Spilling Oil May Be Hazardous to Your Wealth

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The federal government, pursuant to Section 1321 of the Federal Water Pollution Control Act Amendments of 1972, has comprehensive powers regarding the discharge of oil and other hazardous substances. Penalties and clean up expenses are provided for in detail. A cooperative federal attitude is expressed in the statute to encourage state participation in oil discharge cleanup and prevention.

INTRODUCTION

The United States is dependent upon oil more than any other natural resource. But during the process of extraction and in the course of distribution, oil and its products are exposed to various hazards, potentially causing accidental discharges. Landmark accidents involving oil development or transportation include the Torrey Canyon disaster, the Santa Barbara oil spill, and the San Francisco oil spill of 1971. An estimated 10,000 spills of oil and other hazardous substances annually pollute the navigable waters of the United States. The problem is most acute in the coastal regions where massive long term devastation can be the most damaging, although inland regions have also been the victims of oil spills. Though oil may be spilled, it may also be cleaned up as technology has been developed to deal effectively with the problem. These techniques are costly and are not totally environmentally effective.

In order to deal more effectively with the constant threat of oil pollution in the waters of the United States, the Secretary of the

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1. With domestic supplies diminishing, it follows that the United States as well as other industrialized nations will depend primarily on foreign oil sources resulting in increased oil transport, W. MARX, OILSPILL 14 (1971).
5. 1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW, §3.01, 3-15 (Bender 1973).
7. Id.
Interior in 1969 recommended to the President that legislation be drafted to meet this national problem.\(^8\) Oil pollution control legislation is not, however, a product of recent times. The first statute judicially interpreted as dealing with oil discharges was the Refuse Act of 1899 (Refuse Act)\(^9\) which defined "refuse" to include oil. The Oil Pollution Act of 1924 (1924 Act)\(^10\) specifically dealt with oil discharges of vessels and was enacted to protect coastal waters. Congress next passed the 1948 Water Pollution Control Act;\(^11\) and in 1965 it enacted the Water Quality Act which established water quality standards for interstate waters.\(^12\) The Clean Water Restoration Act of 1966 (1966 Act)\(^13\) amended the 1924 Act. The 1966 Act was superseded by the Water Quality Improvement Act of 1970 (1970 Act);\(^14\) an even more comprehensive statute. The 1970 Act, as amended by the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA),\(^15\) in particular section 1321,\(^16\) which deals with oil and hazardous substance discharge liability, is the subject matter of this comment.\(^17\) The FWPCAA adopts the same measure of damages as the 1924 Act; however, the defenses are more limited, reflecting a strict liability standard rather than a negligence standard.

8. Id. at 62.
13. Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (codified at 33 U.S.C. \$431-437, 466a, 466c-1 to 466g, 466j, 466l-466n (1966)).
15. Unless otherwise noted, all citations in the text are to section numbers (primarily \$1321) of the session law, Federal Water Pollution Control Act amendments of 1972. Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. \$1251 (Supp. II 1972)).
16. Id. \$1321, as amended by, Pub. L. No. 93-207 \$1, 87 Stat. 906 (1973); Pub. L. No. 95-217, \$2, 4-72, 91 Stat. 1566-1609 (1977). Extensive legislative history as it relates specifically to this section is sparse and ambiguous and, therefore, will not be referenced exhaustively. For a complete legislative history of the FWPCAA see Committee on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972 (2 vol. 1973).
17. This comment will not address the myriad of causes of action based upon admiralty jurisdiction and the common law theories of liability which may arise subsequent to an oil discharge, such as: nuisance, unseaworthiness, negligence, trespass, etc.; nor will the case law be discussed regarding the applicability of other federal statutes such as the Refuse Act of 1899. For a helpful, short outline of these additional theories of liability, see T. POST, PRIVATE COMPENSATION FOR INJURIES SUSTAINED BY THE DISCHARGE OF OIL FROM VESSELS ON THE NAVIGABLE WATERS OF THE UNITED STATES, 23 (1972).
In reaffirming the objective contemplated by the Refuse Act, Congress in enacting the FWPCA stated that "without a clearly set goal of natural water quality achieved through application of a no-discharge policy, it is not likely that resources will be applied to develop the means necessary to achieve an environmentally and ecologically sound water quality goal." The objective of the FWPCA is to restore and maintain the natural, chemical, physical, and biological integrity of the Nation's waters. In its legislative proviso, Congress stated that "it is the policy of the United States that there should be no discharge 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." The FWPCA also visualizes a goal of the elimination of all polluting discharges by 1985. As Congress conceived it, the purpose of this federal legislation is to prevent harmful spills and minimize the damage caused by such spills.

MAJOR PENALTY PROVISIONS

Section 1321 of the FWPCA (Section) is physically divided into eighteen subsections which are assembled primarily to effectuate the efficient, effective cleanup of oil and hazardous substances and, secondarily, to provide a systematic framework for penalty imposition. The primary emphasis of this paper is placed upon subsections (b), (c), (f), (i), and (o), and their interconnections with each other and the seemingly minor subsections.

Subsection (b) outlines not only the Section's declaration of policy, but also provides a mechanism for the designation of hazardous substances, assesses penalties upon a finding of non-removeability, assesses liability for the discharge of oil or hazardous substances in harmful quantities, provides for the designation of harmful quantities, provides for prompt notification procedures with criminal sanctions, and provides a civil penalty subject to compromise by the Coast Guard. Unquestionably, this subsection is the

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20. Id. §1321(b)(1).
foundation upon which federal oil pollution cleanup liability is built. It does not, however, proscribe who shall be liable for cleanup responsibility and expenses. Subsequent provisions provide for these responsibilities. This subsection has been the most proficiently litigated subsection of all the subsections combined.

The vital issues addressed by this subsection may be summarized as follows: it provides for the penalties to be assessed if it is found that certain elements and compounds designated as hazardous substances cannot be removed from water; it establishes the discharge levels for oil and hazardous substances in harmful quantities; it establishes whose responsibility it is for notifying the appropriate agency of a harmful discharge; and it delimits the civil penalty provisions of the subsection.

The Section provides for liability not only for the discharge of oil based substances but also for the discharge of non-oil based substances. Since oil based or similarly chemically structured compounds do not mix with water, and therefore can be removed from water if done expeditiously, provision had to be made to account for those substances that would be impossible to remove from water.

The Section directs the Administrator of the Environmental Protection Agency (Administrator) to determine which hazardous substances can be removed. A discharge of non-removable hazardous substances will result in liability pursuant to a two-tier penalty provision, subject to any appropriate defenses. These penalties are totally discretionary with the Administrator. The first penalty alternative is based upon a finding of toxicity, degradability and dispersal characteristics of the hazardous substance. The second alternative is quantitatively determined pursuant to a unit figuration. This

25. Id. § 1321(c), (f), (g), and (i).
26. Id. § 1321(b)(2)(B)(ii) and (iii).
27. Id. § 1321(b)(3).
28. The Coast Guard is treated throughout as the “appropriate agency.” The section has sometimes directly authorized the Coast Guard or the Secretary of the Department which includes the Coast Guard to carry out its provisions. At other times the statute has delegated to the President who has delegated to the Coast Guard. See, e.g., Executive Order No. 11735, 38 F.R. 21243 (1973); 33 U.S.C. § 1321 (1978).
30. Id. § 1321(b)(6).
31. Id. § 1321(b)(2)(A).
32. Id. § 1321(b)(2)(B).
33. Id. § 1321(b)(2)(B)(i).
34. Id. § 1321(b)(2)(B)(ii).
35. Id. § 1321(f). Defenses are enumerated within this subsection.
36. Id. § 1321(b)(2)(B)(iii)(aa). Under this alternative, the bottom line penalty is $500 with a $5000 ceiling.
37. Id. § 1321(b)(2)(B)(iii)(bb). Pursuant to this alternative there is no minimum penalty, yet the maximum bounds are $5,000,000 for vessel discharges and $500,000 for offshore and onshore discharges.
figuration simply directs the Administrator to establish by regulation dollar values per each unit of hazardous substance, based upon trade practices, guided by considerations of toxicity, degradability and dispersal characteristics of the hazardous substance.\textsuperscript{38}

Though non-renewable substances are not subject to any removal remedy recoverable by the federal government, action may be taken to mitigate damage to the public health and welfare, the cost of which will be designated a recoverable cost.\textsuperscript{39} It has not been specified just what type of discretionary action the federal government may initiate. Presumably this would include legal action with equitable remedies.

The Section provides a measuring stick for the imposition of liability where oil and hazardous substances which are removable are discharged. The concept of "harmful quantities,"\textsuperscript{40} as determined by the President,\textsuperscript{41} is a key provision in the Section. Basically, the discharge of "harmful quantities" of oil or hazardous substances are prohibited except where the discharges occur on the high seas or pursuant to other specific exemptions.\textsuperscript{42} The entire regulatory structure of the FWPCA\textsuperscript{A} hinges upon the term "harmful quantities," as determined by the President. The President has determined that discharges of oil which cause "a film or sheen upon or discoloration of the surface of the water" are determined to be harmful.\textsuperscript{43} Congress could have prohibited all oil spills in the waters of the United States.\textsuperscript{44} But the congressional conference committee compromised on the "harmful quantity" test.\textsuperscript{45}

The validity of the "sheen test" has been questioned but upheld in the federal courts.\textsuperscript{46} These decisions are based upon the Ninth Circuit's decision in \textit{United States v. Boyd}.\textsuperscript{47} In that case, a crewman was refueling a vessel when the fuel hose was accidentally knocked

\textsuperscript{38} Id. §1321(b)(2)(B)(iv). The dollar value fixed per unit must not be less than $100 or more than $1000.

\textsuperscript{39} Id. §1321(b)(2)(B)(v) (1978).

\textsuperscript{40} Id. §1321(b)(3).

\textsuperscript{41} Id. §1321(b)(4).

\textsuperscript{42} See generally F. CHARTER, T. SUTHERLAND & R. PONICELLI, QUANTITATIVE ESTIMATES ON PETROLEUM TO THE OCEANS (1973), where it is estimated that each year operational discharges account for 1,370,000 tons of oil, while vessel accidents account for about 350,000 tons.

\textsuperscript{43} 40 C.F.R. §110.3 (1977).


\textsuperscript{45} Id. at 2722-2733.


\textsuperscript{47} 491 F.2d 1163 (9th Cir. 1973).
out of place and approximately thirty gallons of oil were discharged into the water. This discharge caused a noticeable sheen upon the surface of the water. In the prosecution for failure to report a known oil spill occurring in “harmful quantities,” the court agreed with the defendant that not all oil discharges are harmful. It established a class of de minimus discharges to which the sanctions of the Section do not apply. The court refused to take judicial notice as to the effect of de minimus oil spills. It also rejected the defendant’s argument that the “sheen test” sacrifices congressional intent for ease of application and workability. The court concluded that as a practical matter it was the most appropriate test available and that ease of administration is not an impermissible factor in the determination of whether the test should be applied. In considering the reporting requirement, coupled with the “sheen test,” the defendant’s Fifth Amendment substantive due process argument which relied on the “void for vagueness” approach, was rejected by the court. In rejecting this claim, the court found that the duty to report an oil spill which depends upon one’s perception of a sheen is anything but vague.

Although the Ninth Circuit accepted the workable standard fixed by the President, the presumption of harmfulness of an oil spill which causes a sheen is rebuttable. In United States v. Chevron Oil Co., approximately one-half to one barrel of crude oil was spilled from Chevron’s off-shore gas producing structure located in Louisiana. Relying upon the testimony of an expert biologist in marine life, who testified as to the effects of oil upon marine life, Chevron established that the oil spill involved was not harmful.

49. 491 F.2d at 1167 (9th Cir. 1973).
50. It is quite apparent an expert witness will have to be called in order to prove the non-harmful nature of an oil discharge which produces the regulatory sheen. Courts will not take judicial notice of the non-harmful effects of small quantities of oil, see United States v. Boyd, 491 F.2d 1163 (9th Cir. 1973).
51. Id. at 1168.
52. The reporting requirement at that time was embodied within 33 U.S.C. §1161(b)(4) (1970). Presently, the requirement may be found at 33 U.S.C. §1321(b)(5) (1978).
53. U.S. CONST. amend. V.
54. 491 F.2d at 1169 (9th Cir. 1973).
55. The sheen test’s presumption of harmfulness is probably only rebuttable pursuant to 33 U.S.C. §1321(b)(6) (1978) and not pursuant to the penalty provision for failure to notify the “appropriate agency” of a known oil spill pursuant to 33 U.S.C. §1321(b)(5) (1978). See United States v. Chevron Oil Co., infra note 71, at 1364, n. 12.
56. 583 F.2d 1357 (5th Cir. 1978).
57. Id. at 1360. Defendant’s expert established that toxicity of oil is a function of its quantity and concentration and a sheen does not show quantity or concentration. It should also be noted that defendant’s evidence was uncontradicted, since the government did not produce any evidence at the hearing.
other words, the defendant proved that although the spill resulted in a visible sheen upon the water’s surface, the spill was not “harmful.” The court rationalized its adoption of this conclusion by claiming that the “sheen test” exceeded “the scope of congressionally delegated authority.”

Essentially, the Chevron case requires that at the hearing the discharger must be permitted to offer proof that the oil spill was de minimus. This is not to say that an oil spill that is cleaned up is de minimus in reference to the penalty provisions of the FWPCA. The determination of the non-harmful nature of the spill is fixed at the time of the spill.

In summary, the water pollution liability standard is expressed in the “harmful quantity” provision and specifically applied in the regulatory “sheen test.” This “sheen test” creates a rebuttable presumption that an oil spill is harmful. Hence, the basic standards are easily articulated in terms of subsequent enforcement provisions.

Section 1321(b)(5) creates a duty on behalf of any person in charge of vessel, or onshore or offshore facilities to immediately report any knowledge of a discharge of oil or hazardous substances to the appropriate agency. This subsection also provides for a criminal sanction applicable to a person in charge who fails to immediately notify the appropriate government agency of a discharge.

Any information obtained from such a statutorily required notification may not be used against the person in charge in any criminal proceeding. 

58. Id. at 1363. Yet the court did not strike down the regulation since it found the test workable and based upon scientific concepts of what quantities of oil spilled are harmful.


60. 583 F.2d at 1363 (5th Cir. 1978). The court specifically noted that its determination that the “sheen test” creates a rebuttable presumption regarding the harmfulness of an oil spill is specifically limited to its consideration of §1321(b)(6) and has no application regarding the reporting requirements of §1321(b)(5) which may very well create an irrebuttable presumption of harmfulness; since, the creation of a rebuttable presumption would hamper the expeditious cleanup of any oil discharge.


62. Though the standards regarding the mechanical “sheen test” are capable of simple application, one would hazard a guess that tracing a sheen to a particular discharger could be difficult; this has simply not been a problem. Aside from the obvious circumstantial evidence which might be utilized to identify the culprit, products identification has been as easy as fingerprinting, Puerto Rico v. S. S. Zoe Colocotroni, 456 F. Supp. 1327 (P.R. 1978) (recognizing gas liquid chromatography, spectography, and atomic absorption spectrophotometry); United States v. Slade, Inc., 447 F. Supp. 638 (E.D. Tex. 1978) (recognizing gas liquid chromatography).

63. Hereinafter, “vessels, onshore or offshore facilities” shall be collectively referred to as “dischargers.”

64. The penalty cannot result in imprisonment of more than one year and more than a $10,000 fine.
case, save a prosecution for perjury. This provision essentially creates a "use immunity" for dischargers who notify the appropriate government agency.

The parameters of the reporting requirement cannot be appreciated without discussion of the term "person in charge." The definitional subsection specifically defines "person" as an individual, firm, corporation, association, or a partnership. Despite this straightforward definition, at least one defendant has argued that "person" is not probative of the meaning of "person in charge." The argument was simply discounted by the court hearing the case, since the statute makes no such distinction. Therefore, a corporation is a "person in charge" when it fails to comply with the reporting requirements.

"Persons in charge" does not refer to everybody who participates in the act of discharge. The legislative history of the Section indicates that Congress intended the person who is responsible for reporting a discharge to be the person "operationally responsible for the facility." Therefore, even though a person may be guilty of a discharge in harmful quantities, and liable under the automatic civil penalty provisions, a person will not be liable pursuant to the notification provision unless he is "operationally responsible." Notification must be immediate in order for the "use immunity" provision to be applicable. Bare notice is not enough. Notification must be made to the "appropriate agency," whose meaning has been confused not only by the government but also by dischargers.

Confusion over what is the "appropriate agency" seems to have been cured by the Ninth Circuit's decision in United States v. Kennecott

66. Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir. 1976).
68. United States v. Mackin Constr. Co., 388 F. Supp. 478 (Mass. 1975). A seller of fuel oil over pumped the exact order of the fuel oil ordered, causing the tank to overflow into a nearby tributary. The seller pumper, was held not liable for a failure to report under § 1321(b)(5).
71. Id. § 1321(b)(6).
72. Id. § 1321(b)(5).
75. United States v. Messer Oil Corp., 391 F. Supp. 557 (W.D. Pa. 1975). A criminal prosecution was unsuccessful because neither party knew whether the "appropriate agency" was the Coast Guard or the EPA.
Copper Corp.\textsuperscript{76} The Ninth Circuit defined "appropriate agency" as "any federal agency concerned with water and environmental pollution on navigable waters."\textsuperscript{77} This definition does not appear to be overly broad and seems to be consistent with the goals of the federal water pollution legislation.

Not surprisingly, the scope of the use immunity provision has been the subject of considerable litigation. It has been held consistently that this provision only applies to criminal cases.\textsuperscript{78} It does not provide for immunity from the "civil penalty" provisions,\textsuperscript{79} nor from any of the provisions of the Section.\textsuperscript{80} The object of the Section's "use immunity" provision is the ancient Refuse Act.\textsuperscript{81} Although the provision is not strictly limited to exclude this particular criminal sanction, namely a criminal fine up to $2,500 or imprisonment up to one year or both, it was the only possible criminal liability applicable to dischargers.\textsuperscript{82}

In general, the substantive provisions of §1321(b)(5) have been objectively interpreted. Additionally, it has been the subject of a number of constitutional attacks. In United States v. Boyd,\textsuperscript{83} the Ninth Circuit concluded that the notification requirements coupled with the "sheen test" are not violative of due process of law. A similar due process argument was rejected by the Ninth Circuit in United States v. Kennecott Copper Corp.\textsuperscript{84} The penalty provisions have been strictly construed. Claims that fines are excessive\textsuperscript{85} or that sentencing\textsuperscript{86} is improper have been rejected by other courts. Courts

\textsuperscript{76} 523 F.2d 821 (9th Cir. 1975).
\textsuperscript{77} Id. at 824.
\textsuperscript{80} United States v. Atlantic Richfield Co., 429 F. Supp. 830, 833 (E.D. Pa. 1977). The court stated that "... §1321 has no criminal sanctions (except for the failure to report for which one obviously cannot gain immunity by reporting)."
\textsuperscript{81} See note 10, supra.
\textsuperscript{83} 491 F.2d 1163 (9th Cir. 1973).
\textsuperscript{84} 523 F.2d 821 (9th Cir. 1975).
\textsuperscript{85} United States v. Beatty, Inc., 401 F. Supp. 1040 (W.D. Ky. 1975). The court held that a $2,000 fine for the discharge of 10 to 15 gallons of oil was not excessive.
\textsuperscript{86} United States v. Michalopoulous, Cr. No. 61-73 (P.R. 1978). Capt. Michalopoulous purposely lightened his grounded ship of 1.5 million gallons of crude oil.
have had little problem analyzing the plain and simple parameters of this paragraph.

Section 1321(b)(5) also provides that an automatic civil penalty will be imposed upon a discharger for a *per se* discharge of oil in harmful quantities.\(^7\) Before a valid penalty may be assessed,\(^8\) there must be adequate notice to the alleged discharger and an opportunity for a hearing. The quantitative penalty assessed is also regulated by a three factor analysis of the violation and the violator. In determining the amount of the civil penalty, the Coast Guard *shall* consider the "size of the business," the impact of the penalty on the survival of the business, and the seriousness of the violation.\(^8\)\(^9\)

In essence, the automatic civil penalty provision is a strict liability civil penalty sanction. A substantial penalty may be assessed in the complete absence of fault.\(^9\)\(^0\) This rule was stated most artfully in *United States v. Atlantic Richfield*:

> The discharges [may be] "accidental" or "unintentional," but perforce, they violated the prohibition on discharge of (b)(3); hence, without more, they subjected the owners (defendants) to liability for the civil penalty under (b)(6).\(^9\)\(^1\)

Although "fault" is not an element of the cause of action, it will be a factor in assessing the quantity of the penalty administratively.\(^9\)\(^2\)

The Marathon Pipe Line Co.\(^9\)\(^3\) offered an interesting argument involving this issue to the Seventh Circuit. It argued that a nominal penalty should be assessed pursuant to the strict liability application of this provision, while a substantial penalty should be assessed whenever there is provable negligence. The court rejected this claim, refusing to place qualifications on a clearly written statute.\(^9\)\(^4\)

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\(^8\) There is a $5000 maximum penalty capable of being assessed.
\(^9\) 33 U.S.C. § 1321(b)(6). In determining the amount of the civil penalty, the Coast Guard *shall* consider the "size of the business," the impact of the penalty on the survival of the business, and the seriousness of the violation.


92. *Id.* at 836. The Court points out that the Coast Guard has construed the weighing of the "gravity of the violation" as incorporating considerations of fault.


94. *Id.* A substantially similar argument was also rejected in *United States v. Tex-Tow, Inc.*, No. 78-1656 (7th Cir. Dec. 22, 1978), where the discharger argued that no penalty should be assessed where a discharger was not the *actual* cause of the spill. The court
At least one court has set aside a non-nominal civil penalty when the defendant was not at fault.\footnote{5} In \textit{United States v. General Motors Corp.}, the discharge occurred at defendant's abandoned manufacturing plant and was caused by vandals opening the valves on oil storage tanks needed to keep the plant functional. The oil eventually found its way to a river via a storm sewer. The court did not recognize the defense of no fault, but subsequent to a \textit{de novo} hearing, it found the defendant without fault and assessed a nominal penalty. This case has been criticized by other courts and has not been followed. The power to grant a \textit{de novo} hearing on the reassessment of a penalty imposed by the Coast Guard has been questioned.\footnote{6} It is evident that the non-nominal civil penalty imposed by the Coast Guard in the \textit{General Motors} case\footnote{7} would have been upheld by other courts considering the question. This is so because a number of courts have held that great weight must be afforded to a Coast Guard decision regarding penalty assessment, as long as the assessment is rooted in substantial evidence and is not arbitrary and capricious.\footnote{8}

On only one occasion has the issue of whether the alleged discharger been given sufficient statutory notice and an opportunity for a hearing been addressed. In \textit{United States v. Independent Bulk Transport, Inc.},\footnote{9} the court was concerned that the defendant did not know of certain damaging evidence that was included in the hearing record. The court did not hold that the notice and hearing requirements of the Administrative Procedure Act\footnote{10} were to be met during proceedings pursuant to the FWPCA. But the court did hold that a defendant is entitled to know, address, and be heard on material evidence and any material fact in issue.\footnote{11}

Constitutional questions premised upon the alleged denial of substantive due process under the automatic civil penalty provision have been raised, but not successfully. The claim that the purpose of the civil penalty is to deter oil spills by assessing a substantial civil

\footnotesize{\textit{concluded that the argument suffered from the same defect as in the Marathon case, namely, that it ignored the absolute nature of the civil penalty liability, as well as the penalty's remedial and economic rather than primarily deterrent objectives.}}

\footnotesize{\textit{95. United States v. General Motors Corp., 403 F. Supp. 1151 (Conn. 1975).}}


\footnotesize{\textit{97. 403 F. Supp. 1151 (Conn. 1975).}}


\footnotesize{\textit{100. 5 U.S.C. § § 551-706 (1977).}}

\footnotesize{\textit{101. 394 F. Supp. at 1321 (S.D.N.Y. 1975).}}
penalty in the absence of fault does not meet the due process requirement that legislative means bear "a reasonable relation to a proper legislative purpose and [be] neither arbitrary nor discriminatory" has been rejected.\(^{102}\) The strict liability civil penalty has not only a deterrent purpose but also an economic objective. The economic objective is achieved by shifting the cost of oil and hazardous substance pollution to the economic sector most able to bear it, namely, the corporate water polluter.\(^{103}\) Additionally, the civil penalty provision also serves the function of replenishing the revolving fund\(^{104}\) established by the Section. In the *Atlantic Richfield* case,\(^{105}\) the district court suggested that there may be some instances in which there was neither fault nor third party causation where a discharger will be able to successfully make out a substantive due process claim.\(^{106}\)

It appears that the penalty provisions of the Section have been analyzed and interpreted by the courts in the same clear and simple manner in which they were written. These provisions serve to further the policy and goals found elsewhere in the FWPCA.

### CLEANUP PROVISIONS

The Section provides for government cleanup of disaster spills which create "a substantial threat of a pollution hazard to the public health or welfare of the United States"\(^{107}\) and for other spills which the discharger does not clean up itself.\(^{108}\) This latter governmental duty should not be interpreted as immunizing the discharger from making the federal government whole for the cleanup costs incurred by it.\(^{109}\) To effectuate these functions, the Council on Environ-

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\(^{102}\) This is the constitutional standard articulated in *Nebbia v. New York*, 291 U.S. 502, 537 (1934).


\(^{106}\) In *United States v. Marathon Pipe Line Co.*, No. 78-1453 (7th Cir. Dec. 22, 1978), the court stated that this view was inconsistent with the same case's recognition that the civil penalty also serves the non-deterrent purpose of financing the revolving fund.


\(^{108}\) Id. §1321(e)(1).

\(^{109}\) Puerto Rico v. S. S. Zoe Colocotroni, 456 F. Supp. 1327, 1348 (P.R. 1978). An interpretive analogy might also be drawn from §1321(d), where the costs incurred by the government pursuant to that subsection are fully recoverable as a cost pursuant to §1321(f).
menta 10 is directed to develop a National Contingency Plan pursuant to which the EPA and the Coast Guard are authorized, *inter alia*, to set up detection systems, purchase removal equipment, and train and maintain a strike force.111 Although this plan is required by the Section, a claim against the United States was dismissed when a discharger could not demonstrate specific reliance to support his claim that he reasonably relied upon the plan and suffered greater damages than necessary because of such reliance.112 In addition, the United States Attorney may seek equitable relief when there is an imminent threat of oil pollution.113

Party liability for actual costs of oil or hazardous substance removal is organized within subsection (f) of the Section. The government is entitled to recover the actual expenses incurred in the cleaning up of an oil spill, even if the expenses are not reasonable.114 One court has included within the category of actual expenses an award of pre-judgment interest, computed not as of the date of the casualty, but as of the date of liquidation of damages.115

Subsection (f), utilizing subsection (c) as its cost guide and subsection (b)(3) as its basis for liability, provides that dischargers shall be liable for the actual cleanup costs, absent specific bona fide defenses. These defenses are: (a) an act of God, (b) an act of war, (c) negligence on the part of the federal government, and (d) an act or omission of a third party. These defenses are complete defenses when they are singly or collectively the sole cause of the discharge.

As in *Burgess v. M/V Tamano*,116 a Norwegian supertanker struck

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110. The President delegated his planning authority pursuant to §1321(e)(2) to the Council on Environmental Quality (Executive Order No. 11735, Assignment of Presidential Functions, Sec. 4 (append to §1321)).


112. Burgess v. M/V Tamano, 373 F. Supp. 839, 848 (Me. 1974) (one in a series of five opinions interpreting liabilities pursuant to the predecessor of §1321, for an oil spill in Hussey Sound off Maine’s coast). Defendant’s argument was that by adopting the oil contingency plans, the United States made certain representations as to the availability of cleanup capabilities (e.g., the government failed to have the personnel and equipment necessary in the area of the spill), hence, the United States should be liable for any damages incurred by third parties resulting from the inadequacy of the plans or from any failure to comply with those plans.

113. 33 U.S.C. §1321(e) (1978); *Cf.* United States v. Ira Bushey & Sons, Inc., 161 F. Supp. 110, 120 (Vt. 1973). The court noted that the U.S. Attorney could have proceeded under that subsection, since there had been nine oil spills in the past five years on Lake Champlain involving defendant’s vessels.


116. 564 F.2d 964 (1st Cir. 1977).
a submerged continental ledge off the coast of Maine, discharging 100,000 gallons of heavy oil. The owners of the supertanker charged that the United States caused the accident through the negligent misplacement of a marker buoy. The First Circuit reversed the district court, finding that the buoy was not misplaced.\textsuperscript{117} Therefore, the United States could recover on its counterclaim for cleanup costs.\textsuperscript{118}

Different levels of liability are set for the different types of dischargers.\textsuperscript{119} However, these dollar limitations are not available if the United States can prove that a discharge was caused by the "willful negligence" or "willful misconduct" of the discharger.\textsuperscript{120} Comparable provisions of liability for responsible third parties are also provided for within the Section.\textsuperscript{121}

Subsection (f) also provides for the recovery of the replacement and restoration costs of the natural resources damaged pursuant to a discharge.\textsuperscript{122} The purpose of this provision is an attempt to make the environment whole by providing a device whereby substantial recovery can be obtained to restore every aspect of the environment.

Under certain circumstances, a discharger who can establish one of the complete defenses may recover the cleanup expenses it incurred from the federal government.\textsuperscript{123} There are four separate elements:

\begin{itemize}
  \item \textsuperscript{117} See Complaint of Steuart Transp. Co., 435 F. Supp. 798, 804 (E.D. Va. 1977). The district court held the United States not negligent, since any error in weather forecasting was insufficient to establish negligence.
  \item \textsuperscript{118} Additionally, the defendant unsuccessfully argued that the compulsory pilot aboard the tanker was a third person within the meaning of § 1321(f)(1)(D).
  \item \textsuperscript{119} 33 U.S.C. § 1321(f)(1)(2)(3) (1978). For inland barges a limit of $125 per gross ton, or $250,000, whichever is greater. For onshore and offshore facilities, a $50,000,000 limitation is set. But see 33 U.S.C. § 1321(q) (1978) where the limitation may be less than $50,000,000 but greater than $8,000,000. 33 U.S.C. § 1321(f)(2) (1978) provides for a potentially lesser liability for onshore facilities.
  \item \textsuperscript{120} The terms "willful misconduct" and "willful negligence" have not been defined in the Act. In Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1163 (2nd Cir. 1978), the court found "willful misconduct" where the act was intentionally done with knowledge that the performance would probably result in injury and was done in such a way as to allow an inference of reckless disregard of the probable consequences.
  \item \textsuperscript{121} See 33 U.S.C. § 1321(g) (1978), which provides that the discharger must reimburse the United States for its actual costs incurred in the cleanup, but that the discharger will be subrogated to all of the rights of the United States to recover such costs against the third party.
  \item \textsuperscript{122} Id. § 1321(f)(5). For an excellent analysis of the actual effect of oil upon the environ, see Puerto Rico v. S. S. Zoe Colocotroni, 456 F. Supp. 1327, 1343-1345 (P.R. 1978), where it was proved that 92,109,720 marine animals were killed by the deliberate oil discharge of defendant. The court utilized the lowest replacement cost at .06 per animal and awarded a grand total of $5,526,583.20 for those specific damages.
  \item \textsuperscript{123} 33 U.S.C. § 1321(i) (1978). Note that this subsection provides the only possible liability of the United States under the Section; this subsection does not provide for a private cause of action against the United States premised on a theory of negligence, Burgess v. M/V Tamano, 373 F. Supp. 839, 845 (Me. 1974).
\end{itemize}
necessary for a successful claim pursuant to this provision. They are: (1) a discharge in a harmful quantity from a facility owned by the plaintiff; (2) a discharge not caused by the plaintiff but whose cause is subject to one of the complete defenses; (3) the oil must be removed in accordance with the regulations; and, (4) the plaintiff must have incurred expenses in the removal of the oil. Whether or not a facility is owned or operated by the discharger is a question of line drawing to be decided by a court. "Owner or operator" has been interpreted to include the owner's subrogee. The second element to be established for a successful reimbursement claim involves the ability to prove by a preponderance of the evidence that the discharge was caused solely by one of the aforementioned defenses. The third and the fourth elements are easily established by objective evidence.

The Court of Claims is the exclusive forum chosen by Congress for the recovery of cleanup expenses from the United States pursuant to this provision. This exclusivity of jurisdiction is further supported by another provision which vests the district courts of the United States with jurisdiction for recovery of costs from the federal government. Additionally, the revolving fund established to reimburse parties for their cleanup expenses may only be used to pay judgments rendered pursuant to this provision.

**MISCELLANEOUS PROVISIONS AND ISSUES**

In the federal government’s quest to recover its cleanup expenses, may it couple such an action with alternative theories of

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125. Union Petroleum Corp. v. United States, No. 144-76 (Ct. Cl., Oct. 16, 1978). Plaintiff attempted to recover its cleanup expenses when a railroad tank car it loaded spilled oil at a time when it was off plaintiff's property.
126. Quarles Petroleum Co. v. United States, 551 F.2d 1201, 1207 (Ct. Cl. 1977). The court also held that a bona fide plaintiff need only incur liability for such cleanup costs; he need not actually incur out of pocket expenses.
127. Sabine Towing and Transp. Co. v. United States, No. 44-76 (Ct. Cl. April 27, 1978) (holding that the definition of "Act of God" must be found in the common law); Shell Pipe Line Corp. v. United States, No. 108075 (Ct. Cl. Nov. 25, 1977) (interpreting "solely" to mean "exclusively," thereby foreclosing recovery for cleanup expenses when plaintiffs pipeline split, since a contributing cause was the negligent omission of plaintiff's pipeline inspector); Chicago, M., St. P. and Pac. R.R. v. United States, 575 F.2d 839 (Ct. Cl. 1978) (pursuant to the third party causation defense (vandal variation) a discharger could not recover unless he proves that reasonable actions had been taken to forestall such intervention by a third party).
130. Id. §1321(k).
132. Id. §1321(c)(1).
recovery in order to recover its total cleanup costs? If the phrase "notwithstanding any other provision of law" found in the subsection providing for recovery of cleanup costs incurred modifies the language in the section that establishes liability, rather than establishes a limitation on liability, the federal government may base a claim for cleanup expenses on other statutes or theories. However, this view was not adopted by the court in United States v. Dixie Carriers, Inc. The court held that the FWPCA only provided for full liability for cleanup costs when the discharger was "willfully negligent" or "willfully [in] misconduct." The court stated that to permit supplemental liability pursuant to the theories of the maritime tort of negligence or public nuisance would allow full recovery outside the standards set by the Section for full recovery. This, the court held, would be inconsistent with the FWPCA.

In the same district in an earlier case, the defendant/discharger also argued the inconsistency of allowing additional cleanup reimbursement beyond the statutory limits. The court specifically emphasized that the limitation of liability provisions of subsection (f) only apply to discharges in harmful quantities. It held further that to try and limit liability would contradict this provision, which expressly provides that the United States may present a claim against a contributing third party in a separate action. The court concluded that a cause of action pursuant to the maritime tort of oil pollution and the Refuse Act will supplement any damages to be received for cleanup expenses. This conflict of authority within the same district is a natural consequence of interpreting an ambiguous section which has no specific legislative history. The better view would be to interpret the section as providing for the exclusive action and remedy for cleanup costs. Otherwise, the section would be a meaningless limitation, subject to the loophole of full liability provided judicially.

The pivotal case in the area of federal-state relations regarding the possible federal pre-emption of state law by the FWPCA is Askew v. American Waterways Operators. In this case, the United States

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133. Id. §1321(f)(1) and (3), note that no such phrase is within the second paragraph delineating cleanup liability for a discharging onshore facility; this was apparently not an oversight and is an example of the generally favored position shared by onshore dischargers pursuant to the Section.
137. Id. §1321(h)(2) (1978).
SPILLING OIL

Supreme Court interpreted the substantially similar predecessor to §1321(o). This subsection provides, \textit{inter alia}, that the Section shall not pre-empt any state from imposing any state requirement or state liability with respect to the discharge of oil. In interpreting the constitutionality of this subsection, the Court squarely held that it is within the police power of a state to recoup its cleanup expenses pursuant to state law. The Court further noted that the FWPCA limits neither a state’s causes of action for damages incurred by it nor for damages resulting from the injury to others. States have brought actions based upon their \textit{parens patriae} standing, and private individuals have brought actions based upon a whole host of theories.

The \textit{Askew} ruling reserved the questions of whether the costs a state could recover from a discharger are limited to those specified in the FWPCA and whether the FWPCA removes the pre-existing limitations of liability found in the Limited Liability Act (LLA). In \textit{Complaint of Steuart Transp. Co.}, a barge sank causing a substantial oil spill. The relevant damage claims involved both federal cleanup claims and state cleanup claims, which in the aggregate exceeded the limits established in the FWPCA. Since the negligence of the discharger was within its privity and knowledge, the district court held, the LLA did not apply. However, the court suggested that the LLA will not apply to limit cleanup costs. Yet the court did hold that the FWPCA limitations on liability did not

\begin{footnotesize}
141. 411 U.S. at 332.
142. \textit{Id. Compare} \textit{Matter of Oswego Barge Corp.}, 439 F. Supp. 312, 321 (N.D.N.Y. 1977), where the court held that the state of New York, pursuant to its own internal law, may not recover the costs incurred in cleaning up an oil discharge since this would violate the Supremacy Clause. Similarly, it was held that a state may only recover its compensatory damages incurred as the result of an oil discharge caused by a federal entity. No penalty may be assessed. California v. Department of the Navy, 371 F. Supp. 82 (N.D. Cal. 1973).
143. \textit{Id. Note} 18, \textit{supra}.
145. 411 U.S. at 332.
146. 46 U.S.C. § §181-189 (1958), which provides that an owner of a vessel shall not be liable for damages incurred without his privity or knowledge to an extent greater than the value of the interest in such vessel and its current freight.
\end{footnotesize}
apply to a state claim for oil spill cleanup costs. In other words, a state can recover these costs without limit.\textsuperscript{151} Lastly, the court held that the federal government's claim for cleanup costs is limited only by the FWPCA, regardless of the basis upon which it was made.\textsuperscript{152}

CONCLUSION

The FWPCA, generally, provides a comprehensive schemata of water pollution policy, guidelines, and liabilities. Section 1321 in particular, establishes reasonable limits on liability for oil spills. Although the Section is a clear indication that Congress is committed to protect our nation's waterways, it is not the best enforcement device available for violations of federal water pollution standards. The Refuse Act of 1899 seems to have provided the most numerous and most effective actions in the water pollution control arena.\textsuperscript{153} Contrariwise, only a relative handful of prosecutions have been brought pursuant to the Section.

With greater quantities of oil and its products being transported annually, more prosecutions under the Section are foreseeable. It is necessary for additional case law to develop before any valid generalizations may be made as to the efficacy of Section 1321 of the Federal Water Pollution Control Act Amendments of 1972.

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\textsuperscript{151} Id. Though there is no limit on a state for its recovery of cleanup costs, one court has held where a vessel is involved, that the LLA will limit a state's recovery for environmental claims. Matter of Oswego Barge Corp., 439 F. Supp. 312, 320 (N.D.N.Y. 1977).

\textsuperscript{152} 435 F. Supp. at 808 (E.D. Va. 1977).

\textsuperscript{153} United States v. Rohm & Haas Co., 500 F.2d 167, 171 (5th Cir. 1974).