

MARITIME POLLUTION - OPA 90

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Modern legislation relating to liability for water pollution can be traced to the enactment of the Water Quality Improvement Act of 1970, 33 USC § 1151-1175 and its re-enactment as a component of the Federal Water Pollution Control Act (“FWPCA”) 33 USC § 1251-1376. One of the most important features of that legislation was the adoption of strict liability, which imposes liability without fault on the owners or operators of vessels from which oil or hazardous substances are discharged. Not long after the enactment of the FWPCA, the Comprehensive Environmental Response and Liability Act (“CERCLA”) was enacted which to a great extent replaced the FWPCA with regard to hazardous substances.

As a result of the EXXON VALDEZ oil spill in 1989, Congress enacted sweeping legislation covering liability for discharges of oil and petroleum products in the form of the Oil Pollution Act of 1990 (“OPA 90”). Although OPA 90 was patterned to some extent after CERCLA, OPA 90 is concerned only with oil and petroleum products that are not otherwise defined as hazardous substances under CERCLA.

It should be noted that OPA 90 did not repeal the FWPCA - it only replaced certain provisions of that statute. As a result, the FWPCA remains in force, although liability for the discharge of oil or petroleum products is generally governed by the provisions of OPA 90.

OPA 90 imposes strict liability for oil pollution on the owner or operator of a vessel from which a discharge occurs. OPA 90 greatly expands the scope of damages that are recoverable

from the owner or operator of a vessel which is determined to be responsible for a spill. First and foremost are cleanup and removal costs. In addition, OPA 90 also imposes liability on a responsible party for damages to the environment and for damages incurred by third parties. Third party damages can include claims for loss of profits or earning capacity caused by a spill in addition to direct damages to real or personal property.

OPA 90 amended and extended provisions of the FWPCA that provide for both administrative and civil penalties that may be imposed on the owners and operators of vessels that pollute. Depending upon the nature and extent of the spill and the type of violations involved, these penalties can be substantial.

OPA 90 contains provisions establishing limits of liability, which vary according to the size and type of vessel involved. If a vessel is not a “tank vessel” as defined by the Act, the maximum limit of liability is specified to be \$500,000. However, the \$500,000 limit will not be available if the spill was proximately caused by: a) gross negligence; b) willful misconduct; or, c) violation of a federal safety construction or operating regulation by the responsible party. The \$500,000 limit will also not be available if the responsible party fails or refuses to: a) report an incident; b) provide all reasonable cooperation and assistance in connection with removal activities; or c) complies with an order issued under the Federal Water Pollution Control Act.

The importance of the above-described exceptions to OPA 90's limit of liability cannot be overemphasized because if limitation is not available, the liability of the owner or operator of a discharging vessel will include all provable damages within the categories of damages discussed above.

Although the Act imposes strict liability on the owner or operator of a discharging vessel,

OPA 90 provides for limited defenses to liability. These defenses will absolve the owner or operator of a discharging vessel for all liability arising out of a spill, but they are available only if they are proven to be the “sole cause” of the discharge. The available defenses are: 1) act of God; 2) act of war; or 3) act or omission of a third party not in any contractual relationship with the responsible party.

In the event of a spill or discharge of a reportable quantity of oil or petroleum product, the National Response Center (NRC) must be immediately notified of the spill. Because OPA 90 does not preempt state law, it is also important to note that appropriate state agencies should also be promptly notified when a spill or discharge occurs.

The foregoing is only a brief capsule summary of the important features of OPA 90 and related federal water pollution legislation. Although its provisions can be quite onerous from the perspective of the owner or operator of a discharging vessel involved in a pollution incident, OPA 90 is an important byproduct of the EXXON VALDEZ disaster which has substantially changed the manner in which oil spills in US waters have been handled over the last decade.

For further information about OPA 90 see:

- Lawrence I. Kiern, *Liability, Compensation and Financial Responsibility Under the Oil Pollution Act 1990: A Review of the First Decade*, 24 Tul. Mar. L.J. 481 (2000).
- Robert Force and Jonathan M. Gutoff, *Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus*, 22 Tul. Mar. L.J. 331 (1998).

- Sergio J. Alarcon and Flynn M. Jennings, *Monitoring Costs Under the Oil Pollution Act of 1990: A Blank Check for the Coast Guard?*, 21 Tul. Mar. L.J. 419 (1997).
- Antonio J. Rodriguez and Paul A.C. Jaffe, *The Oil Pollution Act of 1990*, 15 Tul. Mar. L.J. 1 (1990).
- Criston Cicala, Comment, *The Double Hull Requirement of the Oil Pollution Act of 1990: Does It Constitute A Regulatory Taking?*, 24 Tul. Mar. L.J. 877 (2000).
- Timothy Semonoro, Note, *To Be An "Incident" Or Not An "Incident", That Is The Question Under the Oil Pollution Act of 1990: Gatlin Oil Co. v. United States Revisited*, 24 Tul. Mar. L.J. 955 (2000).