

## Marine Oil Spill Liabilities

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### I. Introduction

The world's oceans cover nearly 71% of the earth's surface, contain 97% of its water, and produce nearly one-half of its oxygen supply.<sup>3</sup> The oceans also facilitate more than 90% of all U.S. international trade, including the transport of millions of barrels of oil per day.<sup>4</sup> Though these transits typically proceed without issue, the occasional allision, collision, or grounding happens, resulting in an oil spill. This paper outlines the liabilities and environmental consequences associated with marine oil spills, with a particular focus on the Oil Pollution Act of 1990 ("OPA").

In the event of a major oil spill, total damages, response costs, civil and criminal penalties, and other liabilities are unpredictable, but would likely be significant and take years to resolve, as seen following the Deepwater Horizon and Exxon Valdez oil spills. This is partly because marine transportation activities are subject to various federal and state statutory schemes that can impose significant liability and lengthy claims processes, easily resulting in damages of tens to hundreds of millions of dollars. And, although there are limits on liability, responsible parties must prove that they meet the applicable criteria to avail themselves of the limitations, and such limits do not apply across all statutes.

The primary vehicle in the United States for oil spill liability is OPA, but there are a number of other laws that could result in the imposition of liability, such as the Clean Water Act ("CWA"), the National Marine Sanctuaries Act ("NMSA"), the Refuse Act of 1899, the Migratory Bird Treaty Act, the Endangered Species Act, and the Marine Mammal Protection Act. Some coastal states, including Texas and Louisiana, also have oil pollution laws that could result in additional liability.

In addition to liability for response costs and damages, responsible parties can also be liable for large civil and criminal penalties under state and federal statutes, including penalties of up to three times the actual costs of the removal and sizable penalties calculated based on the number of days the violation continues or on the amount of oil discharged. Similarly, third parties would be expected to bring claims of their own, which could be as broad, or broader, than the types of claims available to the government. Aside from economic damages, vessel owners and operators involved in a significant spill would almost likely suffer reputational harm, as bp and Exxon did in Deepwater Horizon and Exxon Valdez.

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<sup>3</sup> NOAA, Global Ocean Monitoring and Observing, available at <https://globalocean.noaa.gov/The-Ocean>.

<sup>4</sup> Bureau of Transportation Statistics, Crude Oil and Petroleum Products Transported in the United States by Mode, available at <https://www.bts.gov/content/crude-oil-and-petroleum-products-transported-united-states-mode>; NOAA, Ports, available at <https://coast.noaa.gov/states/fast-facts/ports.html>.

## **II. Government Response**

The CWA places the federal government in charge of ensuring that spills are timely and adequately cleaned up.<sup>5</sup> The U.S. Coast Guard is the primary federal agency involved in managing clean-up and response efforts. In the aftermath of a large marine oil spill, the Coast Guard will establish a Unified Command to coordinate and manage the government's response to the spill. State agencies and local government officials will generally consult with and provide support to the Coast Guard and other federal government officials during the primary response effort. Even if federal government officials determine that responsible parties have met their clean-up obligations, State agencies or local authorities can require that the clean-up operation be continued to meet state and local requirements.

If the federal government perceives that the responsible parties are not adequately responding to the oil spill, the Coast Guard may take over the clean-up operation and hire commercial contractors to undertake the clean-up at the expense of the responsible parties.<sup>6</sup> The key to implementing an oil spill response is to have an effective plan to mobilize resources timely, and to put the resources to work at the most appropriate locations in order to contain and minimize the oil spill. This requires the utmost cooperation between vessel interests and federal, state and local officials involved in the response efforts. From the very first moments of the reported casualty, it is crucial to gather the pertinent information, on the casualty, confirm its accuracy, and provide a detailed report to government authorities. It is also important to establish a clear line of communication with government authorities, and to gain the trust of the individual officials involved in the management of the oil spill.

For large oil spills (and more frequently those involving collisions or allisions), the Coast Guard may consider the possibility of a criminal referral to the U.S. Department of Justice ("DOJ"). Generally, however, the Coast Guard's position has been to encourage cooperation with clean-up and response efforts, rather than pursue criminal referral. If a criminal investigation does commence, the likely focus of the investigation would be on the master and crew members, and then on the corporate owner, and corporate officers. In view of the potentially severe consequences, individuals who are subject to a federal criminal investigation resulting from a discharge of oil in the United States are advised to secure criminal counsel prior to responding to an investigation concerning their personal involvement.

## **III. Environmental Liabilities**

A complex web of potential liability exists for major oil spills—numerous laws apply a variety of penalties and provide for damages and cost recovery. While the primary vehicle for liability is OPA, liability can arise under many other federal and state laws, as well as common law and contracts.

### **A. Federal Statutes**

Laws that apply liability for a marine oil spill include OPA, CWA, NMSA, the Refuse Act of 1899, the Migratory Bird Treaty Act, the Endangered Species Act, and the Marine Mammal

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<sup>5</sup> See 33 U.S.C. §§ 1251-1387.

<sup>6</sup> 33 U.S.C. § 1321(c).

Protection Act. In addition to liability for response costs and damages, a responsible party may also be liable for large civil and criminal fines and penalties under federal statutes, including penalties of up to three times the actual costs of the removal and sizable penalties calculated based on the number of days the violation continues or the amount of oil discharged.

With the exception of the Refuse Act and the Migratory Bird Treaty Act, criminal liability is imposed under the applicable laws only for violations done knowingly or negligently. Many of the federal statutes, prominently including the CWA, incorporate the responsible corporate officer doctrine, under which a corporate supervisor or officer in an organization may be criminally liable when that supervisor or officer has knowledge of an environmental violation committed by a subordinate.

## **1. OPA**

OPA was designed to impose a comprehensive regulatory scheme on the maritime industry to address liabilities associated with clean-up, removal and other damages in the aftermath of an oil spill in U.S. waters. OPA applies strict joint and several liability<sup>7</sup> to defined categories of responsible parties, including “any person owning, operating, or demise chartering the vessel,” and “also includes the owner of oil being transported in a tank vessel with a single hull.”<sup>8</sup> Strict liability means that the responsible party is liable solely on the basis of its status as one of the listed types of responsible parties regardless of fault or intent to cause the discharge. Joint and several liability means that any responsible party can be liable for the entire amount of damages, not just the share of damages attributable to its involvement.

OPA also imposes a civil penalty that cannot exceed \$25,000 per day of violation for any person found to have violated the statute.<sup>9</sup> However, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 allows for the adjustment of this amount according to inflation.<sup>10</sup> The adjusted maximum penalty as of March 18, 2022, is \$51,796.<sup>11</sup> In addition to being liable for clean-up and removal costs, responsible parties are also liable for spill-related damage to real or personal property; natural resources used for economic activity, such as commercial fishing; and damage to natural resources.

### **a. Natural Resources Damages**

Marine oil spills can have devastating impacts on marine life, the environment, and human uses of the same. Given the breadth of these impacts, natural resource damage claims are often the most significant, complex, and costly environmental claims associated with a spill. The measure of damages under OPA includes the costs of restoring injured resources to their baseline plus compensation for the interim loss of resources from the time of the injury until full recovery. The interim loss component is designed to compensate for the reduction in the public’s enjoyment of

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<sup>7</sup> See e.g., *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 844 F. Supp. 2d 746, 754 (E.D. La. 2012).

<sup>8</sup> 33 U.S.C. § 2701(32) (The definition of “responsible person . . . In the case of a vessel, any person owning, operating, or demise chartering the vessel. In the case of a vessel, the term “responsible party” also includes the owner of oil being transported in a tank vessel with a single hull after December 31, 2010.”)

<sup>9</sup> 33 U.S.C. § 2716a.

<sup>10</sup> 87 Fed. Reg. 15333 (Mar. 18, 2022).

<sup>11</sup> *Id.* at 15334.

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