

Chapter Eight: Oil Spills, Clean Water Act § 311, and the Oil Pollution Act

I. Introduction

The CWA and the Oil Pollution Act (OPA) include both regulatory and liability provisions that are designed to reduce damage to natural resources from oil spills. Federal laws aimed at preventing and responding to oil spills represent Congress's reaction to dramatic incidents causing environmental damage. Following oil well blowouts and oil spills in the late 1960s, Congress added § 311 to the CWA.¹ Congress then expanded § 311 in 1978 by authorizing the government to recover the value of lost or damaged natural resources from those responsible for a spill. In response to the Exxon Valdez oil spill in Prince William Sound, Alaska, Congress enacted the Oil Pollution Act (OPA) of 1990.² The OPA amended CWA § 311 and contains provisions applicable to onshore facilities and operations, including those on Federal lands.

Section 311, as amended by the OPA, provides for spill prevention requirements, spill reporting obligations, and spill response planning and authorities. It regulates the prevention and response to accidental releases of oil and hazardous substances into navigable waters, on adjoining shorelines, or affecting natural resources belonging to or managed by the United States. Section 311 works in conjunction with the program provided by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for cleaning up hazardous substance spills. CERCLA addresses releases of hazardous substances to all environmental media including water. Therefore, both CERCLA and the CWA come into play when there is a discharge of hazardous substances to waters. Even though CERCLA does not

¹ 33 U.S.C. § 1321.

² Pub. L. No. 101-380 (Aug. 18, 1990).

supersede § 311, releases of hazardous chemicals are more comprehensively addressed under CERCLA, so efforts under § 311 tend to focus primarily on discharges of oil.

A. Agency Jurisdiction

Implementation of CWA § 311 and the OPA is the dual responsibility of the Coast Guard and the EPA. The Coast Guard is primarily responsible for regulations and enforcement related to vessels and marine transportation, whereas the EPA is responsible for non-transportation-related facilities and onshore operations.

B. Waters and Pollutants Covered

CWA § 311 prohibits the discharge of oil into navigable waters, on adjoining shorelines, or affecting natural resource belonging to the United States in such quantities as are determined by the EPA to be harmful.³ “Discharge” is broadly defined as any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of oil or hazardous substances.⁴ “Oil” includes oil of any kind including petroleum, fuel oil, oil refuse, sludge, and oil mixed with wastes other than dredged spoils.⁵ The EPA has determined that a “harmful quantity” of oil is an amount that, when discharged, violates state water quality standards, causes a film or sheen on the surface of the water, or causes a sludge to be deposited beneath the surface.⁶

The scope of CWA § 311 and the OPA is similar to the rest of the CWA (Chapters One and Six). It applies to all waters that are navigable in-fact, non-navigable tributaries, and adjoining wetlands. These provisions also apply to discharges into or on the waters of the

³ 33 U.S.C. § 1321(b)(3).

⁴ 33 U.S.C. § 1321(a)(2).

⁵ *Id.*

⁶ 40 C.F.R. § 110.3.

exclusive economic zone, i.e. the zone contiguous to the territorial sea extending 200 miles from shore.⁷ Natural resources covered by CWA § 311 and the OPA include land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other resources belonging to or managed, held in trust, or otherwise controlled by the United States, and state or local governments, Indian tribes, or foreign governments.⁸

II. Removal Authority

The OPA amended the Federal authority in § 311 to respond to spills. Prior to the OPA, § 311 authorized the President to respond to discharges of oil and hazardous substances, but there was significant latitude for private cleanup efforts by the discharger. The OPA amended § 311 to mandate the President to take action to ensure “effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance.”⁹ The President’s removal authority is primarily carried out through the creation and implementation of facility and response plans.

III. Planning Provisions

CWA § 311 mandates that the President issue regulations establishing procedures, methods, equipment, and other requirements to prevent discharge of oil and hazardous substances from vessels and facilities and to contain such discharges.¹⁰ The EPA has been delegated the authority to regulate non-transportation related onshore facilities, and the Coast

⁷ 33 U.S.C. § 1321 (c)(1)(A).

⁸ 33 U.S.C. § 2701(20).

⁹ 33 USC § 1321(c)(1)(A).

¹⁰ *Id.*

Guard has the authority to regulate tank vessels, transportation-related facilities, and offshore facilities (such as platforms).

Elaborate planning provisions constitute the regulatory components of § 311 and the OPA. These provisions are aimed at correcting organizational difficulties experienced in responding to spills such as that from the Exxon Valdez. However, planning processes sometimes work better in theory than they do in practice. As Glicksman notes, planning may increase readiness prior to a spill, but it may also reduce decision making flexibility at the time of the spill.¹¹

A. Facility Planning: Spill Prevention, Control, and Countermeasure (SPCC) Plans

Non-transportation onshore facilities include those that drill, produce, gather, store, process, refine, transfer, distribute, or consume oil. This includes “any onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters.”¹² These facilities must have a fully prepared and implemented SPCC Plan.¹³

An SPCC Plan must be consistent with the National Contingency Plan (NCP) and with Area Contingency Plans (ACPs) (discussed below) and contain the following information: 1) for a facility that had experienced one or more spills within the past year, a written description of each spill, the corrective action taken, and plans for preventing recurrence; 2) a prediction of the direction, rate of flow, and total quantity of oil that could be discharged where experience indicates a potential for equipment failure; 3) a description of containment and/or diversionary

¹¹ Glicksman, Robert. Pollution on the Federal Lands II: Water Pollution Law. 12 UCLA J. Envtl. L. and Pol’y 61. 1993.

¹² 33 U.S.C. § 1321(j)(5)(B)(iii).

¹³ 40 C.F.R. § 112.3(b).

structures or equipment to prevent discharged oil from reaching navigable waters; 4) when it is determined that containment and/or diversionary structures are not practicable, a demonstration of the impracticability accompanied by a practical oil spill contingency plan and a written commitment of personnel, equipment, and materials to quickly control and remove spilled oil; and 5) a complete discussion of the spill prevention and control measures applicable in the regulations to the type of facility and/or its operations.¹⁴

SPCC Plans can be amended either upon order of the EPA Regional Administrator or based upon review by the owner or operator of the facility. The plans are required to be reviewed by the facility owner or operator at least once every three years or when there is a change in the facility's design or operation.¹⁵

B. Response Planning: National Contingency Plan (NCP) and Area Contingency Plans (ACPs)

The OPA revised the contingency planning and response requirements and established greater control at the national level through the National Contingency Plan.

i. National Contingency Plans (NCP)

The NCP is the primary planning vehicle to provide for the efficient, coordinated, and effective response to spills. The NCP has been promulgated by the EPA (40 C.F.R. part 300) and as required by § 311, includes the following:

1. Assignment of duties and responsibilities among Federal departments for water pollution control and conservation and trusteeship of natural resources;
2. Provision for the identification, procurement, maintenance, and storage of response equipment and supplies;
3. Establishment of Coast Guard spill response strike teams;

¹⁴ 40 C.F.R. § 112.7.

¹⁵ 40 C.F.R. § 112.5.

4. A system of surveillance and notice to safeguard against discharges or imminent threats of discharges of oil and hazardous substances and to ensure earliest possible notice for response;
5. Procedures and techniques to employ in identifying, containing, dispersing, and removing oil and hazardous substances;
6. A schedule that identifies dispersants and other chemicals that may be used to respond to oil and hazardous substance discharges, and the waters where they may be used;
7. A system whereby an affected state or states may act to remove a discharge of oil or a hazardous substance and how the state(s) may be reimbursed for the reasonable costs of such removal from the Oil Spill Liability Trust Fund;
8. Criteria and procedures to respond immediately and effectively to discharges or threats of discharges that pose a substantial threat to the public health or welfare;
9. Procedures and standards for removing a worst-case discharge of oil, and for mitigating or preventing a substantial threat of such a discharge;
10. Procedures for coordinating response actions among the various Federal response entities; and
11. A fish and wildlife response plan for the protection, rescue, and rehabilitation of fish and wildlife resources and their habitat.¹⁶

ii. Area Contingency Plans (ACP)

Area committees designated by the President to work with state and local officials must prepare Area Contingency Plans (ACPs) to enhance contingency planning and joint response and mitigation efforts. ACPs supplement the NCP by including more specific resource and response information for the specific area covered. Each ACP must include a list of requirements, including development of adequate means of dealing with a “worst-case” discharge and a description of areas of special economic or environmental importance, which a discharge might damage.¹⁷

IV. Liability Under CWA § 311 and the OPA

CWA § 311, as amended by the OPA, imposes strict, joint and several liability on any party that is responsible for an oil spill or the substantial threat of an oil spill in quantities that

¹⁶ 33 U.S.C. § 1321(d)(2).

¹⁷ 33 U.S.C. § 1321(j)(4).

may be harmful to public health or the environment. The “environment” includes fish, shellfish, wildlife, public and private property, shorelines, and beaches.¹⁸ Every responsible party is liable for the removal costs and damages that result from the discharge.¹⁹ However, discharges authorized by a permit issued under Federal, state, or local law, and discharges from an onshore facility subject to the Trans-Alaska Pipeline Authorization Act are not liable under the OPA.

Defenses to liability are limited to proof that the discharge was caused solely by an act of God, an act of war, an act or omission of a third party, or any combination.²⁰ These defenses are unavailable to a party who 1) fails to report a spill as required by law; 2) fails to cooperate reasonably with officials responsible for removal activities; or 3) fails, without sufficient cause, to comply with a cleanup order.²¹

A. Liability for Removal Costs

Responsible parties are liable under CWA § 311 and the OPA for removal costs incurred by the United States, a state, or an Indian tribe.²² Removal costs include the costs of removing an oil spill that has already occurred, as well as the costs of preventing, minimizing, or mitigating pollution from a threatened discharge. Liability also extends to costs incurred by any private party for removal in a manner consistent with the NCP.²³

¹⁸ 33 U.S.C. § 1321(b)(4).

¹⁹ 33 U.S.C. § 2702(a).

²⁰ 33 U.S.C. § 2703(a).

²¹ 33 U.S.C. § 2703(c).

²² 33 U.S.C. § 2702(b)(1).

²³ 33 U.S.C. § 2702(b)(1)(B).

B. Liability for Damages: Natural Resource Damage

The OPA and CWA § 311 impose liability on responsible parties for damages. Any public or private plaintiff may sue to recover damages to real and personal property and loss of profits or earning capacity.²⁴ Most relevant to the BLM is that Federal, state, or local governmental entities may sue for lost taxes or other revenues and for increased costs of public services resulting from an oil spill;²⁵ and trustees of the Federal government or Indian tribes may sue for damages for injury to, or destruction of natural resources, including the costs of assessing the damage.²⁶ As mentioned above, natural resources are defined as land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other resources belonging to or managed, held in trust, or otherwise controlled by the United States, and state and local governments, Indian tribes, or foreign governments.²⁷

The OPA requires the Federal, state, and tribal governments to designate officials as trustees of natural resources.²⁸ If these natural resources are damaged by oil spills covered by the OPA, the trustee is authorized to assess the damages and develop a plan for the restoration, rehabilitation, or replacement of the resources.²⁹ The trustee must assess damages in accordance with specific regulations.³⁰ The trustee may seek to recover natural resource damages either by bringing suit in Federal district court against responsible parties, or by making a claim on the Oil Spill Liability Trust Fund. The amount of natural resource damages to which the trustee will be entitled is the sum of the costs of restoring, rehabilitating, replacing, or acquiring the equivalent

²⁴ 33 U.S.C. § 2702(b)(2)(B), (E).

²⁵ 33 U.S.C. § 2702(b)(2)(D), (F).

²⁶ 33 U.S.C. § 2702(b)(2)(A).

²⁷ 33 U.S.C. § 2701(20).

²⁸ 33 U.S.C. § 2706(b).

²⁹ 33 U.S.C. § 2706(c).

³⁰ NOAA issued these regulations in 1996. 15 C.F.R. §§ 990.10-990.66. These regulations provide that natural resource trustees can consider both “active-use” and “passive-use” losses in assessing natural resource damages. Active use is the loss of actual use of the resource while passive use is the loss suffered by those who have never used or intended to use the resource, but value its availability.

of the damaged resources; the diminution in value of those natural resources pending restoration; and the reasonable cost of assessing those damages.³¹

C. Oil Spill Liability Trust Fund

The OPA establishes an Oil Spill Liability Trust Fund that is financed by a tax on crude oil and petroleum products. This fund may be used to pay the following: 1) removal costs incurred by Federal or state authorities consistent with the NCP; 2) costs incurred by trustees to assess natural resource damages and develop and implement restoration plans; 3) reasonable Federal administrative costs to implement and enforce the OPA; and 4) claims for uncompensated removal costs incurred in a manner consistent with the NCP or for uncompensated damages.³²

³¹ 33 U.S.C. § 2706(d).

³² 33 U.S.C. § 2712(a).