

MARINE POLLUTION – CERCLA

A. Carter Mills, IV

Montgomery Barnett Brown Read Hammond & Mintz, New Orleans

Beyond imposing liability upon the owners and operators of land-based facilities and hazardous substance disposal businesses, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C.A. §§ 9601-9675, imposes liability upon the owner and operator of a vessel from which there is a release or a threatened release of a hazardous substance to pay certain costs of removal, response and remedial action.

The Federal Water Pollution Control Act (FWPCA or Clean Water Act), 33 U.S.C.A. §§ 1251-1387 (first enacted as the Water Quality Improvement Act of 1970), also governs discharges of hazardous substance, but when CERCLA was enacted in 1980, it broadened the categories of hazardous substances that are covered. Moreover, where it applies, CERCLA supercedes the Clean Water Act. *See* 42 U.S.C.A. § 9607(a).

Although the term “hazardous substance” is defined broadly by CERCLA, 42 U.S.C.A. § 9601(14), “The term does not include petroleum, including crude oil or any fraction thereof which is not specifically listed or designated as a hazardous substance under [the statute sections incorporated by reference into the CERCLA definition of “hazardous substance”], and the term does not include natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).” The Oil Pollution Act of 1990 (OPA), 33 U.S.C.A. §§ 2701-2761, specifically covers these petroleum substances that were excluded from coverage by CERCLA.

Whereas the Clean Water Act and OPA cover “discharges” that are “into or upon the navigable waters” of the United States “or adjoining shorelines,” CERCLA more broadly covers

“releases” that are “into the environment.”

OPA was largely modeled after the Clean Water Act and CERCLA. Thus, like OPA, CERCLA contains strict reporting requirements, provisions for assessing both civil and criminal penalties, liability also for natural resource damages and assessment, limited defenses to liability, a requirement for maintenance of evidence of financial responsibility, and a limitation of liability based upon the size and purpose of the releasing vessel that can be lost and voided if the vessel owner or operator fails or refuses to cooperate with government officials conducting response activities, or if the release results from willful misconduct or is primarily caused by violation of applicable safety, construction, or operating standards or regulations.

CERCLA imposes strict liability, and the only defenses are where the release or threatened release of a hazardous substances and the resulting damages were caused *solely* by an act of God, an act of war, or an act or omission of a third party that does not occur in connection with a contractual relationship between the third party and the vessel owner or operator. Even where the release is caused solely by a third party with which it has no contractual relationship, the responsible vessel owner or operator must prove that he exercised due care and that he took precautions against the foreseeable acts or omissions of any such third party. Nevertheless, where costs of removal or remedial action are claimed by any third person (other than the government of the United States or a State or an Indian tribe), liability is only for “necessary costs of response ... consistent with the national contingency plan.”

For additional information concerning CERCLA, see:

- Charles B. Anderson and Marisa Marinelli, *CERCLA and the Carriage of Dangerous Goods and Hazardous Substances*, 21 Tul. Mar. L.J. 501 (1997).
- J.T. Smith, II, *Natural Resource Damages Under CERCLA and OPA: Some*

Basics for Maritime Operators, 18 Tul. Mar. L.J. 1 (1993).