

Liability for Oil Pollution



Legal Ease

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The Deepwater Horizon Oil Spill in the Gulf of Mexico, potentially one of the most devastating oil spills in U.S. history, will no doubt cause the government to re-examine the legal and regulatory scheme governing oil pollution in U.S. waters. Until then, we should consider the current legal regime governing civil and criminal liability for oil pollution under U.S. law.

Pursuant to the Oil Pollution Act of 1990 (OPA), "... each responsible party for a vessel or facility from which oil is discharged ... into or upon the navigable waters or adjoining shoreline or exclusive economic zone is liable for the removal costs and damages ... that result from such incident. (See 33 U.S.C. Sec. 2702)

OPA defines "responsible party" as the owner, operator, licensee or permittee of a vessel, onshore facility, offshore facility, deepwater port or pipeline. 33 U.S.C. Sec. 2701 (32). In the case of a vessel, any person owning, operating or demise chartering the vessel will be deemed to be responsible party. Generally speaking, a time or voyage charterer is unlikely to be held as a "responsible party" unless they are operationally involved in the spill incident.

OPA does not prohibit states from enacting their own laws and regulations concerning oil spill liability. As under OPA, state law clearly hold owners of vessels and facilities liable for oil spill clean up costs.

However, these state statutes do not uniformly define who is an owner or operator. For example, Delaware law defines "operator" as "any ... person who is responsible for the operation, manning, victualing and supplying of the vessel." Delaware further defines "operator" as follows: "In the case of a facility, any person responsible for the operation of the facility by agreement with the owner." Del. Stat. Sec. 6202 (10) (a) and (b).

Under Delaware state law, it is conceivable that not only a voyage charterer but a company who supplies food to a vessel could be held liable for oil spill clean up costs and damages.

In addition to identifying those parties who could be potentially held liable for damages arising from oil pollution, OPA requires owners of vessels and facilities to post substantial security, in the form of certificates of financial responsibility (COFRs), to cover possible damages and clean-up costs. Based upon the type of vessel or facility, owners are required to post varying amounts for their respective COFRs.

OPA also established the National Pollution Trust Fund to cover damages not covered by the responsible party.

A responsible party can also be liable for civil and criminal penalties, as well as federal and state costs for the assessment of natural resource damage.

OPA does provide for a complete exoneration of liability but only if the spill was solely due to: Act of God, Act of War, or Act of Third party not in contract with the responsible party.

If the responsible party seeks to avoid liability due to the acts of a third party, the responsible party still must prove that it exercised due care for the oil and that it took precautions against the foreseeable acts of third parties. For example, if a tugboat collided with an oil pipeline, the pipeline owner could nevertheless be on the hook for clean up costs if it could be shown, for example, that the pipeline was not clearly marked a navigational hazard or the pipeline owner took all reasonable steps to direct ship traffic away from the pipeline.

The responsible party's right to limit is lost, in any event, if the oil spill was caused by:

- (1) gross negligence or willful misconduct (33 U.S.C. Sec. 2703(b)); or
 - (2) violation of an applicable Federal safety, construction or operating regulation by the responsible party, employee, agent or contracting party; or
 - (3) failure to promptly report the spill; or
 - (4) failure to reasonably cooperate in the cleanup; or
 - (5) failure to comply with orders or directives of Federal authorities.
- Bottom line, the right to limit liability under OPA is severely restricted.

Criminal investigations of oil spills are the rule, not the exception. Federal prosecutors have a panoply of federal statutes with which to impose criminal liability for oil spills. The following are three common federal statutes for which criminal liability is commonly sought:



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- (1) Refuse Act, 33 U.S.C. Sec. 411: criminal liability for discharging oil in U.S. waters, irrespective of fault or intent;
- (2) Migratory Bird Treaty Act, 16 U.S.C. Sec. 707: criminal liability for discharge of oil which kills migratory birds;
- (3) Clean Water Act, 33 U.S.C. Sec. 1319(c): misdemeanor for negligent discharge of oil.

The foregoing is meant to be a brief review of potential civil and criminal liability that could arise from oil pollution under U.S. law. The Deepwater Horizon Oil Spill will no doubt prompt the government to impose additional penalties arising from oil pollution. You should consult your own legal counsel for a more comprehensive analysis of these issues.

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