Tanker Rules].

6. The White House Fact Sheet accompanying the President's message noted that studies of groundings indicate 45 to 90 percent of oil lost in such accidents would not have escaped if the vessel had had a double bottom. BNA ENVIR. REP. Current Developments, 21:0143.

7. The White House Fact Sheet indicated that "deballasting and associated tank washing is the major source of operational oil pollution from tankers." BNA ENVIR. REP., Current Developments, 21:0143.

8. Coast Guard Tanker Rules, supra note 5, § 157.09.

9. Coast Guard Efforts to Prevent Oil Pollution Cuased by Tanker Accidents, Hearings before a subcommittee of the Committee on Government Operations, House of Representatives, 95th Cong., Sess. 1, 1977.

10. 42 Fed. Reg. 24868 (May 16, 1977).

11. At section 4 of its proposed rule on Improved Emergency Steering Standards for Oil Tankers (42 Fed. Reg. 24869, 24870, May 16, 1977), the Coast Guard cites casualty reports showing 87 casualties involving failure of steering gear control systems between 1963 and 1976 on vessels of 20,000 deadweight tons and over. Nearly half of these casualties occurred on foreign vessels operating in U.S. waters. The Coast Guard noted that although "no deaths or pollution incidents were reported as a result of these casualties, vessel damage and other property damage occurred and the potential of pollution resulting from collision or grounding was present in each casualty. The potential for collision or grounding and subsequent pollution as a result of steering failure cannot be ignored when considering the increasing number of vessels being used to transport oil in bulk.

12. 10,000 Gross Tons is roughly equivalent to 20,000 DWT Tons. See 42 Fed. Reg. 24872 (May 16, 1977).

13. Vessels of 10,000 Gross Tons or More - Proposed Additional Equipment, proposed rule, 42 Fed. Reg. 24871 (May 16, 1977).

14. Id.

15. Inert Gas System, proposed amendment, 42 Fed. Reg. 24874 (May 16, 1977).

16. Id., at 24875.

17. Id. at 24876.

IV. OUTER CONTINENTAL SHELF LANDS ACT[1]

Under section 5(a)(1)[2] of the Outer Continental Shelf Lands Act the Secretary of the Interior is authorized generally to prescribe rules and regulations deemed "necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein." Activities affected include leasing, unitization, pooling, drilling agreements, suspension of operations or production, subsurface storage of oil or gas, drilling and a number of other operations.

Regulations under this section are administered by the United States Geological Survey[3] (USGS). Section 250.43 of the regulations states a broad prohibition against pollution of the environment and requires oil lessees to record all spills or leaks of oil or waste materials. Upon request of the area oil and gas supervisor of the Geological Survey, the lessee must report all spills or leakage. Major spills must be reported immediately. Subsection (b) imposes strict liability for cleanup costs. The USGS also issues orders governing operations in a specific area.[4] Government decisions to lease oil drilling rights on the Outer Continental Shelf are clearly "major Federal actions" under the National Environmental Policy Act.[5] Thus, environmental considerations must be weighed on equal terms with economic ones in Federal decisions to lease.

In the aftermath of the Santa Barbara Channel blowout, which caused a massive oilspill, the Secretary of the Interior issued orders suspending drilling operations in the Channel until Congress could consider proposed legislation to terminate the leases. The

Secretary based his action on section 5(a)(1). A California Federal district court set aside the suspension orders saying that the Secretary's interpretation was not supported by the Act. On review the United States Court of Appeals for the Ninth Circuit reversed on the ground that the Act authorizes the Secretary to suspend operations under existing leases whenever he determines that the risk to the marine environment outweighs the immediate national interest in exploring and drilling for oil and gas.[7] However, on rehearing, the court held that the suspension order, while valid when made, became invalid when its only raison d'être vanished - i.e., when Congress adjourned without having considered the proposed legislation.[8] Two years later the question arose whether Secretary Morton could deny permission to oil and gas lessees to construct a drilling platform in the Santa Barbara Channel on the basis of section 5(a)(1). This time the district court sustained the Secretary's order on the basis of the Ninth Circuit's holding in the above case. However, the Ninth Circuit found that the denial of a right to construct a drilling platform amounted not to a mere suspension, but to a cancellation of the lease since the conditions prompting the order were likely to continue permanently. Cancellations of leases, the court held, were beyond the power of the Secretary, and thus, his order was vacated.[9]

The above decision upholding Interior's authority to suspend offshore oil and gas leasing, even when temporary blockage of a Congressionally approved project is involved, was cited favorably by the Court of Appeals for the Fifth Circuit in Canal Authority of State of Florida v. Callaway[10] and again in Sierra Club v. Morton.[11]

The latter case, however, was a defeat for environmentalists who wished to postpone federal leasing of offshore oil tracts in the Gulf of Mexico, on grounds that the Environmental Impact Statement (E.I.S.) required by section 102(2)(c) of the National Environmental Policy Act (NEPA)[12] was inadequate. The court strictly limited its power of review to whether the agency's decision to proceed with leasing, based upon the E.I.S., was arbitrary, capricious or an abuse of discretion under section 701 of the Administrative Procedure Act,[13] thus avoiding consideration of the merits of the actual decision to go forward with the sale.[14] Thus, it appears that while the Secretary of the Interior may exercise discretion to halt federal leasing of offshore oil lands, as well as to suspend operations under section 5(a)(1) he may not be required to do so by citizen groups unless his action is clearly unsupported under NEPA and the Administrative Procedure Act.[15]

FOOTNOTES - PART IV

1. 43 U.S.C.A. §§ 1331 et seq. (1964).
2. 43 U.S.C.A. § 1334(a)(1) (1964).
3. 30 CFR 250 (1977).
4. Orders and Leasing Regulations 43 CFR §§ 3100 et seq. (1976).
5. 42 U.S.C.A. §§ 4321 - 4347 (1969).
6. Gulf Oil Corp. v. Morton, 345 F. Supp. 685 (C.D. Cal. 1972).
7. Gulf Oil Corp. v. Morton, 493 F.2d 141 (9th Cir. 1973).
8. Id., at 149. Opinion on Petiton for a Rehearing.
9. Union Oil Company of California v. Morton, 512 F.2d 743 (9th Cir. 1975).
10. 489 F.2d 567, 577 (5th Cir. 1974).
11. 510 F.2d 813, 828 (5th Cir. 1975).
12. 42 U.S.C.A. § 4422 et seq. (1969).
13. 5 U.S.C.A. § 701, et seq. (1977).
14. 510 F. 2d 813, 829.
15. For further examination of the offshore oil development issue with regard to environmental protection, see: General Accounting Office, Improved Inspection and Regulation Could Reduce the Possibility of Oil Spills on the Outer Continental Shelf, June, 1973.

V. OIL POLLUTION ACT OF 1961[1]

The Oil Pollution Act of 1961 was passed to adopt and implement the International Convention for the Prevention of Pollution of the Sea by Oil, 1954.[2] It was amended in 1973 to comply with new amendments to the International Convention. The Act prohibits the discharge of oil from vessels within fifty miles of the nearest land (as determined by a method outlined in the Act) except to secure the safety of a ship, to prevent damage to a ship or cargo, or to save lives.[3]

However, the Act exempts a type of discharge which in practice has proved to be a major source of oil pollution - tanker ballast.[4] Although only those discharges which "would produce no visible traces of oil on the surface of the water" are exempted, in practice this is probably difficult, if not impossible to enforce. Violations of the Act carry a criminal penalty of up to $10,000 with additional possibility of one year's imprisonment, and a civil penalty, also up to $10,000 for willful or negligent discharges of oil and $5,000 for a violation of regulation promulgated by the Coast Guard under the Act. Any penalty assessed will constitute a lien on the ship.[5]

One authority severely critizes the International Convention:

> The 1954 Convention forbade some types of discharges (with a content of 100 parts per million or more) for some types of tankers in some areas (namely, "prohibited zones," typically extending 50 miles from the nearest land). Enforcement, such as it was, was dependent upon the keeping of oil discharge record books by the skipper of each member vessel, and enforcement by the flag state, the latter being aptly described as "no enforcement at all," and the former as something less than that.[6]

FOOTNOTES - PART V

1. 75 Stat 402, 33 U.S.C.A. § 1001, et seq., as amended (1970).
2. 12 U.S.T. 2989, T.I.A.S. No. 4900 (1961).
3. 33 U.S.C.A. §§ 1001, 1002 (Supp. 1977).
4. Id., § 1004.
5. Id., § 1005(b) and (c).
6. WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW, 515.

VI. DEEPWATER PORT ACT OF 1974[1]

Although potentially a powerful scheme of oil spill regulation, the Deepwater Port Act of 1974 has no current applicability. It was enacted in the expectation that deepwater ports would soon be constructed off the coasts of the United States to accommodate transfer of oil from deep draught supertankers to shore.[2] Despite two proposals for such ports on the Louisiana and Texas Gulf Coasts, no plan appeared to be near realization by the end of 1977. The Texas proposal, dubbed Seadock by the consortium of oil companies which planned to build the $700 million facility twenty-six miles off the coast, fell through amid complaints by oil executives that the government regulations were oppressive.[3] An earlier proposal by Aristotle Onassis for the New Hampshire seacoast died when a related refinery proposal was defeated by a vote of local citizens.

Under the Act environmental considerations must be weighed in decisions at every stage of a deepwater port plan,[4] and strict liability applies to oil spills from port operations.[5] In the event that a deepwater port proposal is licensed a vast scheme of environmental regulations and control will go into effect.

FOOTNOTES - PART VI

1. 33 U.S.C. §§ 1501 to 1524 (Supp. 1977).

2. For legislative history and purpose of the Deepwater Port Act see 1974 U.S. CODE CONG. AND ADM. NEWS 7529.

3. "Seadock Oil Port Project Appears Dead," Memphis Commercial Appeal, July 27, 1977, p. 26.

4. 33 U.S.C. §§ 1503(c)(5), 1503(d), 1503(e)(3), 1504(c)(2)(K), 1504(c)(2)(L), 1504(f), 1504(i)(3)(A), 1505, 1508(a)(2), 1509(a), 1511(b) (Supp. 1977).

5. 33 U.S.C. § 1518 (Supp. 1977).

VII. FISH AND WILDLIFE COORDINATION ACT

Section 665 of the Fish and Wildlife Coordination Act[1] authorized the Secretary of the Interior, acting through the Fish and Wildlife Service and the Bureau of Mines to investigate the effects of petroleum and other pollutants on wildlife and to report the results of these investigations, along with recommendations for "alleviating dangerous and undesirable effects" of such pollution, to Congress. No powers of enforcement are granted by the section to either agency. Rather, the agencies are mandated to determine necessary water quality standards for maintenance of wildlife and to study methods of abating pollution with a view toward use of the investigation results by agencies, groups and individuals.

FOOTNOTES - PART VII

1. 16 U.S.C. § 665 (1974).

APPENDIX I

Environmental Quality - 1976.

Seventh Annual Report of the Council on Environmental Quality.

TABLE I-14. Spills in U.S. waters: 1971-1975 (Source: U.S. Coast Guard)

Spills, by category[a]	Number of incidents					Total volume, million gallons				
	1971	1972	1973	1974	1975	1971	1972	1973	1974	1975
Type of location										
Inland waters	631	682	1,722	2,815	1,995	1,409.8	2.270	7,117	8.924	6,884
Coastal waters	7,201	7,441	9,871	9,503	6,622	6,720	14.277	15,490	6,799.8	6.993
Open waters (Great Lakes or territorial seas)	315	423	571	251	1,020	37	24	419	108	3,364
Contiguous zone (from 3 to 12 miles from coastline)	396	801	483	164	133	651	34	1,218.8	24	4
High seas	193	583	681	1,233	778	20	2,197	68.9	52	6,879
Type of pollutant										
Light oil[b]	4,320	4,290	4,104	2,657	2,677	2,822	6,578	6,415	3,181	7,185
Heavy oil[c]	1,603	2,049	2,851	5,084	2,698	2,934	1,761	4,538	12,754.8	9,565
Solvent	(d)	(d)	49	44	45	(d)	(d)	32	33	10
Waste oil	930	890	1,003	1,094	958	164	8,067	1,211	111.9	3,483.8
Other oil	462	1,151	2,976	2,774	2,414	2,673	357	2 650	728	421
Other materials (including sewage, refuse, etc.)	269	428	774	470	552	115	2,025	8,339	1,193	3,437
Unknown	945	1,123	1,551	1,843	1,194	89	15	1,128	56.8	23.8
Source										
Vessels	2,134	2,493	3,550	3,726	2,804					
Dry cargo vessels	271	402	353	377	294	418	42	650	90.9	2
Tank ships[e]	386	453	825	973	546	1,665	2,583.9	4,494	1,434	7,637
Tank barges	828	830	718	833	679	1,197.8	3,739	1,572	2,468	3,472
Combatant vessels	261	294	246	278	208	440.8	40.9	17.9	39	17
Other vessels	388	494	1,408	1,265	1,082	180	96	1,184	253	1,322
Land vehicles	77	145	305	373	312	101	172	741	7.885	1,105
Nontransportation-related facilities, refineries	188	185	214	155	2,509	2,206	42	166	772	4,268
Pipelines	(e)	216	559	557	534	(e)	1,237	1,847	6,205	2,416
Other transportation facilities	22	48	162	3,489	174	159.9	13	151	2.695	219
All other onshore and offshore facilities[f]	3,723	3,804	3,904	799	402	2,158	10,483	6.479	1.567	122.8
Miscellaneous and unknown	2.592	3.040	4,634	4,867	3.803	310	354[g]	7.009	603	3.524
Cause										
Casualty (includes collision, grounding, and blowouts)	124	360	2,793	952	147	2,045	4.082	16.068	4,861	5,874
Rupture, leak, or structural failure	2,757	2,201		2,352	1.018	2.715	4.823[h]		7,234.9	11,486
Equipment failure (valves, pumps)	947	1,542	1,872	2,103	2,502	274	293	800	1,100	1,843
Personnel failure	829	1,287	2,204	2,707	1,865	1,035.9	940	1,127.8	3.544	962
Deliberate discharges	359	457	599	316	473	50	69	2,176	292	192
Natural phenomena	94	257	354	380	345	5.8	8,045.9	2,051	241	172
Unknown	3,536	3,827	5,506	5,206	4,078	712	551	2,090	858	3,573.9
Total spills reported	13,966	9,931	13,328	13,966	10,538	6,839	18,085	24,314 9	16,916	24,126

[a]The U S Coast Guard has no reason to believe that the number of discharges in 1973 was any greater than in 1971 or 1972 The increase in the number reported probably reflected public awareness of the legal requirement to report discharges.

[b]Data for 1971, 1972 include gasoline, light fuel oil, kerosene, and light crude; 1973 data include crude oil, gasoline, and other distillate fuel oil.

[c]Data for 1971, 1972 include diesel oil, heating oil, heavy fuel oil, heavy crude, and asphalt; 1973 data include diesel oil, asphalt, and residual fuel oil.

[d]Data for 1973 added the category of solvents, previously included under several other categories.

[e]Pipeline data for 1971 are included under other categories.

[f]Changes in 1973 "sources" categories make it necessary to combine some onshore and offshore production, storage, and transfer facilities in order to compare data to those for 1971 and 1972.

[g]Changes in 1973 "cause" categories make it necessary to combine the categories of "casualty" and "rupture, leak, or structural failure."

[h]Includes one 6-million-gallon sewage spill.

APPENDIX II

Hearings before a Subcommittee of the Committee on Government Operations, H.R. Report, 95th Cong., First Session (1977).

Summary of Fines and Penalties Assessed and Collected
U.S. Coast Guard
Fiscal years 1971 - 1976

Fiscal year	Net fines and penalties assessed			Fines penalties collected			Percent of assessments collected	
	Number	Amount	Average	Number	Amount	Average	Number	Amount
1971	2	$ 275	$ 138	2	$ 275	$ 138	100%	100%
1972	223	71,274	320	215	71,024	330	96	100
1973	1,779	1,164,043	654	1,520	913,853	601	85	79
1974	4,220	2,883,676	683	3,776	2,195,221	581	89	76
1975	5,012	2,795,014	558	4,092	1,970,769	482	82	71
1976	6,257	3,222,744	515	5,276	$2,160,938	410	84	67
Total	17,493	$10,137,026	$ 579	14,879	$7,312,080	$ 491	85	72