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Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979),
Cert. granted (Sub nom. United States v. Ward),
48 U.S.L.W. 3385 (Nov. 6, 1979); A Fifth Amendment Problem
in the Enforcement of the Federal Water Pollution Control Act.

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Major Paper
Master of Marine Affairs
April 1980
Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979),
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On March 23, 1975 oil leaked out of an oil retention pit
at a drilling site owned by L. O. Ward. Ward was an Oklahoma
wildcatter and the owner and operator of L. O. Ward Oil and
Gas Operations. The spilled oil ran down a gully and into
Boggie Creek. Boggie Creek is a tributary of the navigable
Arkansas River.²

Two days later an inspector with the Oklahoma State
Department of Health was performing an inspection near Ward's
property when he observed the spill. The inspector testified
at Ward's trial that when he first noticed the Boggie Creek
oil spill on 25 March he was able to see oil floating on the
surface of Boggie Creek. The discharge of oil from Ward's
property therefore amounted to the discharge of a harmful
quantity of oil within the meaning of Section 1321(b)(3) of
the Federal Water Pollution Control Act³ and also a harmful
quantity within the meaning of regulations promulgated by the
Environmental Protection Agency pursuant to its Federal Water
Pollution Control Act authority.

To fully appreciate the implications of the incident de-
scribed above, to understand the significance of the issues
raised in United States v. Ward, the reader must understand
the Federal Water Pollution Control Act (hereinafter FWPCA)
program of oil pollution prevention and clean-up. The FWPCA
establishes a comprehensive statutory regime designed "to re-
store and maintain the chemical, physical, and biological
integrity of the Nation's waters." 33 U.S.C. § 1251(a). As part of this regime, Section 1321 generally prohibits the discharge of oil and hazardous substances into navigable waters in fulfillment of the congressional policy that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States...." 33 U.S.C. § 1321(b)(1).

To achieve this no discharge objective, the heart of the oil pollution section of the FWPCA, Congress prohibited the discharge into navigable waters of the United States or onto adjoining shorelines of navigable waters of the United States of oil or hazardous substances in quantities determined by the President to be "harmful." The President delegated the function of determining the amount of substances that are "harmful" under this provision to the Administrator of the Environmental Protection Agency (hereinafter EPA).

So it was that when one of Ward's employees received a telephone call on March 25th from the Oklahoma State Department of Health concerning the Boggie Creek spill, the employee's reaction was instantaneous. Ward was called and he immediately ordered an oil spill clean-up operation.

Ward's prompt reaction was the intended result of the FWPCA oil pollution prevention system. Pursuant to the system established by Congress in the FWPCA for regulating oil pollution, the "person in charge" of a vessel or facility from which oil or a hazardous substance is discharged in violation of Section 1321(b)(3) is required to "immediately notify the appropriate agency of the United States Government of such discharge." This notification enables the federal government to make sure that a clean-up response and other remedial measures are taken promptly. Failure to notify the appropriate agency immediately is a criminal offense punishable by
a fine of up to $10,000.00 and imprisonment for one year. Section 1321(b)(5) provides, however: "notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement."

Ward's response was probably hastened by the power of the President under Section 1321(c)(1) of the FWPCA to act to remove or to arrange for the removal of any oil or hazardous substance discharged into or upon the navigable waters of the United States or adjoining shorelines, unless he determines that the owner or operator of the vessel or facility from which the substance was discharged will properly remove the substance. If the President acts to have the oil spill cleaned up, clean-up costs are paid out of a special 35 million dollar fund established in the Treasury by Section 1321(k). Congress has from time to time appropriated money for the 1321(k) fund, however, the fund is intended to be replenished by recoveries from those responsible for prohibited discharges. Thus the FWPCA provides that with few exceptions the owner or operator of a vessel or facility from which oil or a hazardous substance is discharged in violation of Section 1321(b)(3) is liable to the United States for the actual costs incurred by the government in clean-up operations.¹²

For some unknown reason, Ward was tardy in providing the required notice of the Boggie Creek spill to the appropriate federal agency, the regional office of the EPA. EPA was without notice of the spill until Ward called EPA on April 2, 1975.¹³ Apparently, though, Ward's notice satisfied the FWPCA notice requirements, since EPA made no apparent comment regarding Ward's tardy notice.¹⁴ In addition to this telephone notification, Ward filed with EPA on 25 June 1975 a detailed report concerning the Boggie Creek spill.¹⁵
On August 15, 1975 EPA notified the Commander, Second Coast Guard District of the Boggie Creek spill. EPA forwarded Ward's report of 25 June and noted on the report that the Boggie Creek spill probably violated Section 1321(b)(3). In accordance with the standards established in the FWPCA, EPA therefore recommended that Ward receive a civil penalty of from $500.00 to $1,000.00.16

Section 1321(b)(6) as it read at the time of the Boggie Creek spill provided that the "owner or operator" of a facility from which oil or a hazardous substance is discharged in violation of Subsection (b)(3) "shall" be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating in an amount not to exceed $5,000.00 for each offense.17 In determining the amount of the penalty or any settlement thereof, the Secretary was to take into account "the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation." 33 U.S.C. § 1321(b)(6).

As noted above, penalties recovered in proceedings brought under Section 1321(b)(6) are paid into the 1321(k) revolving fund. Also paid into the 1321(k) revolving fund are Section 1321(f) recoveries of clean-up costs incurred by the United States in cleaning up discharges on behalf of owners or operators.18 It can be seen, therefore, how the collection of Section 1321(b)(6) penalties in all cases helps to defray the cost of cleaning up oil spills for which the government makes the initial oil spill clean-up cost expenditure, or for which the government's clean-up costs are ultimately unrecoverable.19
Eventually, then, Ward was notified by the Commander, Second Coast Guard District of his right to a hearing concerning imposition of the Section 1321(b)(6) penalty. This right Ward left unexercised. Consequently, on December 19, 1975, the Second Coast Guard District Commander assessed a civil penalty against Ward of $500.00. From this assessment, on 26 December 1975, Ward filed an administrative appeal to the Commandant of the Coast Guard. Here for the first time Ward raised the issue of Fifth Amendment rights. That is, Ward questioned whether imposition of the Section 1321(b)(6) penalty against him violated his Fifth Amendment right against self-incrimination. This appeal was denied on February 11, 1976.

Ward persisted. On April 13, 1976 Ward filed suit in the United States District Court for the Western District of Oklahoma against the Secretary of Transportation, the Commandant of the Coast Guard, and the administrator of EPA to enjoin enforcement of Section 1321(b)(5) and (b)(6) and collection of the Section 1321(b)(6) penalty.

Subsequently, on June 4, 1976 the United States Attorney began a collection suit against Ward personally and against his oil company. This suit was to collect the Coast Guard imposed civil penalty. The collection action was consolidated with Ward's suit, and both cases came on for trial. At the commencement of trial, Ward filed a motion for summary judgment in which he again raised his argument concerning possible violation of his privilege against self-incrimination under the Fifth Amendment of the Constitution.

If the arguments Ward raised at his trial are to be understood, it is necessary to understand the privilege against self-incrimination flowing from the Fifth Amendment to the Constitution of the United States. The Fifth Amendment says:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.23

Note the language well. No person, "shall be compelled in any criminal case to be a witness against himself...."24 (emphasis added) This relatively simple proposition, it has been said, "reflects many of our fundamental values and most noble aspirations."25 Essentially, says the Supreme Court, the Fifth Amendment privilege against compelled self-incrimination results from our respect for the integrity and worth of the individual citizen26 combined with our unwillingness to subject those suspected of crime to the "cruel trilemma of self accusation, perjury or contempt."27 The Fifth Amendment, the Supreme Court has also said, is one of the great landmarks in man's effort to make himself civilized.

Scholars suggest that a number of related values are fostered by the existence of the Fifth Amendment privilege against self-incrimination. For example, some argue that the privilege engenders respect for the integrity of the criminal justice system. It is suggested in support of this proposition that if no Fifth Amendment privilege existed, the government might be inclined to support criminal prosecutions by relying less on thorough criminal investigations, and more on its power to compel incriminating evidence from the accused.28 In addition, the right of privacy, it has been claimed, is protected by the Fifth Amendment.29
Although availability of the Fifth Amendment privilege against self-incrimination is, as a practical matter, generally unquestioned when the party claiming the privilege is an individual, the Supreme Court has recognized that the Fifth Amendment prohibition against compelled testimony can be avoided. This is accomplished by removing the threat of punishment, punishment that could result from a self-incriminating statement. The device used to effect this is a grant of immunity.30

Furthermore, in regard to corporations, the privilege against self-incrimination is subject to two basic exceptions.31 The first is called the corporate records exception.32 Under this exception, all corporate records not otherwise privileged against disclosure must be produced upon proper government request for use in criminal proceedings.

The rationale for the corporate records exception is readily understood. Corporations are impersonal; they embody no purely private or personal interests.33 Being mere creatures of the state created for public benefit, corporations, unlike individuals, have no corporeal presence. Thus they have no natural right to existence that can be asserted against the "visitorial power of the state."34 In less abstract terms, corporations charged with crimes are in no danger of torture. In sum, granting corporations the privilege and thereby creating a shield for illicit activity might foster general disrespect for the judicial system.35

The second recognized exception to the Fifth Amendment privilege is the bifurcated self-reporting/required records exception. Under the required records branch of this exception, the federal government may compel an individual to record certain information. This information must then be produced for government use upon government request.36 The
other branch of this exception, the self-reporting exception to the privilege against self-incrimination, permits the government to require an individual to report certain information to the government without being asked.37

The foundation for the argument made by Ward in his motion for summary judgment in the District Court should now be apparent. Ward argued that the Section 1321(b)(6) penalty he had received was actually a criminal penalty. Thus, argued Ward, imposition of the civil penalty was unconstitutional, since the Coast Guard imposed the penalty based on information Ward had been compelled to give EPA pursuant to Section 1321(b)(5). In short, Ward argued that as a result of his compelled statement, he was incriminated and punished.38

At the outset of its analysis of the case, the district court said that the determination of the character of the 1321(b)(6) penalty as civil or criminal was a problem of statutory interpretation. Hence, the court said that it would look to the face of the statute to see what label Congress had given the statute. The court believed that Congress's description of the statute should be given great weight.39

Upon its examination of Section 1321, and upon its recognition that the Section 1321(b)(6) penalty is labelled a "civil penalty," the district court said that it believed the 1321(b)(6) penalty to be not criminal, but civil. Other factors, however, beyond the description of the penalty in the statute, were important to the district court. The court took into account the existence of an administrative mechanism by which the penalty is imposed. From the existence of such a mechanism the court inferred that the penalty was intended to be civil. In addition, the court noted the juxtaposition of the civil penalty in Section 1321(b)(6) with the penalty in the preceding section, Section 1321(b)(5), which is expressly labelled "criminal."
The district court observed that as a matter of statutory interpretation, its analysis would be at an end but for one point. Ward had raised a constitutional issue, his Fifth Amendment privilege. That issue required the court to go beyond its initial analysis.

To guide its further inquiry, then, the district court looked to the Supreme Court case of Kennedy v. Mendoza-Martinez. In Mendoza-Martinez the Supreme Court analysed statutes divesting American citizens of their citizenship soley because they left the United States or remained away from the United States during times of war or national emergency for the purpose of evading military service. As in Ward, the real question in Mendoza-Martinez was the propriety of imposing certain sanctions on an individual without affording the individual all the rights of a criminal defendant. The issue, then, was really whether the sanction being imposed was a criminal sanction, or whether the sanction was as supposed civil.

In Mendoza-Martinez the Supreme Court listed a series of factors according to which a statute could be analyzed. Use of these factors, said the Supreme Court, would reveal whether Congress intended by enacting the statute to create a civil or a criminal sanction. Applying the Mendoza-Martinez criteria to the penalty in Section 1321(b)(6), the District Court found the penalty imposed therein civil. As a result, Ward's motion for a summary judgment was denied.

Following denial of Ward's motion, his case was tried before a jury. The verdict was that Ward was responsible for the Boggie Creek oil spill. However, since Ward had been diligent in cleaning up the spilled oil, the Court reduced the civil penalty imposed on Ward from $500 to $250. Still unsatisfied, Ward again appealed. This time he won.
In holding that the Section 1321(b)(6) penalty is criminal for purposes of the Fifth Amendment self-incrimination clause, and that as a result notification given the agency pursuant to Section 1321(b)(5) could not be used in determining liability for the 1321(b)(6) penalty or the penalty amount, the Tenth Circuit Court of Appeals made as detailed an analysis of Section 1321(b)(6) as had the district court. Not unexpectedly, though, at almost all key points, the Tenth Circuit disagreed with the district court opinion.43

To begin with, the District Court had analyzed Section 1321(b)(6) for legislative intent by considering first the face of the statute and second the congressional intent that could be inferred by applying the Mendoza-Martinez criteria. The Tenth Circuit, however, focused its analysis on whether the congressional intent in enacting the statute was to punish the conduct in question.44 In pursuit of this point, the Tenth Circuit expanded on the district court analysis to include the administrative mechanism developed to enforce Section 1321(b)(6).45

Considering first the statutory language of 1321(b)(6), the Tenth Circuit acknowledged that payment of the penalties imposed by the Section into the 1321(k) revolving fund in order to defray the costs of administering and enforcing Section 1321 and of cleaning up oil spills where costs are not otherwise recoverable all indicated the "remedial" character of the 1321(b)(6) penalty provision. However, the Tenth Circuit found the remedial character of the statute to be outweighed by what it thought to be the statute's clear punitive character. It counted heavily with the Tenth Circuit that Section 1321(b)(6) penalties are assessed automatically and without regard fault.
According to the court, while the existence of the revolving fund into which the penalties are paid may indicate a remedial purpose for the statute, the penalty assessment scheme, when taken as a whole indicated an intent punitive.\textsuperscript{46} The Tenth Circuit also indicated that Section 1321(b)(6) could not, in its opinion, be a compensatory form of regulatory statute since the FPWPCA already contains provisions for the reimbursement of clean-up costs, and, when the substance spilled is deemed unremovable, payment to the federal government of liquidated damages. Application of the Section 1321(b)(6) penalty, noted the Court, is unrelated to payments made under these compensation provisions.\textsuperscript{47}

Additional support for its decision regarding punitive congressional intent in Section 1321(b)(6) was found by the Tenth Circuit in the scheme developed by the Coast Guard for Section 1321(b)(6) enforcement.\textsuperscript{48} Coast Guard internal regulations, observed the Tenth Circuit, say that because of the language of the FPWPCA, the Coast Guard would assess some penalty in every proven oil spill case. Furthermore, under these regulations, Commandant Instruction 5922.11A, a penalty at or near the maximum of $5000 has to be assessed unless one of the factors listed in Section 1321(b)(6) justified a lesser penalty. This Coast Guard instruction also requires the degree of culpability and the prior record of the person responsible for the discharge to be taken into account. In addition, according to the Instruction, computation of the penalty has to be performed without regard to the spiller's clean-up effort or clean-up expenses. The Tenth Circuit found the criteria for computation of the penalty to be totally unrelated to actual environmental harm that may be caused by a spill. Absent this penalty justification, the Tenth Circuit deduced that the Coast Guard assessed penalty must have a punitive purpose.\textsuperscript{49}
Finally, the Tenth Circuit considered the Mendoza-Martinez criteria. Here it considered especially important two factors. First, the precise conduct triggering the penalty was already cognizable under Sections 13 and 16 of the Rivers and Harbors Act of 1899. 33 U.S.C. §§ 407, 411, a criminal statute. Second, the 1321(b)(6) could be assessed without regard to fault, and therefore the amount of the penalty could well be excessive. The Tenth Circuit decided that these factors in particular made it likely that Congress intended the Section 1321 penalty to be criminal. As a result of the above analysis, the decision against Ward in the District Court was overturned.

Following entry of the judgment of the Tenth Circuit in favor of Ward on May 10, 1979, the United States appealed to the Supreme Court of the United States. This appeal was by petition for a writ of certiorari. Filed on September 7, 1979, the petition was granted on November 5, 1979.

Early this year Ward's appeal was argued before the Supreme Court. With one exception, the arguments presented in the briefs and oral argument of both Ward and the United States were unsurprising. Determining the character of the penalty Ward received was simply an exercise in determining legislative intent argued the United States. In support of this argument, the Government noted that Section 1321 of the FWPCA is designed to prevent discharges of oil into the navigable waters of the United States and to insure the rapid clean-up of such discharges as may occur. To enhance compliance with this broad purpose, the Government argued, Congress could establish civil sanctions. Hence, suggested the Government, since Congress had established the penalty in Section 1321(b)(6) and since Congress had expressly labeled the sanction a "civil penalty," the Supreme Court ought to take Congress at its word and find the Section 1321(b)(6) sanction civil.
In further support of its argument, the Government suggested that the Section 1321(b)(6) penalty was civil according to congressional intent determined by a Mendoza-Martinez analysis. Regarding the first criterion, then, the Government suggested that the type of restraint or disability to which Mendoza-Martinez referred was not the adverse consequence of a monetary penalty, but rather, a restraint on personal liberty. Since Section 1321(b)(6) imposed only a monetary sanction, Mendoza-Martinez criterion one indicated a congressional intent in creating the Section 1321(b)(6) penalty to impose a civil sanction.

Mendoza-Martinez criterion two, the Government argued, also supported a finding of a remedial, noncriminal purpose in the congressional establishment of the Section 1321(b)(5) and (b)(6) reporting and penalty system. In support of this argument, the Government observed that the monetary penalty imposed under Section 1321(b)(6) was completely different than the sort of sanctions at issue in cases cited by the Supreme Court in its development of Mendoza-Martinez criterion two.

Regarding criterion three, the Tenth Circuit Court of Appeals had found that even though the statute lacked a scienter element, the amount of the penalty was determined by the Coast Guard using scienter-like factors. This, said the Tenth Circuit, was enough to find in Mendoza-Martinez criterion three a support for its inference of an intent in Congress to impose a criminal sanction in Section 1321(b)(6). The Government, of course, disagreed, simply noting that there was in fact no scienter element in the statute. It was the Government's reasoning that since there was no scienter element in the statute, no tests used by Coast Guard hearing officers in determining the amount of a Section 1321(b)(6) penalty could serve as a scienter substitute.
Concerning Mendoza-Martinez criterion four, the Government noted that although the Tenth Circuit did not find a prohibited deterrent function in the Section 1321(b)(6) penalty, it did find that Section 1321(b)(6) as implemented by the Coast Guard manifested a retributive purpose. The Government countered this argument by observing that the Coast Guard implementation of Section 1321(b)(5) of which the Tenth Circuit complained was not aimed at punishing the individual concerned, but rather, was aimed at controlling particular conduct. This, argued the Government in its brief, rendered the 1321(b)(6) penalty not criminal but regulatory.

The Tenth Circuit found persuasive evidence of the criminal nature of the Section 1321(b)(6) sanction in Martinez-Mendoza criterion five. This because the Rivers and Harbor Act already made the discharge of material into navigable waters a crime. But observing that Congress may impose both criminal and civil sanctions for the same act or omission, the Government suggested that criminal sanctions imposed by the Refuse Act, an ancient statute completely separate from the FWPCA, should have no bearing on determining congressional intent in Section 1321(b)(6).

The Government and the Tenth Circuit came close to agreement in applying Mendoza-Martinez criterion VI to Section 1321(b)(6). Here the Tenth Circuit was at least willing to accept the possibility that the penalty might have a rational alternative purpose, compensation to the United States Government for environmental damage caused by oil spills. The Court of Appeals ultimately decided, however, that this criterion too worked against a finding of regulatory or remedial purpose. This was because factors other than those related to the degree of environmental damage caused by an oil spill were used by the Coast Guard to assess the Section 1321(b)(6) penalty. Countering this logic in its brief, the Government
argued that factors used by the Coast Guard in assessing the penalty had their origin in the language of the FWPCA. Hence, these Coast Guard used factors were reasonably related not to a punitive purpose, but rather, to the express congressional purpose in enacting the FWPCA of improving the nation's water quality. 68

Finally, the Government dealt with the excessive penalty criterion. Here the Government took the Tenth Circuit to task for the Tenth Circuit's reliance on the possibility that the Section 1321(b)(6) penalty as applied to some hypothetical oil spiller might be excessive. 69 As the Government noted, Section 1321(b)(6) penalties, if properly assessed, should be tailored to the particular case in which they are imposed. Excessive penalties are thereby avoided.

It can be seen, then, that the Government argued the civil nature of the Section 1321(b)(6) penalty by attempting to refute the reasoning of the Tenth Circuit Court of Appeals in the Tenth Circuit's application of the seven Mendoza-Martinez criteria. Of course the respondent, Ward, fervently disagreed with the Government's analysis. 70

However, argument in brief to the Supreme Court was not wholly without surprise. In his brief, Ward presented for the first time a complex historical analysis of penalties and fines imposed in the United States that he hoped would prove the criminal nature of the Section 1321(b)(6) penalty. 71 Ward essentially argued that since the earliest days of English common law, penalties, fines, and forfeitures have been treated as penal or punitive for purposes of avoiding self-incrimination. The English common law, Ward suggested, was that no man could be compelled to incriminate himself in any action to recover penalties or fines. According to Ward, during the development of the American colonial period, the
body of English common law concerning self-incrimination was incorporated in the developing American legal system. Thus, suggested Ward, the American colonies continued in the pre-constitutional period the English common law that the protection against self-incrimination was to be interpreted broadly, and that it applied in actions to collect fines, penalties, and forfeitures. Ward concluded that following formal adoption of the Fifth Amendment, the American courts continued the pre-constitutional rule. Finally, Ward argued that the rule he had described concerning Fifth Amendment application to penalty, fine, and forfeiture proceedings was adopted by the Supreme Court.

To counter Ward's detailed argument, the Government made one major point. Ward's argument was based upon sources predating ratification of the Fifth Amendment. Therefore, the Government suggested, Ward had ignored the express limitation of the Fifth Amendment, discussed when it was ratified, that it was specifically limited to criminal cases.

It is worth noting at this point that like many other cases, the Ward case could well be decided either way. For example, after examining the seven Mendoza-Martinez criteria and the many cases that have applied these criteria to determine a particular statute's implicit congressional intent, it is a fair conclusion that the seven criteria present fairly loose guidance. It can be said that while the criteria listed by the Supreme Court in Mendoza-Martinez are useful, as a group they are so flexible that with a little effort, any court applying them to a particular statute could extract either the civil penalty or the criminal penalty congressional intent desired. Given the proposition, then, that the Ward case could be decided either way, it is fair, especially since the Supreme Court is deciding the case, to ask whether there might be policy arguments against rendering a decision for Ward.
To begin with, it is probable that a decision for Ward could cripple the administration of the oil pollution section of the FWPCA. In calendar year 1978 there were 14,741 discharges of oil reported to the Coast Guard. Coast Guard estimates are that about 8,000 of these discharges were traceable to a particular vessel or facility. Therefore, since the Coast Guard assesses at least some penalty in all cases where an oil spill is proven and the spiller has no defense, about 8,000 Section 1321(b)(6) penalty cases were filed in 1978.

A sample of 100 penalty cases in each of the twelve Coast Guard Districts by the Government in connection with the Ward case indicated that an individual owner or operator was the spiller in almost a fifth of the cases. Thus, the number of Section 1321(b)(6) penalty cases filed against individual owners or operators during the year 1978 was about 1,400. This data also indicates that about one quarter of the Section 1321(b)(6) penalties against individuals resulted from a spiller reported spill. Under the Tenth Circuit interpretation of Section 1321(b)(6) in United Stated v. Ward, therefore, approximately 350 Section 1321(b)(6) penalty cases would have been beyond reasonable Coast Guard remedial action.

It should be understood that the Tenth Circuit decision if upheld by the Supreme Court would not prohibit imposition of Section 1321(b)(6) penalties against individual oil spillers. It would, however, require the Coast Guard to develop and prove an independent source for evidence used by the Coast Guard in imposing the Section 1321(b)(6) penalty. In practical terms, if imposed on an administrative procedure that concerns many relatively small, hard to discover incidents, this independent source requirement would impose unsurmountable procedural obstacles. An independent source requirement would obligate the Coast Guard to prove that it made no use or derivative use of the information the individual reported.
under Section 1321(b)(5) in developing a 1321 penalty case. It is a fair inference that this burden would presumably extend to proving not only that the Coast Guard made no use of the Section 1321(b)(5) notification, but also that the Coast Guard made no use of the more detailed report provided by the owner or operator of a facility like the one Ward filed after his initial report. It is unlikely that either the Coast Guard or any other agency of the federal government could afford the resources necessary to overcome the procedural obstacles that a decision for Ward would create.

It is easy to imagine how the decision of the Tenth Circuit if upheld could cause the enforcement of entire oil pollution penalty program to grind to a sudden halt. The cause would be a sudden increase in oil pollution litigation. Under the current system, most Section 1321(b)(6) penalties are paid when assessed; no trial is necessary to enforce collection. If there were suddenly created by the Supreme Court a new defense to the penalty based on difficult to resolve evidentiary questions, though, there could well develop for strategic reasons and otherwise a rash of delay producing litigation. This litigation could, in turn, divert penalty enforcement effort away from Section 1321(b)(6) cases normally quickly collected. If upheld, then, the Tenth Circuit Court of Appeals opinion might cause the entire Section 1321 oil pollution prevention program to suffer.

In addition to the above, the Tenth Circuit opinion if upheld could have a drastic effect on the still to be implemented program concerning hazardous substances spills. On 29 August 1979 EPA published regulations both controlling the discharge of hazardous substances and establishing civil penalties to be imposed following hazardous substances discharges. This program is directly analogous to the Section 1321 oil pollution prevention program. Cases crippling the
Section 1321 oil pollution program would therefore have the same effect on the new hazardous substances program.

Another policy argument militating against upholding the Tenth Circuit, is that under the Tenth Circuit decision, the Section 1321(k) revolving fund is deprived of a key source of funding. Section 1321(b)(6) penalties when collected are paid into the revolving fund. If Section 1321(b)(6) penalties are rendered uncollectible, the revolving fund would lose one of the sources of funds to which it was to be replenished.74

Finally, the Tenth Circuit decision neutralizes an important incentive for individuals, potential oil spillers, to exercise high standards of care in their handling of petroleum products. The current system forbids the discharge of oil into navigable waters. This system requires the spiller to report his spill or suffer criminal sanctions. An individual oil spiller is thereby given an incentive to report an oil spill. Furthermore, when the spill is reported, a penalty for the spill is imposed to reimburse the Government for environmental damage possibly caused by the spill and to replenish the Section 1321(k) revolving fund so that mystery spills can be cleaned up. The Tenth Circuit decision, however, would excise from the oil pollution program the final element: imposition of a penalty in all cases. Fearing criminal sanctions imposed for failure to report an oil spill, spillers would still report their spills, but there would be no cost to them other than the requirement that they clean-up their spill, to provide an incentive to avoid future oil spills.76

2. Hence, for purposes of administering the Federal Water Pollution Control Act, Boggie Creek too was a navigable waterway of the United States. United States v. Texas Pipeline Co., 14 E.R.C. 1120 (10th Cir. 1979) (Congress intended "navigable waters" as used in Federal Water Pollution Control Act to cover all waters subject to Commerce Clause powers.); 33 U.S.C. § 1362(7) (1978); United States v. Ashland Oil and Transportation Co. 504 F.2d 1317 (6th Cir. 1974).

3. Section 311 of the Federal Water Pollution Control Act, 33 U.S.C. § 1321 is included as Appendix A.

4. Section 1321(b)(3), which originally prohibited discharge of oil and hazardous substances into or on navigable waters of the United States in harmful quantities, was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub.L.No. 95-576, 92 Stat. 2468, to prohibit the discharge of oil and hazardous substances "in such quantities as "may be harmful" as determined by the President.(emphasis added).

5. Since the arguments raised by Ward at his trial and on appeal concern the constitutionality of a key section of the Federal Water Pollution Control Act (hereinafter FWPCA), it is necessary to have a fundamental understanding of the Act. This can be best achieved by first reviewing the development of the Act.

Originally the prime federal law intended to prevent water pollution was the Rivers and Harbors Appropriation Act of 1899 33 U.S.C. § 407 et seq. (hereinafter cited as the Refuse Act). Under the Refuse Act, the discharge of, "any refuse matter of any kind or description what ever...into any navigable water of the United States," by "every person and every corporation" is prohibited. The Refuse Act is a criminal statute. Violation of the Refuse Act is a misdemeanor punishable by a fine, imprisonment, or both.

The Refuse Act was an inadequate tool to prevent discharge of oil into U.S. navigable waters. To prevent oil spills Congress passed the Oil Pollution Act of 1924, Ch. 316 §§ 2-4, 43 Stat. 604-06 (1924). However, since this Act barred...
only "grossly negligent" or "willful" discharges of oil, the Act was nearly impossible to enforce. Even in combination with the Refuse Act this statute had little effect in decreasing the amount of oil spilled into the waters of an increasingly urbanized United States. Compelled Self-Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases 55 B.U.L. Rev. 112 (1975).

Thus, in 1948 Congress passed the precursor of the current Federal Water Pollution Control Act, the Water Pollution Control Act of 1948. Act of June 30, 1948, Ch. 758, 62 Stat. 1155 (hereinafter 1948 Act). The 1948 Act was a significant step forward in control of water pollution. It vested states with primary responsibility for water pollution control, and it established the concept of comprehensive planning for water pollution abatement. State and local governments were encouraged to comply with the 1948 Act by availability of federal financial assistance. A Federal Water Pollution Control Advisory Board was established, and in certain circumstances the federal government was authorized to seek injunctions against water pollution.

For several reasons, however, the regulatory scheme established by the 1948 Act was ineffective. First, enforcement jurisdiction was limited to cases where pollution in interstate waters caused or contributed to a danger to the health of persons in a state other than the state in which pollution originated. In addition, even if the pollution appeared to be within the jurisdiction of the Act, enforcement procedures were so cumbersome as to be useless.

Prior to suit under the 1948 Act, the federal government had to give the polluter notice twice, the water pollution control agency of the polluter's state had to be notified, and a hearing had to be held before a specially convened board. Even then suit was barred if the board imposed "reasonable and equitable" measures to abate the pollution. It was only if the polluter failed to comply with the board's recommendations that the Surgeon General could, with the permission of the water pollution control agency of the state in which the pollution originated, request the Attorney General to bring an abatement suit against the polluter on behalf of the United States. Finally, even if the case got to court, the polluter could raise as a defense the impracticability or the physical or economic unfeasibility of pollution abatement. It should come as no surprise, therefore, that there were no suits filed under the 1948 Act. F. Bany, The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation, 68 Mich. L. Rev. 1103, 1107 (1970) (hereinafter Barry).
In 1956 in an attempt to eliminate some of the redundancy in the 1948 Act Congress passed the Water Pollution Control Act Amendments of 1956. Act of July 9, 1956, Ch. 518, 70 Stat 498 (hereinafter 1956 Act). In the 1956 Act, the second notice required by the 1948 Act was deleted as was the requirement for consent of the state water pollution control agency prior to the initiation of federal suit against a polluter. But the enforcement procedures of the 1948 Act even as amended by the 1956 Act remained unworkable.

In addition to the administrative board procedure under the 1948 Act, the 1956 Act also required the Surgeon General of the United States as part of his action against a polluter to call a conference of all state and interstate water pollution control agencies of all states affected by the alleged water pollution. Additionally, if the Surgeon General found that his recommended abatement measures were being ignored, he was obliged to recommend to state pollution control agencies concerned that they take abatement action, and the Surgeon General was to give the states up to six months for these efforts. Furthermore, if the pollution continued after the states had an opportunity to abate the pollution, the Secretary of Health, Education and Welfare, was to convene and administrative hearing similar to the one required by the 1948 Act. This board was required to make findings, and once these findings were received by the polluters, they had yet another six months in which to abate the alleged pollution. Finally, even after all the above procedures had been followed the Secretary of HEW had to wait until he was asked by a pollution control agency in the pollution source state or in a state where the health and welfare of persons was endangered by the pollution before he could commence suit. A more cumbersome procedure to achieve water pollution control is hard to imagine. Therefore, while the 1956 Act is significant in that it eliminated the state veto power over federal pollution abatement actions, it did nothing to enhance federal water pollution abatement powers. See, at 1112.

In 1961 the federal water pollution control statute was amended again in the Federal Water Pollution Control Amendments of 1961. Pub.L.No. 87-88, 75 Stat. 204 (hereinafter 1961 Act) Here a crucial change in federal water pollution control was made. The 1961 Act has broadened the jurisdiction of the Act to include almost all waters of the United States: navigable waters were included as were wholly intrastate waters. Additionally, federal authority was extended to cover intrastate pollution matters. Exercise of this power was severely limited by a requirement similar to the suit solicitation requirement in the 1956 Act that federal action concerning intrastate pollution could be instigated only at the request of the governor of the state in which the pollution originated. Nonetheless, the 1961 Act allowed federal action in intrastate waters and thus was a significant step toward the current oil pollution prevention regime.

III

The following year, in the Clean Water Restoration Act of 1966 Congress further strengthened the water pollution program. Act of Nov. 3, 1966, Pub.L.No. 89-753, 80 Stat. 1246 (hereinafter 1966 Act). International pollution generated by the United States could now be dealt with by the federal government upon request of the Secretary of State. More important was the provision in the 1966 Act that the administrator of the federal pollution control program could require an alleged polluter to file with him a report describing the "character, kind, and quantity" of the alleged discharge. This report also had to describe the facilities or other means being used to reduce discharges. 1966 Act § 208(b). As will be seen below, the rudimentary mandatory report procedure established by the 1966 Act has been extensively developed. But, this amendment marks a crucial step in the development of federal water pollution control law since it is the first time federal water pollution control legislation addressed the reality that given the nature of water pollution sources and types, water pollution control without some cooperation from the polluters is impossible.

In 1970, Congress passed yet another piece of legislation amending the 1948 Act. This amendment was so fundamental, though, that at least in the area of pollution of water by oil, federal efforts to prevent oil pollution can be said to begin in 1970. Water Quality Improvement Act of 1970. Act of April 3, 1970, Pub.L.No. 91-224, 84 Stat. 91 (hereinafter 1970 Act).

The substance of Section 1321, the federal statute at issue in Ward v. Coleman, was first added as Sections 11 and 13 of the 1970 Act. 33 U.S.C. §§ 1161 and 1162 (1970 ed.). These sections were added to replace the Oil Pollution Act of 1924, 33 U.S.C. § 431 (1964 ed.) et seq., which, as noted above, had proven to be ineffective.

Addition of these new section in 1970 was spurred by the breakup of the tanker TORREY CANYON, "with its incalculable damage to the coast of England and its nearly $8 million clean-up cost," and by the Santa Barbara Channel oil spill, which caused "vast" and "appalling" damage to marine life and recreation in the area. See H.R.Rep. No. 91-127, 91st Cong., 1st Sess. 2 (1969); see also S.Rep. No. 91-351, 91st Cong., 1st Sess. 3, 6 (1969).
Sections 11 and 13 were combined to form Section 1321 (33 U.S.C. § 1321) in the comprehensive Federal Water Pollution Control Act Amendments of 1972. Pub.L.No. 92-500, 86 Stat. 862 et seq. With modifications not directly relevant to this case, these sections have been carried forward to the present time.

Since enactment of the Clean Water Act of 1977, the amended Federal Water Pollution Act has commonly been referred to as the Clean Water Act. However, since Ward v. Coleman arose under the pre-1977 version of the statute, it will be referred to as the Federal Water Pollution Control Act, or the FWPCA.

6. Section 11 of the 1970 Act replaced the Oil Pollution Act of 1924, and established a new system for dealing with oil pollution. First, the statute required any person in charge of a vessel, an onshore facility, or an offshore facility, as soon as he has knowledge of a discharge of oil in navigable waters or onto the shoreline from such vessel or facility, to notify the appropriate agency of the federal government. Under the 1970 Act failure to make the required report was a crime punishable by a fine of up to $10,000.00, imprisonment for one year, or both. In addition, under the 1970 Act the owner or operator of any vessel or facility from which oil was knowingly discharged was subject to a civil penalty of up to $10,000.00. Finally, the statute provided that information obtained by the exploitation of the notification from the spiller required by the statute could not be used against the spiller in any criminal action except for a prosecution for perjury.


8. Petition for Certiorari at 7, 8.

9. Section 1321(b)(5) provides that the person in charge of a facility shall immediately notify the "appropriate agency" of the federal government as soon as he has knowledge of a discharge of oil or hazardous substances from the facility in violation of Section 1321(b)(3) of the Act. For a discussion of the appropriate delegation, see note 11.
10. Because the oil discharged in the present case was visible on the surface of Boggie Creek (Petition for Certiorari at 7) it was a discharge of a harmful quantity under the applicable regulations. 40 C.F.R. 110.3(1974). These regulations were issued by the EPA pursuant to authority delegated by the President in Section 1 of Executive Order No. 11735, 3 C.F.R. § 793(1971-1975 Compilation).

11. As noted above, 33 U.S.C. § 1321(b)(5) requires the person in charge of a vessel, an onshore facility, or an offshore facility to notify an appropriate agency of the federal government of a prohibited oil discharge. Although the FWPCA defines "person," at Section 1321(a)(7), the term "person in charge" is undefined.

Early in the history of the 1972 Act the question arose whether a corporation could be a "person in charge" for purposes of Section 1321(b)(5) immunity. After treatment of the issue by a number of courts, it is safe to say that corporations are persons in charge for purposes of Section 1321(b)(5). See 17 A.L.R.Fed. 804.

Pursuant to Executive Order No. 11735, 3 C.F.R. § 793(1971-1975 Compilation), the President has designated the Coast Guard as the "appropriate agency" for purposes of receiving the Section 1321(b)(5) notice. Coast Guard regulations provide that such notification may in proper circumstances be given to the government official redesignated as the On-Scene-Coordinator for the geographic region in which the oil spill occurs. 33 C.F.R. § 153.203(a)(2).

EPA is responsible for furnishing the On-Scene-Coordinator for inland waters, 33 C.F.R. § 153.103(p). EPA therefore is an appropriate agency to receive Section 1321(b)(5) notice. Cf. United States v. Kennecott Copper Corp., 523 F.2nd 821, 824 (9th Cir. 1975).

12. Exceptions are when a discharge is caused solely by act of God, act of war, negligence on the part of the United States, or an act of a third party. 33 U.S.C. § 1321(f). This system is intended to force the oil spiller to internalize the cost of his oil spill. For a detailed description of the federal oil spill contingency plan, see amendments to 40 C.F.R. § 1510 in 45 Fed.Reg. 17831(March 19, 1980).

Contrast the costs recoverable from the Section 1321(k) funds for coastal and internal water oil spills with the far more broad cost recovery scheme established by the Outer Continental Shelf Land Act Amendments of 1978, 43 U.S.C. § 1801 et seq. for oil spills resulting from outer continental shelf oil and gas exploration and production activities. Under the OCS fund, items of economic loss related to clean-up are recoverable along with damages for:
Injury to or destruction of real and personal property.
Loss of use of real and personal property.
Injury to or destruction of natural resources.
Loss of use of natural resources.
Loss of profits or impairment of earning capacity due to injury or destruction of real or personal property or natural resources.
Loss of tax revenue for one year due to injury to real or personal property.

For further information concerning the implementation of the outer continental shelf oil pollution fund, see: M. COHEN, Legal Column, 3 Coastal Soc. Bulletin 14(1980).

13. Petition for Certiorari at 8.

14. However, note the issue raised the Petition for Certiorari at Footnote 4, Page 8. Since Ward notified EPA eight days after one of his employees was informed of the discharge by an official of the Oklahoma Department of Health, there is a real question whether Ward's notice to an appropriate agency of the federal government was timely. See United States v. Kennecott Copper Corp; United States v. Ashland Oil and Transp. Co. If Ward's notice was not timely, Ward might have lost the benefits of his voluntary notice. Furthermore, he would have been in jeopardy of Section 1321 criminal sanctions.

15. Section 1318(a)(A) of 33 U.S.C. authorizes EPA to require the owner or operator of a point source of effluent to make such reports, maintain such records, and provide such other information as the administrator may require in order to enable him to develop effluent or other limitations, determine whether a person has violated existing effluent limitations, or to implement other FWPCA sections.

EPA regulations in effect at the time of the Boggie Creek spill required the owner or operator of a facility at which there had been a discharge of more than 1000 gallons of oil or 2 or more discharges of oil in "harmful quantities" to submit a complete report of the discharge to the Regional Administrator within 60 days of the discharge. 40 C.F.R. § 112.4. The discharge into Boggie Creek was a discharge of a "harmful quantity" of oil. 40 C.F.R. § 110.3. There are civil and criminal penalties for failure to file a report as required under these regulations. 33 U.S.C. § 1319(c) and (d). By letter sent in May 1975, EPA had requested Ward to submit the written report required and EPA advised Ward that failure to submit the report could result in the imposition of criminal sanction.
Since the report Ward submitted in response to EPA's request was compelled, use of the report raises the same constitutional questions as does use of the information Wards submitted in his April 2 report to the Environmental Protection Agency.

16. Petition for Certiorari at 9. A civil penalty is a fine imposed by an administrative agency that can be collected by civil proceedings. Civil penalties are distinguishable from criminal penalties in that unlike criminal penalties, civil penalties can be imposed without making available to the individual penalized many constitutional protections. For example, the right to a jury trial, the right to protection from double jeopardy, and the right to proof by the government of guilt beyond a reasonable doubt are all fundamental constitutional rights guaranteed to criminal defendants. Yet these fundamental constitutional rights are unavailable to one receiving a civil penalty.

It has been argued that use of civil penalties is a mere charade, a change in the label of the statute from criminal to civil in order to avoid affording the individual penalized his constitutional rights. J. Charney, Constitutional Protections for Defendants in Civil Penalty Cases, 59 Cornell L.Rev. 478, 479-89 (1974); Amici Brief at 35. Be that as it may, use of civil penalties as a regulatory device is accepted. One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); Helvering v. Mitchell, 303 U.S. 391 (1938). Furthermore, use of the Compelled Self Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases, 55 B.U.L. Rev. 112 (1975).


17. Section 1321(b)(6) was amended to Section 58(a)(7) and (8) of the Clean Water Act of 1977, Pub.L.No. 95-217, 91 Stat. 1566, 1594, to provide that the "person in charge" of a facility is liable for a civil penalty in addition to the "owner [or] operator" of the facility.

18. Money may be withdrawn from the revolving fund in order to implement the National Contingency Plan for removal of oil and hazardous substances. 33 U.S.C. § 1321(c)(2) and (k).
19. It is apparent that the civil penalty section is intended by Congress to be an important part of the comprehensive oil spill prevention program established by the FWPCA. Costs for spill clean-up are unrecoverable when a spill cannot be traced to a particular source, when a spill is caused by an act of God, and act of war, or negligence on the part of the United States, when the owner or operator of the facility at which the discharge occurred is insolvent, and when the clean-up costs exceed the limitations on liability established in Section 1321(f).

Section 1321(b)(6) was amended by the Federal Water Pollution Control Act Amendments of 1978, Pub.L.No. 95-576, 92 Stat. 2468, to permit EPA to bring an action directly in federal district court to recover civil penalties of up to $50,000.00 against the owner, operator, or person in charge of a vessel or facility from which a substance is discharged in violation of Section 1321(b)(3). The amount of this penalty is to be determined by the same three factors used by the Coast Guard in assessing a civil penalty. In addition to these factors, the "standard of care manifested" and the efforts to "minimize or mitigate the effects of such discharge" are to be taken into account in the district court penalty assessment. This penalty may be in an amount up to $250,000.00 if the EPA can show willful negligence or misconduct on the part of the defendant. This new provision for the assessment of a civil penalty by suit in district court was intended to be used in cases of the most serious discharges. It cannot be used if the Coast Guard has already assessed a civil penalty. EPA recently issued regulations concerning this penalty proceeding and entered into a memorandum of understanding with the Coast Guard governing assessment of civil fines in district court. 44 Fed. Reg. 50766, Aug. 29, (1979).

20. Ward v. Coleman, 423 F.Supp. 1352, 1354 (W.D. Okla. 1976) (hereinafter Ward Trial). It does not appear that as a basis for imposition of this penalty the Coast Guard used any information other than that forwarded to it by EPA. Petition for Certiorari at 7.


22. Ward also moved to convene a three judge federal court pursuant to 28 U.S.C. § 2282. This statute required a panel of three district court judges to hear cases when the enforcement of any act of congress for repugnance to the Constitution of the United States was called into question. Section 2282 had been repealed by Act of August 12, 1976, Pub.L.No. 94-381, 90 Stat. 1119, but Section 7 of that Act allowed Section 2282 to stay in force as to cases already filed, Ward v. Coleman being one.
On August 26, 1976 Ward's three judge court motion was
denied by the district court on the ground that no substantial
challenge to the constitutionality of the FWPCA was presented.
Ward Trial at 1354.

23. United States Const., Amendment V.

24. Not restricted to criminal matters, the Fifth Amendment
privilege may be claimed in any proceeding where a person is
called upon to give testimony. The Fifth Amendment privilege
against self-incrimination has been held applicable to pro­
cedings before a grand jury, Conselman v. Hitchcock, 142 U.S.
547(1892); to civil proceedings, McCarty v. Arndstein,
261 U.S. 39(1924); to police custodial interrogations, Miranda
v. Arizona, 384 U.S. 426(1966); to juvenile proceedings In re
Gault 387 U.S. 1(1967); to congressional investigations,
Watkins v. United States, 354 U.S. 178(1957); and to other

(hereinafter Murphy).


27. Murphy, at 55.

inafter McCormick).

29. See e.g., Bellis v. United States, 417 U.S. 85(1974);

Other arguments in favor of the privilege are that it
protects from the danger of having to testify at all, the
individual who might for irrelevant reasons appear guilty.
McCormick at 252. Also, through the privilege the state's use
of a potent means of suppressing dissent is banned. Id.

Opponents of the privilege make several cogent points.
They argue that the rationale for the privilege, protection
against compulsion by torture, has no support in modern ex­
perience. They also suggest that the privilege impedes to too
great an extent the government's ability to obtain information
necessary for criminal prosecution, especially in areas like
white collar crime. Finally, opponents of the privilege argue that in light of human nature, the privilege is impossible to effectively implement. In other words, though one stands mute in court, and though the state may not comment upon the accused's silence, to many jurors the accused's silence is a confession. Id. at 251.

30. See Kastigar v. United States, 406 U.S. 441(1972) for an example of a statute granting immunity against prosecution based on compelled testimony.


34. Willson v. United States, 221 U.S. 361, 382(1911).

35. IRS Article at 63.

36. Shapiro v. United States, 335 U.S. 1(1948); Note, Required Information and the Privilege Against Self-Incrimination, 65 Columbia L.Rev. 631, 691(1965). The best rationale for this exception to the Fifth Amendment is probably simple public necessity. The government needs certain information so that valid regulatory purposes can be effected. McCormick at 303.


38. Ward raised two other issues in his motion for summary judgment. First, that the civil penalty violated his constitutional right to due process. The District Court disposed of this argument by noting that it was within congressional power to establish strict liability penalty schemes like that in Section 1321. The district court also observed that the civil penalty scheme established by Congress afforded spillers the constitutionally required notice and an opportunity to be heard prior to imposition of the penalty. Ward Trial at 1359.
Second, Ward argued that the sheen test was unauthorized under the FWPCA. The sheen test requires the presence of visible oil on the water in order to find that a harmful quantity of oil has been spilled. The District Court concluded that Ward had presented no convincing evidence to support his argument that the sheen test was beyond the mandate of the FWPCA. Thus, Ward's second argument was rejected.

Ward Trial at 1358.

39. Ward Trial at 1355.

The rule of statutory construction under which courts look to the face of a statute but no further in interpreting the statute is called the plain meaning rule of statutory interpretation. Implicit in this method of statutory interpretation is an assumption that the words of a statute can have a meaning so clear that resort to legislative history to guide statutory interpretation is unnecessary. Probably because the plain meaning rule is just too simplistic, the rule is generally disfavored in the United States. Compare e.g., United States v. LeBeouf Bros Towing Co., Inc., 377 F.Supp 558, 563 (E.D.LA. 1974) (Accepting congressional labels for oil spill penalties an analytic pitfall), with United States v. Atlantic Richfield Co., 429 F.Supp. 830, 838 (E.D.Penn. 1977) (Legislative labels like "civil" are not suspect, but are revelatory).

An alternative rule of statutory interpretation to the plain meaning rule allows judicial resort to legislative history. This school of interpretation is based on the concept that most language, even simple statutory language, is ambiguous. It is necessary when interpreting a statute according to this theory, therefore, to determine the congressional purpose in enacting the statute so that the act can be interpreted as the law makers intended. This method of statutory interpretation enjoys widespread use at all levels of the American judicial system.

For an extensive discussion of the complexities of statutory interpretation, including the pros and cons of the various methods of statutory interpretation, see the author's comment on In re Union Nacional de Trabajadores, 502 F.2d 113 (1st Cir. 1974), which can be found in 10 Suffolk U.L.Rev. 383-86 (1976).

Compare the problems discussed in the author's cited article with the problems faced by courts interpreting the civil penalty section of 33 U.C.C. § 1321(1978). A frequent problem of statutory interpretation based on analysis of legislative history is selecting the right part of the legislative history to interpret. But Courts analyzing...
Section 1321(b)(6) have the opposite problem: there is no legislative history concerning the Section 1321 penalty. Since adequately determing legislative intent is so difficult even when there is abundant legislative history, it is readily apparent how difficult the process must become when a court is forced to base its conclusions regarding the intent of lawmakers in enacting a given section of statute on inferences concerning that intent drawn from the legislative history of entirely different sections of the statute.


41. In Mendoza-Martinez the Supreme Court noted that although the task of deciding whether a statute is penal or regulatory is an extremely difficult problem, certain tests have been traditionally available to guide courts in their solution of the problem. Said the Supreme Court, a court can look to the following:

(I) Whether the sanction involves an affirmative disability or restraint, (II) whether it has historically been regarded as a punishment, (III) whether it comes into play only on a finding of Scienter, (IV) whether its operation will promote the traditional aims of punishment-retribution and deterrence, (V) whether the behavior to which it applies is already a crime, (VI) whether an alternative purpose to which it may rationally be connected is assignable for it, and (VII) whether it appears excessive in relation to the alternative purpose assigned....

Mendoza-Martinez at 168-69 (Roman Numerals added).

42. Ward Trial at 1356-57.

43. Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979) (hereinafter Ward Appeal).

44. Ward Appeal at 1190.

45. Id. In a brief preliminary analysis, the Tenth Circuit considered whether the statutory scheme of which Ward complained implicated constitutional issues. Finding the Section 1321(b)(5) report both compulsory and testimonial, the Tenth Circuit decided that Ward's case properly drew into question Fifth Amendment issues. Id..
46. Id. at 1191.

47. Id.

48. The Coast Guard's Commandant Instruction 5922.11A (Feb 23, 1973) relied upon by the Tenth Circuit was reprinted in an appendix to the opinion in United States v. Lebout Bros. Towing Co. 377 F. Sup. 558, 568-70 (E.D. La. 1974).

49. Ward Appeal at 1192.

50. Id. at 1194.

5. The court did not strike down either the self reporting requirement in Section 1321(b)(5) or the civil penalty provision in Section 1321(b)(6). Instead, it found inherent in the Section 1321(b)(5) and (b)(6) system a use and a derivative use immunity. It therefore remanded the United States's collection suit to the district court for further proceedings consistent with its opinion. Ward Appeal at 1194. This meant that unless the United States could produce a source of evidence concerning the Boggie Creek spill unconnected to Ward's Section 1321(b)(5) report, the penalty collection suit was dead.

52. Brief for the United States at 1 and 2.

53. There was little reliance on quantitative argument. A problem in making a quantitative argument is the lack of sound statistical data. The Coast Guard does collect data on all discharges of oil of which it becomes aware. This is accomplished through its Pollution Incident Reporting System. This system has been on line since 1971, and it collects a variety of data regarding nature of discharges, clean-up of discharges, and penalty actions for discharges. It fails, however, to quantify dischargers by their corporate versus individual character.

Another problem is that it is impossible to determine how many of the discharges by individuals, if unreported, would have been discovered anyway.

Brief of the Appellant at 12-13.
54. Id. 17-18.

55. Id. 21-25.

56. Id. 13-15, 26-27.

57. The Mendoza-Martinez criteria are listed in footnote 41 above.

58. Brief of the Apellant at 35-37. The Tenth Circuit had decided that since monetary penalties can inflict "pocketbook deterrence or restraint," criterion I offers little assistance in determining congressional intent. Ward Appeal at 1193.

59. Brief of the Apellant at 37-38. The court of appeals found this factor too offered little help in determining congressional intent. Payment of forfeitures and penalties into a fund to reimburse the government for its enforcement expenses, however, has been held by the Court to be a remedial purpose. One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972).

60. Mendoza-Martinez criterion III is "scienter." Scienter means criminal intent.

61. Ward Appeal at 1193.


63. Id. at 39-42.

64. Ward Appeal at 1194.

65. Brief of the Apellant at 43.

66. The Government noted that the "already a crime" criterion of Mendoza-Martinez originated in the specific congressional intent to reach a particular class of potential criminal defendants; individuals who wrongfully avoided compulsory military service. These potential defendants were avoiding military service by staying outside the United States, which
placed them beyond the jurisdiction of United States courts. In the case of Mendoza-Martinez, unlike the Section 1321(b)(6) penalty, Congress created law for the specific purpose of creating a supplementary, and to Congress, more effective punishment for what was already an established crime.

67. Ward Appeal at 1194.

68. Brief of the Apellant at 45-46.

69. Id. at 46-48.

70. Brief of the Respondent at 48-68. Ward was joined in this argument by the Amici Curiae: Mountain States Legal Foundation, Independent Petroleum Ass'n. of the Mountain States, Rocky Mt. Oil and Gas Ass'n., and Independent Petroleum Ass'n. of America: Brief of the Amici at 21-40.


72. The government presented these arguments in a Reply Brief.

73. Petition for Certiorari at 12-14.

74. It should also be noted that the decision of the Tenth Circuit is inconsistent with a series of cases from other jurisdictions concerning application of Section 1321(b)(5) to oil spilloers that are corporations.

As noted above, corporations have no Fifth Amendment privilege against self-incrimination. Thus the other Fifth Amendment appellate level oil spill cases, all of which concern corporate spilloers, have decided the 1321(b)(5) report and penalty issue in the Government's favor. Nonetheless, these other cases are valuable as they treat in varying degrees the issue of congressional intent in enacting Section 1321(b)(6). See, e.g., United States v. Allied Towing Corp., 578 F.2d 978 (4th Cir. 1978); United States v. Le Beout Bros Towing Co., 537 F.2d 149 (5th Cir. 1976). cert. denied. 430 U.S. 987 (1977); Apex Oil Co. v. United States, 530 F.2d 1291, 1293 n.7 (8th Cir. 1976), cert. denied 429 U.S. 827 (1977); United States v. Atlantic Richfield Co., 429 F.Supp. 830 (E.D.Pa. 1977), aff'd sub. nom. United States v. Gulf Oil Corp., 573 F.2d 1303 (3d Cir. 1978).
APPENDIX

Key Parts of Section 1321 Described

1. Section 1321(b)(3) prohibits an oil spill into navigable waters of the United States;

2. Section 1321(b)(5) requires the owner or operator of a facility where an oil spill has occurred to report such spill immediately to an appropriate agency of the United States Government;

3. Failure to report a spill is a criminal offense punishable by a fine up to $10,000.00 and imprisonment for one year;

4. No notification received pursuant to Section 1321(b)(5) can be used against any person in any criminal case except for a perjury or false statement prosecution;

5. The owner or operator of a facility from which oil has been discharged shall be assessed a "civil penalty" by the Government in an amount not to exceed $5,000.00;

6. In determining the amount of the penalty the Government (Coast Guard) is authorized to take into consideration the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation;

7. The Government is authorized to remove or arrange for the removal of any oil discharged into the navigable waters of the United States unless the Government is satisfied that the owner-operator of the facility from which the substance was discharged will properly do so. The Government's clean-up costs are paid out of a special revolving fund established by Section 1321(k).

8. The owner of a facility that causes a spill is liable to the Government for the actual costs incurred by the Government in a clean-up operation except where the discharge was caused solely by an act of God, war, negligence on the part of the United States, or an act or omission of a third party, Section 1321(f). Funds recovered pursuant to this provision are deposited in the revolving fund established under 1321(k);

9. The owner or operator in all cases remains liable to third parties for property damage.
Thus, the statutory scheme provides for strict liability for operators of facilities where an oil spill occurred. The owner is required to report the spill or face criminal prosecution for his failure to report. Once he reported the spill, however, the information he has provided is used to assess an automatic penalty that is as high as $5,000.00 unless there are mitigating factors. The payment of the fine, however, does not relieve the operator's (a) liability for clean-up costs, (b) liability to property owners for damage inflicted as a result of the spill, (c) possible criminal prosecution for the spill.
office or in any district in which he does business. The Administrator may upon application therefor remit or mitigate any forfeiture provided for under this subsection.

Compensation of board members

(e) Board members, other than officers or employees of Federal, State, or local governments, shall be for each day (including travel-time) during which they are performing board business, entitled to receive compensation at a rate fixed by the Administrator but not in excess of the maximum rate of pay for grade GS-18, as provided in the General Schedule under section 5332 of Title 5, and shall, notwithstanding the limitations of sections 5703 and 5704 of Title 5, be fully reimbursed for travel, subsistence, and related expenses.

Enforcement proceedings

(f) When any such recommendation adopted by the Administrator involves the institution of enforcement proceedings against any person to obtain the abatement of pollution subject to such recommendation, the Administrator shall institute such proceedings if he believes that the evidence warrants such proceedings. The district court of the United States shall consider and determine de novo all relevant issues, but shall receive in evidence the record of the proceedings before the conference or hearing board. The court shall have jurisdiction to enter such judgment and orders enforcing such judgment as it deems appropriate or to remand such proceedings to the Administrator for such further action as it may direct.


Historical Note


Library References


West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see § 1000 et seq.

Code of Federal Regulations

Hearing requirements, see 40 CFR 104.1 et seq.

§ 1321. Oil and hazardous substance liability

Definitions

(a) For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;
(2) “discharge” includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping;

(3) “vessel” means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water other than a public vessel;

(4) “public vessel” means a vessel owned or bareboat-chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce;

(5) “United States” means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands;

(6) “owner or operator” means (A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(7) “person” includes an individual, firm, corporation, association, and a partnership;

(8) “remove” or “removal” refers to removal of the oil or hazardous substances from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

(9) “contiguous zone” means the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone;

(10) “onshore facility” means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land;

(11) “offshore facility” means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(12) “act of God” means an act occasioned by an unanticipated grave natural disaster;

(13) “barrel” means 42 United States gallons at 60 degrees Fahrenheit;

(14) “hazardous substance” means any substance designated pursuant to subsection (b) (2) of this section;
(15) "inland oil barge" means a non-self-propelled vessel carrying oil in bulk as cargo and certificated to operate only in the inland waters of the United States, while operating in such waters;

(16) "inland waters of the United States" means those waters of the United States lying inside the baseline from which the territorial sea is measured and those waters outside such baseline which are a part of the Gulf Intracoastal Waterway.

(b)(1) The Congress hereby declares that it is the policy of the United States that there should be no discharges 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, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

(2)(A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B)(i) The Administrator shall include in any designation under subparagraph (A) of this subsection a determination whether any such designated hazardous substance can actually be removed.

(ii) The owner or operator of any vessel, onshore facility, or offshore facility from which there is discharged during the two-year period beginning on October 18, 1972, any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided under subsection (f) of this section, as appropriate, to the United States for a civil penalty per discharge established by the Administrator based on toxicity, degradability, and dispersal characteristics of such substance, in an amount not to exceed $50,000, except that where the United States can show that such discharge was a result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States for a civil penalty in such amount as the Administrator shall establish, based upon the toxicity, degradability, and dispersal characteristics of such substance.
After the expiration of the two-year period referred to in clause (ii) of this subparagraph, the owner or operator of any vessel, onshore facility, or offshore facility, from which there is discharged any hazardous substance determined not removable under clause (i) of this subparagraph shall be liable, subject to the defenses to liability provided in subsection (f) of this section, to the United States for either one or the other of the following penalties, the determination of which shall be in the discretion of the Administrator:

(a) a penalty in such amount as the Administrator shall establish, based on the toxicity, degradability, and dispersal characteristics of the substance, but not less than $500 nor more than $5,000; or

(b) a penalty determined by the number of units discharged multiplied by the amount established for such unit under clause (iv) of this subparagraph, but such penalty shall not be more than $5,000,000 in the case of a discharge from a vessel and $500,000 in the case of a discharge from an onshore or offshore facility.

(iv) The Administrator shall establish by regulation, for each hazardous substance designated under subparagraph (A) of this paragraph, and within 180 days of the date of such designation, a unit of measurement based upon the usual trade practice and, for the purpose of determining the penalty under clause (iii)(bb) of this subparagraph, shall establish for each such unit a fixed monetary amount which shall be not less than $100 nor more than $1,000 per unit. He shall establish such fixed amount based on the toxicity, degradability, and dispersal characteristics of the substance.

(v) In addition to establishing a penalty for the discharge of a hazardous substance determined not to be removable pursuant to clauses (ii) through (iv) of this subparagraph, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (e) of this section for the removal of such substance by the United States Government.

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), in harmful quantities as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), where permitted under the International Convention for the Prevention of Pollution of the
See by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation, to be issued as soon as possible after October 18, 1972, determine for the purposes of this section, those quantities of oil and any hazardous substance the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of this subsection and who is otherwise subject to the jurisdiction of the United States, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(6) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. Any owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(i) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) who is otherwise subject to the jurisdiction of the United States, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the viola-
tion, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of any vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

Removal of discharged oil or hazardous substances;
National Contingency Plan

(c)(1) Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976) the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

(2) Within sixty days after October 18, 1972, the President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances, pursuant to this subsection. Such National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to—

(A) assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies, including, but not limited to, water pollution control, conservation, and port authorities;

(B) identification, procurement, maintenance, and storage of equipment and supplies;

(C) establishment or designation of a strike force consisting of personnel who shall be trained, prepared, and available to provide necessary services to carry out the Plan, including the establishment at major ports, to be determined by the President, of emergency task forces of trained personnel, adequate oil and hazardous substance pollution control equipment and material, and a detailed oil and hazardous substance pollution prevention and removal plan;

(D) a system of surveillance and policing designed to insure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies;

(E) establishment of a national center to provide coordination and direction for operations in carrying out the Plan;

(F) procedures an containment, dispersants, and chemical dispersants or chemical dispersants of an unknown nature, that the President, or the Convention (f) of this section in.

(H) a system of surveillance and notice designed to insure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies.

The President may, from time to time, and otherwise amend the National Contingency Plan, or other plans and procedures for the removal of oil and hazardous substances.

(d) Whenever a marine pollution incident in the United States has created or substantial threat to the public health or welfare, or to fish, shellfish, private shorelines and beaches, or an imminent or of such pollution creating a hazard to public health or welfare, the President shall identify the substance in the waters in which it can be used safely in such circumstances.

(e) In addition to any other action, when the President determines that a substantial threat to the public health or welfare, or to fish, shellfish, private shorelines and beaches, or an imminent threat of such pollution creating a hazard to public health or welfare, the President shall identify the substance in the waters in which it can be used safely in such circumstances.
(F) procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances;

(G) a schedule, prepared in cooperation with the States, identifying (i) dispersants and other chemicals, if any, that may be used in carrying out the Plan, (ii) the waters in which such dispersants and chemicals may be used, and (iii) the quantities of such dispersant or chemical which can be used safely in such waters, which schedule shall provide in the case of any dispersant, chemical, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants and other chemicals which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters; and

(H) a system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed from the fund established under subsection (k) of this section for the reasonable costs incurred in such removal.

The President may, from time to time, as he deems advisable revise or otherwise amend the National Contingency Plan. After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.

Maritime disaster discharges

(d) Whenever a marine disaster in or upon the navigable waters of the United States has created a substantial threat of a pollution hazard to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States, because of a discharge, or an imminent discharge, of large quantities of oil, or of a hazardous substance from a vessel the United States may (A) coordinate and direct all public and private efforts directed at the removal or elimination of such threat; and (B) summarily remove, and, if necessary, destroy such vessel by whatever means are available without regard to any provisions of law governing the employment of personnel or the expenditure of appropriated funds. Any expense incurred under this subsection or under the Intervention on the High Seas Act (or the convention defined in section 2(3) thereof) shall be a cost incurred by the United States Government for the purposes of subsection (f) of this section in the removal of oil or hazardous substance.

Judicial relief

(e) In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and
private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil or hazardous substance into or upon the navigable waters of the United States from an onshore or offshore facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

Liability for actual costs of removal

(f)(1) Except where an owner or operator can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privi
ey and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. Such costs shall constitute a maritime lien on such vessel which may be recovered in an action in rem in the district court of the United States for any district within which any vessel may be found. The United States may also bring an action against the owner or operator of such vessel in any court of competent jurisdiction to recover such costs.

(2) Except where an owner or operator of an onshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of such oil or hazardous substances in bulk, from which such discharge was the result of willful negligence or willful misconduct within the privi
ey and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs.

Ch. 26 of the United States Code

The United States may bring an action in rem in any court of the United States for any costs. The Administrator with the Secretary of the Treasury in consultation with the Secretary of the Interior, to establish reason and method for assessing such costs. The Administrator may require the United States attorney of the district in which the discharge occurs to secure such relief as may be necessary to abate such discharge, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

(g) Where the owner of an oil barge (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privi
ey and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs.

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The United States may bring an action against the owner or operator of such facility in any court of competent jurisdiction to recover such costs. The Administrator is authorized, by regulation, after consultation with the Secretary of Commerce and the Small Business Administration, to establish reasonable and equitable classifications of those onshore facilities having a total fixed storage capacity of 1,000 barrels or less which he determines because of size, type, and location do not present a substantial risk of the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, and apply with respect to such classifications differing limits of liability which may be less than the amount contained in this paragraph.

(3) Except where an owner or operator of an offshore facility can prove that a discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent, or any combination of the foregoing clauses, such owner or operator of any such facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed $50,000,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, such owner or operator shall be liable to the United States Government for the full amount of such costs. The United States may bring an action against the owner or operator of such a facility in any court of competent jurisdiction to recover such costs.

(4) The costs of removal of oil or a hazardous substance for which the owner or operator of a vessel or onshore or offshore facility is liable under subsection (f) of this section shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil or a hazardous substance in violation of subsection (b) of this section.

(5) The President, or the authorized representative of any State, shall act on behalf of the public as trustee of the natural resources to recover for the costs of replacing or restoring such resources. Sums recovered shall be used to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government, or the State government.

**Third party liability**

(g) Where the owner or operator of a vessel (other than an inland oil barge) carrying oil or hazardous substances as cargo or an onshore or offshore facility which handles or stores oil or hazardous substances in bulk, from which oil or a hazardous substance is discharged in violation of subsection (b) of this section, alleges that such dis-
charge was caused solely by an act or omission of a third party, such owner or operator shall pay to the United States Government the actual costs incurred under subsection (c) of this section for removal of such oil or substance and shall be entitled by subrogation to all rights of the United States Government to recover such costs from such third party under this subsection. In any case where an owner or operator of a vessel, of an onshore facility, or of an offshore facility, from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section, proves that such discharge of oil or hazardous substance was caused solely by an act or omission of a third party, or was caused solely by such an act or omission in combination with an act of God, an act of war, or negligence on the part of the United States Government, such third party shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for removal of such oil or substance by the United States Government, except where such third party can prove that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of another party without regard to whether such act or omission was or was not negligent, or any combination of the foregoing clauses. If such third party was the owner or operator of a vessel which caused the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section, the liability of such third party under this subsection shall not exceed, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater. In any other case the liability of such third party shall not exceed the limitation which would have been applicable to the owner or operator of the vessel or the onshore or offshore facility from which the discharge actually occurred if such owner or operator were liable. If the United States can show that the discharge of oil or a hazardous substance in violation of subsection (b)(3) of this section was the result of willful negligence or willful misconduct within the privity and knowledge of such third party, such third party shall be liable to the United States Government for the full amount of such removal costs. The United States may bring an action against the third party in any court of competent jurisdiction to recover such removal costs.

Rights against third parties who caused or contributed to discharge

(h) The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance.
(1) In any case where an owner or operator of a vessel or an onshore facility or an offshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act, or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k) of this section.

Recovery of removal costs

Regulations; penalty

(1) Consistent with the National Contingency Plan required by subsection (c)(2) of this section, as soon as practicable after October 18, 1972, and from time to time thereafter, the President shall issue regulations consistent with maritime safety and with marine and navigation laws (A) establishing methods and procedures for removal of discharged oil and hazardous substances, (B) establishing criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, (C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges, and (D) governing the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes in order to reduce the likelihood of discharges of oil from vessels in violation of this section.

(2) Any owner or operator of a vessel or an onshore facility or an offshore facility and any other person subject to any regulation issued under paragraph (1) of this subsection who fails or refuses to comply with the provisions of any such regulations, shall be liable to a civil penalty of not more than $5,000 for each such violation. This paragraph shall not apply to any owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3)(ii) of subsection (b) of this section unless such owner, operator, or person in charge is otherwise subject to the jurisdiction of the United States. Each violation shall be a separate offense. The President may assess and compromise such penalty. No penalty shall be assessed until the owner, operator, or other person charged shall
have been given notice and an opportunity for a hearing on such charge. In determining the amount of the penalty, or the amount agreed upon in compromise, the gravity of the violation, and the demonstrated good faith of the owner, operator, or other person charged in attempting to achieve rapid compliance, after notification of a violation, shall be considered by the President.

Authorization of appropriations

(k) There is hereby authorized to be appropriated to a revolving fund to be established in the Treasury such sums as may be necessary to maintain such fund at a level of $35,000,000 to carry out the provisions of subsections (c), (d), (i), and (l) of this section. Any other funds received by the United States under this section shall also be deposited in said fund for such purposes. All sums appropriated to, or deposited in, said fund shall remain available until expended.

Administration

(l) The President is authorized to delegate the administration of this section to the heads of those Federal departments, agencies, and instrumentalities which he determines to be appropriate. Any moneys in the fund established by subsection (k) of this section shall be available to such Federal departments, agencies, and instrumentalities to carry out the provisions of subsections (c) and (i) of this section. Each such department, agency, and instrumentality, in order to avoid duplication of effort, shall, whenever appropriate, utilize the personnel, services, and facilities of other Federal departments, agencies, and instrumentalities.

Boarding and inspection of vessels; arrest; execution of warrants or other process

(m) Anyone authorized by the President to enforce the provisions of this section may, except as to public vessels, (A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone, (B) with or without a warrant arrest any person who violates the provisions of this section or any regulation issued thereunder in his presence or view, and (C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

Jurisdiction

(n) The several district courts of the United States are invested with jurisdiction for any actions, other than actions pursuant to subsection (i)(1) of this section, arising under this section. In the case of Guam and the Trust Territory of the Pacific Islands, such actions may be brought in the district court of Guam, and in the case of the Virgin Islands such actions may be brought in the district court of the Virgin Islands. In the case of American Samoa and the Trust Territory of the Pacific Islands, such actions may be brought in the District Court of the United States for the District of Hawaii and such court shall have jurisdiction of such actions. In the case of the Canal Zone, such actions may be brought in the district court for the District of the Canal Zone.

Obligation for damages under Federal navigable waters laws

(o)(1) Nothing in this section shall be construed to grant any person or entity the right to bring an action for damages in any Federal court for any personal injury or property damage arising out of a discharge of any seawater or liquid or hazardous substance, with the exceptions provided in subsection (p) of this section. Such actions may be brought in any Federal district court of competent jurisdiction, as determined in accordance with subsection (p) of this section.

(2) Nothing in this section shall be construed to abrogate any rights or remedies that an owner, operator, or other person may have under any other existing law, or any other law not in conflict with this section.

(p)(1) Any vessel, other than an oil barge of equivalent size, propelling and that does not carry oil or fuel, using any port or harbor of the United States or the waters of the contiguous zone, shall be subject to regulations of the President, evidence of financing, of an oil barge $125 per gross ton, and, in the case of any such vessel (or, for a vessel of 5,000 gross tons, $250,000), which enters or is in the United States, which shall be subject to penalties provided in this section. In cases where an owner or operator of an oil barge of equivalent size, propelling and that does not carry oil or fuel, is in distress, the President may require such owner or operator to meet the maximum penalty that could be imposed.

(2) Any bond filed shall be submitted to the Secretary of the Treasury for deposit into the United States Treasury.

(3) The President may delegate the responsibilities under this section to the appropriate Federal department, agency, or instrumentality.

(4) Any bond filed shall be submitted to the Secretary of the Treasury for deposit into the United States Treasury.
Zone, such actions may be brought in the United States District Court for the District of the Canal Zone.

**Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified or affected.**

(o)(1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

**Financial responsibility**

(p)(1) Any vessel over three hundred gross tons, including any barge of equivalent size, but not including any barge that is not self-propelled and that does not carry oil or hazardous substances as cargo or fuel, using any port or place in the United States or the navigable waters of the United States for any purpose shall establish and maintain under regulations to be prescribed from time to time by the President, evidence of financial responsibility of, in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater, to meet the liability to the United States which such vessel could be subjected under this section. In cases where an owner or operator owns, operates, or charters more than one such vessel, financial responsibility need only be established to meet the maximum liability to which the largest of such vessels could be subjected. Financial responsibility may be established by any one of, or a combination of, the following methods acceptable to the President: (A) evidence of insurance, (B) surety bonds, (C) qualification as a self-insurer, or (D) other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States.

(2) The provisions of paragraph (1) of this subsection shall be effective April 3, 1971, with respect to oil and one year after October 18, 1972, with respect to hazardous substances. The President shall delegate the responsibility to carry out the provisions of this subsection to the appropriate agency head within sixty days after October
18, 1972. Regulations necessary to implement this subsection shall be issued within six months after October 18, 1972.

(3) Any claim for costs incurred by such vessel may be brought directly against the owner or any other person providing evidence of financial responsibility as required under this subsection. In the case of any action pursuant to this subsection such insurer or other person shall be entitled to invoke all rights and defenses which would have been available to the owner or operator if an action had been brought against him by the claimant, and which would have been available to him if an action had been brought against him by the owner or operator.

(4) Any owner or operator of a vessel subject to this subsection, who fails to comply with the provisions of this subsection or any regulation issued thereunder, shall be subject to a fine of not more than $10,000.

(5) The Secretary of the Treasury may refuse the clearance required by section 91 of Title 46 to any vessel subject to this subsection, which does not have evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(6) The Secretary of the Department in which the Coast Guard is operated may (A) deny entry to any port or place in the United States or the navigable waters of the United States, to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection, which upon request, does not produce evidence furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

Establishment of maximum limit of liability with respect to onshore or offshore facilities

(q) The President is authorized to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under subsections (f)(2) and (3) of this section of less than $50,000,000, but not less than $8,000,000.

Liability limitations not to limit liability under other legislation

(r) Nothing in this section shall be construed to impose, or authorize the imposition of, any limitation on liability under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974.


Historical Note

References to text. The Outer Continental Shelf Lands Act, referred to in subsec. (b)(1), (2)(A), (3), (c)(1), (1)(2), is Act Aug. 7, 1953, c. 435, 67 Stat. 862. For complete classification of this Act to the Code, see set out under section 1331 of this title and Tables volume.

this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables volume.

The Deepwater Port Act of 1974, referred to in subsecs. (b)(1), (2)(A), (3), (c)(1), (d)(2), and (r), in Pub.L. 93-627, Jan. 3, 1975, 88 Stat. 2126, which is classified principally to chapter 29 (section 1501 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1501 of this title and Tables volume.

The Fishery Conservation and Management Act of 1976, referred to in subsec. (b)(1), (2)(A), (3), and (c)(1), is Pub.L. 91-565, Apr. 13, 1970, 90 Stat. 531, which is classified principally to chapter 36 (section 1901 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1901 of Title 16 and Tables volume.

The Intervention on the High Seas Act, referred to in subsec. (a), is Pub.L. 94-238, Apr. 5, 1974, 88 Stat. 8, which is classified generally to chapter 25 (section 1471 et seq.) of this title. Section 2(3) thereof is classified to section 1471(3) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1471 of this title and Tables volume.

1977 Amendment—Subsec. (a)(11). Pub.L. 95-297, § 55(k), added "and any facility of any kind which is subject to the jurisdiction of the United States and is located in, or under any other waters, for drilling "United States".


Subsec. (b)(1). Pub.L. 95-297, § 58(a)(1), added reference to activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

Subsec. (b)(2)(A). Pub.L. 95-297, § 58(a)(2), added reference to activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).


Subsec. (b)(3). Pub.L. 95-297, § 58(a)(3), (4), designated a part of the existing provisions preceding cl. (A) as cl. (I) and added cl. (II), in cl. (A), added "or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976) following the "waters of the contiguous zone" which may affect under 18 of executive or under 28 (section 333 of the Code)."
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State and Federal agencies," for "to the appropriate Federal agency;".

Subsec. (d). Pub.L. 95-217, § 58(e)(2), added "or under the intervention on the High Seas Act (or the convention defined in section 2(3) thereof)" following "Any expense incurred under this subsection;"

Subsec. (f)(1). Pub.L. 95-217, § 58(d)(2), substituted "in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $250 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater," for "$100 per gross ton of such vessel or $14,000,000, whichever is less;"

Subsec. (f)(2). Pub.L. 95-217, § 58(d)(3), substituted "$50,000,000," for "$8,000,000.");

Subsec. (f)(3). Pub.L. 95-217, § 58(d)(4), substituted "$50,000,000," for "$8,000,000.");


Subsec. (g). Pub.L. 95-217, § 58(d)(6), substituted "in the case of an inland oil barge $125 per gross ton of such barge, or $125,000, whichever is greater, and in the case of any other vessel, $250 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, $250,000), whichever is greater," for "$100 per gross ton of such vessel or $14,000,000, whichever is less;"

Subsec. (f)(2). Pub.L. 95-217, § 144(A), substituted reference to subsec. (b)(3) of this section for reference to subsec. (b)(2) of this section.

Subsec. (f)(3). Pub.L. 95-207, § 144(A), substituted reference to subsec. (b)(3) of this section for reference to subsec. (b)(2) of this section.

Subsec. (g)(1). Pub.L. 95-207, § 144(A), substituted reference to subsec. (b)(3) of this section for reference to subsec. (b)(2) of this section in par. (1).

Effective Date of 1977 Amendment. Pub.L. 95-217, § 58(h), provided that: "The amendments made by paragraphs (5) and (6) of subsection (d) of this section [substituting "$500,000,000" for "$8,000,000," in subsec. (f)(2) and substituting "$500,000,000" for "$8,000,000," in subsec. (f)(3) of this section] shall take effect 180 days after the date of enactment of the Clean Water Act of 1977 [Dec. 27, 1977]."

Allowable Delay in Establishing Financial Responsibility for Increases in Amounts Under 1977 Amendment. Pub.L. 95-217, § 58(j), provided that: "No vessel subject to the increased amounts which result from the amendments made by subsections (d)(2), (d)(3), and (d)(4) of this section [amending subsecs. (f)(1), (g), and (p)(1) of this section] shall be required to establish any evidences responsible for amounts required to be paid under 311(p) of the Federal Water Control Act [subsec. (p) of this section] for such increased amounts before January 1, 1978."

ASSIGNMENT

By virtue of the authority vested in me by section 211 of the Federal Water Pollution Control Act as amended by the Water Pollution Control Amendments of 1972 (Public Law 92-86 at 862; 33 U.S.C. 1321 note) and the act, by section 301 of title 3 of the United States Code (section 301 of title 3 of the United States Code) as amended by the President, and as President of the United States, it is hereby ordered as follows:

Section 1. Administrator of Environmental Protection Agency. The Administrator of the Environmental Protection Agency is hereby designated as the person to exercise, without the necessity of further ratification, or other action of the President, the following:

(1) the authority of the President under section 311 of the act [subsection (d)(3) of section 311 of the act] to determine that any quantifies hazardous substances that do not cause harm, which at such times, locations, or conditions, will be harmful;

(2) the authority of the President under section 311 of the act [subsection (e)(2)(B) of section 311 of the act] to designate as hazardous substances from nontransitory, related, and related to securing relief to such actual or threatened discharges of oil and hazardous substances from non-transitory sources that are threats or to a substantial threat to public health or welfare of the United States and those which are likely to become harmful;

(3) the authority of the President to determinations of imminent and substantial threat because of threatened discharges of oil and hazardous substances from non-transitory sources that are threats or to a substantial threat to public health or welfare of the United States and those which are likely to become harmful;
required to establish any evidence of financial responsibility under section 301 of the Federal Water Pollution Control Act [subsec. (p) of this section] for such increased amounts before October 1, 1978."

EXECUTIVE ORDER NO. 11733
Aug. 3, 1973, 38 F.R. 21242
ASSIGNMENT OF PRESIDENTIAL FUNCTIONS

By virtue of the authority vested in me by section 311 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 1862; 33 U.S.C. 1321) [this section], hereinafter referred to as the act, by section 301 of title 3 of the United States Code [section 301 of Title 3, The President], and as President of the United States, it is hereby ordered as follows:

Section 1. Administrator of Environmental Protection Agency. The Administrator of the Environmental Protection Agency is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the following:

(1) the authority of the President under subsection (e) of section 311 of the act [subsec. (e) of this section], relating to determinations of imminent and substantial threat because of actual or threatened discharges of oil or hazardous substances from vessels and transportation-related onshore and offshore facilities, and to contain such discharges;

(2) the authority of the President under subsection (j)(1)(C) of section 311 of the act [subsec. (j)(1)(C) of this section], relating to the establishment of procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and transportation-related onshore and offshore facilities, and to contain such discharges;

(3) the authority of the President under subsection (j)(1)(D) of section 311 of the act [subsec. (j)(1)(D) of this section], relating to the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes;

(4) the authority to administer the revolving fund established pursuant to subsection (k) of section 311 of the act [subsec. (k) of this section]; and

(5) the authority under subsection (m) of section 311 of the act [subsec. (m) of this section], relating to the boarding and inspection of vessels, the arrest of persons violating section 311 [this section], and the execution of warrants or other process pursuant to that section.

Sec. 2. Secretary of Department in which Coast Guard is Operating. The Secretary of the Department in which the Coast Guard is Operating is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the following:

(1) the authority of the President under subsection (e) of section 311 of the act [subsec. (e) of this section], relating to determinations of imminent and substantial threat because of actual or threatened discharges of oil or hazardous substances from vessels and transportation-related onshore and offshore facilities, and to contain such discharges;
(1) the authority of the President under subsection (p)(1) of section 311 of the act [subsec. (p)(1) of this section], relating to the issuance of regulations governing evidence of financial responsibility for vessels to meet liability to the United States; and

(2) the authority under subsection (p)(2) of section 311 of the act [subsec. (p)(2) of this section], relating to the administration of subsection (p) [subsec. (p) of this section].

Sec. 4. Council on Environmental Quality. The Council on Environmental Quality is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority under subsection (c)(1) of section 311 of the act [subsec. (c)(1) of this section], providing for the preparation, publication, revision or amendment of a National Contingency Plan for the removal of oil and hazardous substance discharges (hereinafter referred to as the National Contingency Plan).

Sec. 5. Other assignments.

(a) The head of each Federal department and agency having responsibilities under the National Contingency Plan (30 FR 16215), as now or hereafter amended, is designated and empowered to exercise, without the approval, ratification, or other action of the President, in accordance with that plan, the authority under subsection (c)(1) of section 311 of the act [subsec. (c)(1) of this section], relating to the removal of oil and hazardous substances discharged into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.

(b) The Administrator of the Environmental Protection Agency and the Secretary of the Department in which the Coast Guard is operating, respectively, is in charge of the waters and areas for which each has responsibility for providing or furnishing in-charge-coordinators under the National Contingency Plan, are designated and empowered to exercise, without approval, ratification, or other action of the President, the following:

(1) the authority under subsection (c)(2)(C) of section 311 of the act [subsec. (c)(2)(C) of this section], relating to the determination of major ports for establishment of emergency task forces;

(2) the authority under subsection (d) of section 311 of the act [subsec. (d) of this section], relating to the coordination and direction of the removal or elimination of threats of pollution hazards from discharges, or imminent discharges, of oil or hazardous substances, and the removal and destruction of vessels;

(3) the authority of the President under subsection (j)(1)(A) of section 311 of the act [subsec. (j)(1)(A) of this section], relating to the establishment of methods and procedures for the removal of discharged oil and hazardous substances; and

(4) the authority of the President under subsection (j)(1)(B) of section 311 of the act [subsec. (j)(1)(B) of this section], relating to the establishment of criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans.

(c) The Administrator of the Environmental Protection Agency and the Secretary of the Department in which the Coast Guard is operating are designated and empowered to exercise, without the approval, ratification, or other action of the President, the authority under section 311(j)(2) [subsec. (j)(2) of this section] with respect to assessing and compromising civil penalties in connection with enforcement of the respective regulations issued by each pursuant to this order.

Sec. 6. Consultation. Authorities and functions delegated or assigned by this order shall be exercised subject to consultation with the Secretaries of departments and the heads of agencies with operating or regulatory responsibilities which may be significantly affected.

Sec. 7. Agency to Receive Notices of Discharges of Oil or Hazardous Substances. The Coast Guard is hereby designated the "appropriate agency" for the purpose of receiving the notice of discharge of oil or hazardous substances required by subsection (b)(5) of section 311 of the act [subsec. (b)(5) of this section]. The Commandant of the Coast Guard shall issue regulations implementing this designation.

Sec. 8. Without derogating from any action heretofore taken thereunder, Executive Order No. 11568 of July 20, 1970, is hereby superseded.

Cross References
Federal oil pollution preventive measures on the high seas, availability of revolving fund monies, see section 1490 of this title.

Richard Nixon
POLLUTION PREVENTION 33 § 1321

Library References
Navigable Waters Ch. 26.
C.J.S. Navigable Waters § 11.

West's Federal Forms
Jurisdiction and venue in district courts, matters pertaining to, see § 1000.
Liability requirements, see §§ 11001 to 11005, 11005 to 12005.
Penalties, see §§ 11007 to 11103.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 1021 et seq.
Sentence and fine, see § 7331 et seq.
Taxation of costs, see §§ 4612 to 4632.

Code of Federal Regulations
Administrative requirements,
Claims, see 33 CFR 23.101 et seq., 46 CFR 542.1 et seq.
Pollution control and liability, see 33 CFR 153.101 et seq., 40 CFR 112.1 et seq., 114.1 et seq.
Liability on Trans-Alaska pipeline, see 43 CFR 29.1 et seq.
Limitations on discharge of oil, see 40 CFR 110.1 et seq., 121.1 et seq.
Plan for removal, see 40 CFR 1510.1 et seq.

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1. Constitutionality
Provision of this section dealing with reporting of oil spills into navigable waters is not unconstitutionally complex or labyrinthine. U.S. v. Kennecott Copper Corp., C.A.Ariz.1975, 223 F.2d 821.
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certiorari denied 97 S.Ct. 84, 42 50 L.Ed.2d 90.

In order to prevent and control pollution, Congress provided for those who violated provisions of this chapter. Matter of Vest Tr Inc., D.C.Miss.1974, 434 F.Supp. 1305.

Principal goal of this section that Coast Guard shall assess civil penalty upon owner of discharging facility is to deter spills. U.S. v. Reliable Oil Corp., D.C.Wa.1977, 438 F.Supp. 934.

The congressional purpose providing that Coast Guard assess civil penalty upon owner or operator of discharging facility was a standard of conduct higher related just to economic efficiency.

The economic sanction provided by this section as applied to all persons who spill oil accidentally or oil discharges to the extent that it is allowed to prevent any discharges, remains reasonable and is calculated to deter and to achieve the nonconsent that Congress has selected.

This section governing discharges of navigable waters and hazardous substances is not preventing any discharges, regardless of the economic motive of the discharger for economic reasons.

5. Law governing


Where United States sought judgment against municipal entities a federal court determined that the individual entity was not liable, with respect to cleanup charges from the federal government.

6. State regulation or control

Waiver of preemption, as in this section, concerning impact of any requirement with respect to discharge of navigable waters within the state is void. v. American Waterways Op. Pl. Inc.1975, 93 S.Ct. 1350, 411 U.S. 24, 50 L.Ed.2d 1151.

In view of the substantial difference between parties subject to the provisions of this section, particularly in terms of their different abilities to sustain losses as a result of fines, etc., its provisions do not run afoul of the equal protection clause of U.S.C.A.Const. Amend. 14.

Provision of this section imposing penal sanctions on captain of vessel for failing to report to appropriate authorities all hazardous oil discharge into navigable waters and regulation defining as harmful any oil spill which produces a sheen upon surface of waters does not violate due process because of failure to adequately define "harmful quantities," "immediately," and "appropriate government agency." 1d.

Provision of this section imposing penal sanctions on captain of vessel for failing to report to appropriate authorities all hazardous oil discharge into navigable waters and regulation defining as harmful any oil spill which produces a sheen upon surface of waters does not violate due process because of failure to adequately define "harmful quantities," "immediately," and "appropriate government agency." 1d.

Regulatory "sheen" test of harmfulness of spillage, which test distinguishes the harmful from the de minimus spill on board, can be observed, rather than measured, is not beyond authority granted by this section and is not violative of equal protection. Ward v. Coleman, D.C.Oh.1974, 429 F.Supp. 313.

The imposition of penalty for spillage of oil or hazardous substance as provided in this section, after notice and hearing and after due process given adequate liberty to pay and the gravity of the violation, is not constitutionally impermissible in due process grounds based on fact that penalty is imposed without regard to fault. 1d.

Penalty for spillage of oil or hazardous substance into or upon navigable waters of United States, as provided in this section, is a civil penalty, purpose to effectuate a regulatory and remedial scheme in which self-reporting is properly required and not violative of protection against self-incrimination afforded by U.S.C.A.Const. Amend. 5. 1d.


In view of the substantial difference between parties subject to the provisions of this section, particularly in terms of their different abilities to sustain losses as a result of fines, etc., its provisions do not run afoul of the equal protection clause of U.S.C.A.Const. Amend. 14. In providing that, relative to determining the amount of a penalty for discharge of oil or hazardous substance into navigable waters, consideration should be given to the size of the business of the owner or operator charged and the effect on his ability to continue in business.


While this provision provides that, in determining the amount of a penalty for discharge of oil or hazardous substance into navigable waters, the size of the business of the owner or operator charged and the effect on the owner’s ability to continue in business shall be taken into consideration, and while this creates a discrimination between defendants who are members of the same class, such discrimination is not per se a violation of constitutional rights. 1d.

2. Construction

A liberal construction of the immunity provision of this section with respect to reporting oil spills, insofar as it applies to individuals, would not require same liberal construction as it applies to corporations, where broad construction as to individuals would turn on presumption that Congress does not intend to act unconstitutionally, since that presumption need not be indulged where none of the available interpretations would infringe on constitutional protections afforded corporations. U.S. v. Le Beau Bros. Towing Co., Inc., C.A.N.Y.1976, 537 F.2d 149.

Clearing denied 97 S.Ct. 1688, 430 U.S. 957, 52 L.Ed.2d 353.

3. Construction with other laws

This section acted as a limit on federal government’s claim for cost of cleaning up oil which spilled from sunken harge, regardless of the basis on which such claim was made; government was not permitted to present a claim for such costs under general maritime law, common law or other statutes, except the Outer Continental Shelf Lands Act, section 1331 et seq., of Title 43. Complaint of Stewart Transp. Co., D.C.Wa.1977, 435 F.Supp. 788.

4. Purpose

Purpose of penalty provision of this section is to ensure, insofar as possible, that small discharges will not go undetected and that the possibility of effective abatement will not be lost.

Apex Oil Co. v. U.S., C.A.Mo.1976, 530 F.2d 1291, 186

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Principal goal of this section providing that Coast Guard shall assess a civil penalty upon owner of discharging vessel or facility to deter spills. U.S. v. Atlantic Richfield Co., D.C. Pa. 1977, 439 F.Supp. 330, affirmed 573 F.2d 1393.

The congressional purpose of this section providing that Coast Guard shall assess civil penalty upon owner of discharging vessel or facility was to impose a standard of conduct higher than that related just to economic efficiency. Id.

The economic sanction of penalty provided by this section, as applied to personnel who negligently report such spill to the appropriate authorities, and clean it up at their own expense, is reasonably calculated to deter oil spills and to achieve the noneconomic values that Congress has selected. Id.


3. Law governing


Where United States sought to vindicate against municipal entities and others a federally created right embodied in this chapter with respect to alleged oil discharge into river from facilities on or near municipal marine terminal, 16 Del.C. § 8424, relating to notice of claim, was inapplicable with respect to the claims asserted against the municipal defendants. U.S. v. Board of Harbor Commrs, D.C. Del. 1977, 33 F.R.D. 490.

6. State regulation or control—Generally

Waiver of preemption, as contained in this section, concerning imposition by a state of "any requirement or liability" with respect to discharge of oil into any waters within the state is valid. Askew v. American Waterways Operators Inc., Fla. 1973, 327 So.2d 530, 53 L.Ed.2d 259, rehearing denied 333 So.2d 371, 33 L.Ed.2d 162.

One reason why Congress decided that this section does not preempt the states from establishing either "any requirement or liability" or that this section presupposes a coordinated effort with the states, with any federal limitation of liability running to vessels and not to shore facilities. Id.

Congress by enacting this chapter did not intend to prohibit states from imposing otherwise constitutional taxes upon interstate and foreign commerce to give effect to state action to control evil of oil pollution. Portland Pipe Line Corp. v. Environmental Imp. Commn., Me. 1972, 207 A.2d 1, appeal dismissed 94 S.Ct. 522, 414 U.S. 1035, 58 L.Ed.2d 326.

1. Validity of particular laws and regulations

Regulations of Florida Department of Natural Resources requiring "containment gear" pursuant to Florida Oil-Spill Prevention and Pollution Control Act, Laws Fla. 1970, c. 70-244, § 7(2)(a), are not per se invalid on ground that subject to be regulated requires uniform federal regulation. Askew v. American Waterways Operators, Inc., Fla. 1973, 327 So.2d 290, rehearing denied 333 So.2d 371, 33 L.Ed.2d 162.

Provision of Florida Oil-Spill Prevention and Pollution Control Act, Laws Fla. 1970, c. 70-244 requiring licensing of terminal facilities, a traditional state concern, creates no conflict, per se, with this chapter. Id.


Forum provided by Coastal Conveyance Act, 38 M.R.S.A. § 541 et seq., on issue of Board of Arbitration, is intended to be the exclusive state forum for resolving damages claims arising from oil spills, and legislature did not intend to preclude those injured by oil spills from seeking relief in a federal court. Id.

Congress, in enacting this chapter, did not intend to restrict states to eight million-dollar limit imposed on reimbursement of federal cleanup costs, and legislature in enacting Coastal Conveyance Act, 38 M.R.S.A. § 541 et seq., thus did not create conflict with this chapter by failing to so limit liability under the Coastal Conveyance Act. Id.

Oil spillage ordinance requiring that persons unloading fuel or oil from vessels obtain a permit, give advance notice of unloading and pay into a special fund
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to provide for cleaning costs resulting from oil spillage could not be said, as a matter of law, to be an unconstitutional infringement upon the exclusive maritime and admiralty jurisdiction of the federal government. Mobil Oil Corp. v. Town of Huntington, 1972, 339 N.Y.S.2d 519, 72 Misc.2d 530.

8. Rules and regulations

This chapter gave continued life to previously existing regulations defining certain terms used in former section 1321 et seq. of this title until new ones were promulgated by presidential order in accordance with the dictates of this chapter. U. S. v. Kennecott Copper Corp., C. A. Cir.1973, 523 F.2d 821.

Although Congress wanted new regulations pursuant to this section to be put into effect by presidential orders as soon as possible, it manifested no intent to void existing regulations while awaiting a new set. Id.

Where regulations duly published in the Federal Register require notification of oil discharges in accordance with a regional contingency plan, but the plan itself is not published in the Federal Register and the public could ascertain its requirements only by visiting a Coast Guard office, failure to follow the plan cannot be the basis for a criminal prosecution of a defendant who did not have actual knowledge of the plan's contents. U. S. v. Messer Oil Corp., D.C. Pa.1973, 391 F.Supp. 537.

Even though the persons in charge of the oil facility may have been orally told by a state representative to make a report to the Environmental Protection Agency and the Coast Guard, the court would refuse to find under the circumstances of the case beyond a reasonable doubt that the persons in charge had actual knowledge of any regulation requiring such notice. Id.

9. Waters into which discharges prohibited


In prosecutions under this chapter, the government is not required to establish the effect on interstate commerce of any particular discharge or of any particular stream. Id.

Congressional attention to the effects of pollution on interstate commerce allows federal regulation of any activity within the class of pollution discharges or class of streams without regard to whether a particular discharge or stream has a discernible interstate effect. Id.

10. Designation of substance as hazardous

Where alcohol had not been determined by the Administrator to be a hazardous substance within this section notification of alcohol spill did not bring immunity provisions of this section into play. U. S. v. Ohio Barge Lines, D.C.La.1975, 410 F.Supp. 625, affirmed 531 F.2d 874.

Until a substance other than oil is designated as hazardous by the Administrator, none of the provisions of this section apply. Including duty to report spills, provision for assessment of civil penalty by the Coast Guard, and liability of the polluter for clean-up costs. Id.

11. Notification of discharge—Generally

Under this section, by requiring that certain persons disclose information concerning oil discharges, Congress took steps to ensure the timely discovery of subletable hazards and to facilitate implementation of measures calculated to minimize pollution damage; such policy bears heavily on question of class of persons to whom provisions of this section extend. U. S. v. Mobil Oil Corp., C.A. Tex.1972, 461 F.2d 1124.

12. — Agency which must be notified

Term "appropriate agency of the United States" as used in provision of this section requiring discharges of oil into navigable waters to be immediately reported to such agencies encompasses any federal agency concerned with water and environmental pollution or navigable waters. U. S. v. Kennecott Copper Corp., C.A.Arik.1973, 523 F.2d 821.

Where the Coast Guard designated the Environmental Protection Agency as the appropriate agency to receive notice of oil discharges, but the Agency in turn redesignated the Coast Guard as the appropriate agency, there was no effective legal requirement that notice be given to the Agency. U. S. v. Messer Oil Corp., D.C.Tex.1975, 391 F.Supp. 537.

13. — Discharges which must be reported


When read together, this section and regulations relating to duty of captain of vessel in navigable waters to notify appropriate federal agency of known discharges of oil from vessel should discharge of oil from ship be proximately caused by the ship's water's surface and if it does from a properly functioning engine. U. S. v. Boyd, C.A.Wash.1973, 461 F.2d 1163.

Congress in enacting this section requiring a report to appropriate authorities of all discharges of oil into navigable waters in harmful condition does not intend that all oil discharges be reported, and there is class of de minimis discharges which sanctions of this section do not apply.

Where prosecution of vessel for failing to report proper discharge of oil from vessel called for the spill of some 30 gallons, the case and the hypothesis contained therein should govern decision as to administrative regulation setting forth the test as determinative of harmful oil discharges which are reported should govern decision.

14. — Failure to report discharge

Since criminal penalty provisions section speaks in terms of any charge, it would not be inconceivable for the statutory language be construed to mean employee and his employer and his corporation and its penalties for failure to timely report.

Corporations, businesses of white transportation and storage of types of fuel oil, was liable, a similar charge, for failure to comply with regulation of the United States government of the known oil spill.

Phrase "in charge of" as used here bars the enforcement of this section making it one in charge of on-shore facility to notify federal government of oil from facility into and out of navigable waters covers party in charge even though he had no part in the spill, and is not responsible for the spill. Id.

Thus, we conclude that the factor of the situation, one who participates in the spill and does not include one having mere connection. U. S. v. Mackin Inc., D.C.Mass.1975, 386 F.Supp. 1109.

Even though employee causes spillage, discharge of oil by the employee to storage tank, where ordering was the cause of spillage flowing through vent pipe and not under seller's control, does not violate provision of this section.
discharge of oil from vessel show that a discharge of oil from ship is harmful and prohibited if it produces a sheen on the water's surface and if it does not come from a properly functioning vessel engine. U. S. v. Boyd, C.A.Wa 1972, 491 F.2d 1163.

Congress in enacting this section requiring a report to appropriate federal authorities of all discharges of oil in navigable waters in harmful quantities does not intend that all oil discharges be deemed harmful, and there is a certain class of de minimis discharges to which sanctions of this section do not apply. 1d.

Where prosecution of vessel captain for failing to report to proper authorities discharge of oil from vessel concerned the spill of some 30 gallons, the facts in the case and not the hypothetical situation should govern decision as to whether administrative regulation setting for the shown test as determinative of what are harmful oil discharges which must be reported should govern decision. 1d.

1d. — Failure to report discharge

Since criminal penalty provision of this section speaks in terms of any person in charge, it would not be inconsistent with the statutory language to hold both an employee and his corporate employer to its penalties for failure to report a known oil spill. Apex Oil Co. v. U. S., C.A.Del. 1976, 530 F.2d 1291, certiorari denied 97 S.Ct. 213, 50 L.Ed.2d 50.

Corporation, business of which included transportation and storage of various types of fuel oil, was liable, as the "person in charge", for failure to notify an appropriate agency of the United States government of a known oil spill. 1d.

Phrase "in charge of" as used in provision of this section making it a crime for one in charge of on-shore facility to fail to notify federal government of discharge of oil from facility into and upon navigable waters covers party in charge of facility even though he had nothing to do with spillage but does not include every one who participates in the act and does not include one having mere temporary connection. U. S. v. Mackin Const. Co., Inc., D.C.Mass. 1975, 388 F.Supp. 478.

Even though employee of corporate seller of fuel oil had duty to oversee filling of storage tank, where buyer's over- ordering was the cause of fuel oil overflowing through vent pipe on roof of tank and running downs haceside of tank and collecting into depression from which it proceeded to river and such tank was not under seller's control, seller did not violate provision of this section making it a crime for one in charge of on-shore facility not to notify federal government of oil discharge into navigable waters. 1d.

15. — Immunity from use in criminal prosecution

Corporation, having reported oil spill, was not immune from imposition of "civil" penalty in connection with the spill, regardless of the alleged criminal "nature" of such penalty. U. S. v. Le Beuf Bros. Towing Co., Inc., C.A.La. 1976, 537 F.2d 168, rehearing denied 541 F.2d 291, 292, certiorari denied 97 S.Ct. 1063, 120 U.S. 807, 52 L.Ed.2d 333.

Forfeiture actions brought in rem under section 407 of this title are civil proceedings, and thus, at least with respect to corporations, do not trigger the immunity provisions of this section with respect to reporting oil spills. 1d.

By fashioning a constitutionally-required immunity provision to protect individuals reporting oil spills, Congress did not thereby deprive corporate entities, which never had protection against self-incrimination, of due process insofar as immunity may not have same scope as to them. 1d.

In former section 1161(b)(4) of this title [now covered by subsec. (b)(5) of this section] which provided that notification received, pursuant to its provision of a discharge of oil into a waterway, and any information obtained by exploitation of the notification should not be used against the person making the report in prosecution for violation of anti-pollution laws, the terms "such person" and any "person in charge" did not refer only to natural persons but also included corporations which complied with the provisions of former section 1161(b)(4) of this title by giving immediate notice of a discharge. U. S. v. Republic Steel Corp., C.A.Ohio 1974, 491 F.2d 215.

Prosecution for discharge of oil into water which was based on evidence other than the notification or information obtained by exploitation of notification of the spill, given pursuant to former section 1161(b)(4) of this title [now covered by subsec. (b)(5) of this section], was unaffected by provision of former section 1161(b)(4) of this title that the notification and information obtained by exploitation of the notification should not be used in any criminal case against the person making the report. 1d.

The object of immunity granted by this section which says that person subjected to fine for failure to notify Coast Guard of discharge of oil into navigable waters shall be entitled to immunity from use of such notification in any
Corporations are entitled to immunity granted by this section from use of notification of oil spill in any criminal case, and corporations have the correlative duty to report spills. Id.

Fact that Congress has seen fit to require discharger of oil to report spill, so that it may be promptly contained, does not necessarily prevent it from establishing civil penalty for that environmentally harmful act, or from permitting penalty to be assessed through use of defendant's notification. U. S. v. General Motors Corp., D.C.C.A., 467 F. Supp. 1311.


In prosecution for violations of section 407 of this title, burden rested upon government to show that its evidence was free of immunity provided by subsection (b) of this section for any "person in charge" of vessel or facility who gives notice to appropriate agency of oil discharge, and question whether government's evidence was sufficiently independent of reports so as not to run afoul of the immunity would be decided during course of trial and not by separate pretrial hearing as requested by defendant. Id.

Within meaning of former section 1161 of this title (now covered by this section) which required "person in charge" of an on-shore facility to immediately report discharges of oil into the surrounding water to the appropriate federal agency, and protected any such person from the use of such notification or information obtained by the exploitation thereof in any criminal case against him, a corporate owner operator charged with a violation of the Rivers and Harbors Appropriation Act, section 401 et seq. of this title, was a "person in charge" and was entitled to the immunity provided. U. S. v. Reynolds Metals Co., D.C.Tex.1973, 329 F. Supp. 328.

Congress, in enacting former section 1161 of this title, intended to provide immunity in indictional clause for an individual, whether he was a corporate officer, a corporate supervisor, a person in a supervisory capacity or even a noninsulating janitor or night guard at off-shore facility, and such person did not need to be acting on behalf of the corporation and could be acting on his own personal behalf. U. S. v. Skil Corp., D.C.N.Y., 1972, 351 F. Supp. 253.

Congress, in enacting former section 1161 of this title, which provided that any person in charge of vessel or facility give notification of oil discharge and that notification received or information obtained by exploitation of notification not be used against any such person in criminal case, did not intend by phrase "person in charge" to mean anything else but person who was at facility and in control under management provisions or who was in charge of handling facility part related to spillage and did not intend such phrase to carry with it concepts of corporate action or immunity through officer or supervising personnel. Id.

Persons required to notify agency. A corporation can be a "person in charge" as that term is used in the penalty provision of this section. Apex Oil Co. v. U. S., C.A.Mo., 1973, 330 F.2d 1291, certiorari denied 377 U.S. 827, 80 L.Ed.2d 90.

Inclusion of a corporation within meaning of term "person in charge" as used in the criminal penalty provision of this section is not inconsistent with use of the words "owner or operator" in the civil penalty provisions; phrase "owner or operator" designates persons of a particular proprietary class as does the phrase "person in charge"; a corporation, being a "person" is included within the meaning of both. Id.

An oil corporation which owned a plant wherein simultaneous malfunctions in independent regulatory mechanisms caused tanks to discharge oil into navigable waterway was a "person" within provisions of this section requiring the "person in charge" of a vessel or offshore or onshore facility to notify federal agency of such discharge and granting immunity from criminal prosecution against persons who make the disclosure. U. S. v. Mobil Oil Corp., C.A.Tex.1973, 461 F.2d 1124.

The term "person in charge", as used in this section was not rendered ambiguous by the fact that one court, but not others, construed the term to mean an individual and to be inapplicable to corporations. U. S. v. Houglund, Barge Line, Inc., D.C.Pa., 1974, 387 F. Supp. 1110.

The term "person in charge", as used in this section requiring any person in charge of a vessel, as soon as he has knowledge of any discharge of oil from the vessel in violation of this chapter, to notify the United States Coast Guard, includes corporations as well as individuals. U. S. v. Bulk Transport, Inc., D.C.N.Y., 1973, 330 F. Supp. 1319.

Bargewarner which was accused of permitting oil spill from tank
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was entitled not only to a fair hearing from Coast Guard hearing officer but also to the appeal of which the latter gave notice; at both levels, shipowner had a fundamental right to meet factual matters and contentions that were, or might be deemed, adverse to its position. Id.

To satisfy mandate of this section, bargeowner, on appeal from fine imposed by Coast Guard hearing officer with respect to oil spill, should have known, in full, the record of the initial hearing which would be reviewed on appeal the hearing officer's reasons for his decision, and any additional evidence which would be considered on appeal and should have had an opportunity to be heard in rebuttal. Id.

Where procedures required by this section with respect to imposition of fine upon bargeowner for permitting oil spill were not met at either hearing stage or appellate stage, those deficiencies could not be cured by trial de novo before district court; ultimate decision was one for administrative discretion. Id.

10. Weight and conclusiveness of administrative interpretation

Since the Coast Guard is charged with execution of this section, great weight must be given to the construction it gives to its provisions. U. S. v. W. B. Enterprises, Inc., D.C.N.Y.1974, 378 F. Supp. 429.

Since Coast Guard Commandant's instruction concerning application of civil penalties for discharge of oil and hazardous substances was acted in Congress on day that this chapter was enacted by overwhelming majority of both houses, such was strong evidence that Congress sanctioned the Coast Guard's interpretation of its provisions. Id.

20. Power of court

Fact that there were outstanding navigational rules regulating navigation of defendants' vessels, which were used to transport oil, and that pursuant to delegation of special rule-making authority the United States Coast Guard could promulgate special rules in respect to that regulation did not preclude federal district court, in attempting to prevent oil spills, from imposing additional requirements or conditions of operation which did not conflict with regulations in effect. U. S. v. In re E. H. Stanley & Son., Inc., D.C.Vt.1973, 363 F.Supp. 110, affirmed 457 F.2d 1383, certiorari denied 94 S.Ct. 3152, 417 U.S. 976, 41 L.Ed.2d 1146.

21. Jurisdiction

District court was without jurisdiction to pass on claim to recover costs in-
22. Persons liable

Within specified monetary limits and subject to certain exceptions, one being the act of a "third party", a vessel discharging oil in violation of this section and the vessel's owners are liable without fault for the government's cleanup costs.

23. Persons entitled to maintain action

Action under this section by corporate owners of tank tank which overturned, spilling 6500 gallons of fuel oil, to recover from the United States costs allegedly incurred in cleaning up the oil spill was brought for the use and benefit of plaintiffs' insurer where plaintiff's insurer had paid out the total cost of the cleanup operations and, under the insurance contract, was thereafter subrogated to its insured's rights of action and the insurer's economic interest was thus actually at stake in the claim. Quarrles Petroleum Co. v. U. S., 377, 551 F.2d 1201, 213 Ct.Cl. 15.

In view of fact that corporate owners of tank truck which overturned and ruptured, spilling 6500 gallons of fuel oil, were liable for costs resulting from cleaning up the oil spill, fact that owners were insured and that their insurer paid out the total cost of the cleanup operations was immaterial to owner's right to bring suit under this section, for and on behalf of their insurer as subrogee, to recover from the United States reasonable costs incurred in the cleanup. Id.

Provisions of this section which allow certain parties who satisfy jurisdictional limitations to bring suit against the United States in the United States Court of Claims to recover money expended in removing oil spills from navigable waters does not contain any intimation that Congress intended to outlaw such suit for or on behalf of a subrogee. Id.


State was not entitled to recover from barge owner the costs incurred by Coast Guard or other federal agencies in their oil cleanup operations necessitated by barge grounding and subsequent oil spill. Id.


Businessmen who claimed loss of customers indirectly resulting from alleged pollution of coastal waters and beaches could not maintain action against parties allegedly responsible for spillage of oil into bay. Id.

24. Persons liable

Within specified monetary limits and subject to certain exceptions, one being the act of a "third party", a vessel discharging oil in violation of this section and the vessel's owners are liable without fault for the government's cleanup costs. Burgess v. M/V Tamano, C.A.Md.1977, 561 F.2d 564, certiorari denied 98 S.Ct. 1529, 435 U.S. 941, 55 L.Ed.2d 537.

Owners of Norwegian supertanker which struck submerged ledge and spilled oil were liable for government's cleanup costs where accident was caused by negligence of compulsory pilot. Id.

For purpose of the provision of this section excepting circumstances involving the "act of a third party": from rule imposing liability without fault for government's cleanup costs on a vessel discharging oil in violation of this chapter, an example of such "act of a third party" would be a vandalism opening a ship's valve; however, if ship's valve failed because of an act of the installer, ship's owners should not be permitted to avoid liability by claiming that the installer was a third party because he was an independent contractor rather than an employee. Id.

Provision of this section which creates an exception for acts or omissions of a "third party" to general rule that a vessel discharging oil in violation of this section and the vessel's owners are liable without fault for the government's cleanup costs must be narrowly construed to encompass only actions entirely outside the ship or, in the case of actors, the actions of strangers; therefore, as far as the compartment is at all times subject to the ultimate control of the ship's master, such pilot is not a "third party" as to the shipowners for purposes of the exception. Id.

A corporate employee's knowledge of an oil spill is knowledge of the corporation for purpose of this section. Apex Oil Co. v. U. S., C.A.Md.1978, 530 F.2d 1291, certiorari denied 97 S.Ct. 1291, 49 U.S. 297, 55 L.Ed.2d 60.


Where leak of some 25 to 30 gallons of oil into the East River from barge created a sheen on or discoloration of the water's surface at time of discharge, barge owner had violated this section because such a discharge has been determined by the Secretary of the Interior to be harmful to the environment; owner's subse-
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21. Indictment or information

Indictments charging corporation with failing to notify an appropriate agency of the United States government of a known oil spill in violation of this chapter were not sufficient to allege knowledge since each count alleged that there was a knowing failure to report. Apex Oil Co. v. U.S., C.A. Mo. 1976, 389 F.2d 1201, certiorari denied 400 U.S. 857, 91 L.Ed. 2d 90.

Information alleging defendant's failure to notify Environmental Protection Agency of discharge of oil from its facility was defective, where only regulation in effect at time of offense designated Coast Guard as appropriate agency for receiving notice of oil discharges and there was no regulation in effect at time of offense requiring giving of notice of oil discharges to Agency and therefore defendant could not be convicted of failure to notify the agency. U.S. v. Messer Oil Corp., D.C. Pa. 1977, 401 F.Supp. 507.

23. Defense

That oil discharge into navigable waters was solely caused by third party was not defense to imposition of civil penalty for such discharge under provisions of this section. U.S. v. General Motors Corp., D.C. Conn. 1978, 465 F.Supp. 1151.

28. Estoppel

Tank barge owner under cumulative effect view rule, was estopped from reasserting cumulative effect of findings in prior suit whereby oil spill at issue was established to have been caused by vessels of corporation controlled by same corporation as tank barge owner; thus, tank barge owner could not recover against United States for clean-up costs resulting from oil spill in navigable waters of United States, since spill was not caused solely by third party. Tanker Rymade No. 18, Inc. v. U.S., 1975, 359 F.2d 805, 288 Ct.Cl. 488, certiorari denied 410 U.S. 924, 40 L.Ed.2d 373.

21. Jury trial

Defendants who were assessed penalty by Coast Guard for discharges of oil into navigable waters were not entitled to criminal jury trial. U.S. v. Atlantic Richfield Co., D.C. Pa. 1977, 429 F.Supp. 830, affirmed 573 F.2d 1302.

Defendants who were assessed penalties by the Coast Guard pursuant to this section were not entitled to criminal jury trial. Id.

22. Presumptions

Inasmuch as Congress called "civil" the penalty provided by this section for owner of discharging vessel or facility, court was required to presume that Congress did not intend for immunity from use of notification of spill in any criminal case to apply. U.S. v. Atlantic Richfield Co., D.C. Pa. 1977, 429 F.Supp. 830, affirmed 573 F.2d 1302.

29. Burden of proof

Burden on captain of vessel, charged with failing to report oil discharge in navigable waters, to show that administrative regulation was unlawful was a heavy one since the captain was required to show that the sheer test determination of harmfulness as set forth in regulation could not be considered a reasonable expression of the congressional will even though Congress gave executive broad authority to make that determination. U.S. v. Boyd, C.A. Wash. 1973, 491 F.2d 1163.

30. Weight and sufficiency of evidence

Evidence that over 173,000 gallons of diesel oil spilled as result of pipeline break, that oil initially flowed into a pond two miles from the break and that the pond was connected by a 100-yard channel to the Gila River, that only 24,000 gallons were recovered, and that water samples downstream from the pond contained oil from the spill and that company did not report the spill, which it learned about on the evening of Nov. 30, until Dec. 3 sustained finding that corporation violated provision of this section requiring immediate reporting of any discharge of oil into navigable waters. U.S. v. Kennecott Copper Corp., C.A. Ariz. 1975, 523 F.2d 921.

Evidence that defendant's tanker barge had sustained damage to her hull while transporting cargo of oil, that substantial amount of oil was subsequently discovered on river that barge had traveled, together with evidence of results of government tests for spill identification utilizing gas liquid chromatography, established that oil cleaned up at government expense was discharged into river from defendant's barge. U.S. v. Skale, Inc., D.C. Tex. 1978, 447 F.Supp. 638.

Evidence, in proceeding wherein Coast Guard determined that some 12,000 barrels of oil discharged into river by owner of ship constituted a "harmful quantity", as prescribed by this section and that penalty of $5,000 was appropriate, taking into consideration size of business of owner and effect payment of penalty might have on owner's ability to continue...
Note 30

In business and gravity of violation, supported decision of Commandant to assess maximum penalty of $5,000 and decision was not arbitrary, capricious or abuse of discretion. Matter of Vest Transp. Co., Inc., D.C.Mis.1977, 434 F.Supp. 748.

In action by United States to collect penalty from shipowner for discharge of oil into river, evidence did not support shipowner's contention that had oil not been discharged ship might have sunk and thus, caused much greater quantity of oil to pollute river. U. S. v. Beatty, Inc., D.C.Ky.1963, 491 F.Supp. 1916.

31. Suppression of evidence

Motion of defendant, charged under this section with failing to immediately notify an appropriate federal agency after ascertaining that it had discharged oil into a nonnavigable stream, to suppress evidence obtained by the exploitation of defendant's notification to the agency would be denied, since defendant's notification was not immediate and was therefore not received in accordance with this section. U. S. v. Ashland Oil & Transp. Co., D.C.Ky.1973, 361 F.Supp. 349, affirmed 504 F.2d 1317.

32. Argument of counsel

In prosecution for willfully discharging gasoline into a navigable waterway under this section, limiting penalty for discharge of "pollutant," unobjectionable to summation by prosecutor emphasizing the criminal penalty in this section specifically relating to oil and hazardous substance liability and neglecting this section's civil remedies, though incomplete, was nonetheless accurate, and to the extent that it was improper, it was harmless, despite contention that the government had proceeded under the wrong section. U. S. v. Hamel, C.A.6th.1977, 581 F.2d 107.

Even though no evidence was introduced to show availability of 24-hour telephone answering service at one Environmental Protection Agency office to which company belatedly reported oil spill, where there was evidence to show the Coast Guard offices in the area and in Washington, D.C. maintained 24-hour telephone answering service, prosecutor was properly permitted to refer to closing argument to the existence of constant telephone service to reporting agencies as the one Agency office was not the only appropriate agency to which the spill could have been reported as required by provision of this section. U. S. v. Kennecott Copper Corp., C.A.Ariz.1975, 523 F.2d 821.

33. Costs of removal—Generally

Where barge discharged harmful quantity of oil into river, as evidenced by film or sheen upon or discoloration of surface of river, and barge owner failed to remove oil from river, barge owner and its insurer were liable to United States for amount paid to contractor for oil spill cleanup, together with other personnel and material costs assumed by Coast Guard. U. S. v. Sindle, Inc., D.C.Tex.1978, 447 F.Supp. 658.

Where owner of oil barge which ran aground on submerged rocks causing spillage in Hudson River channel, and owner of tug which was towing barge at time of accident, were not same entity, and where there was no vestige of contractual relationship running between owners of two vessels and government, "helmsman rule" would not apply to require calculation of tug owner's liability for cleanup costs under this section based upon combined tonnage of tug and barge; tug owner's liability would be limited to $100 in cleanup and removal of oil alone. Tug Ocean Prince, Inc. v. U. S., D.C.N.Y.1977, 438 F.Supp. 907.

This section imposed no limits on right of State of Virginia to recover from barge owner the entire cost of cleaning up oil which spilled from barge when it sank in Chesapeake Bay and, likewise, this section did not limit recovery by the state for statutory penalties, damage to state oyster beds and injury to wildlife and other natural resources. Complaint of Steuart Transp. Co., D.C.Va.1977, 438 F.Supp. 768.

Where insured, which was responsible for oil spill in navigable waters, proposed to insure that insured itself perform oil removal and cleanup work instead of permitting government to have it done by others, because it was apparent that insured's costs for such work would be within policy limits, but if others did the work charges against insured would substantially exceed policy limits, insured had duty to assent to insured's proposal and treat expenses incurred by insured in same manner as those charged by government for work done by others. Chemical Applications Co., Inc. v. Home Indem. Co., D.C.Mass. 1977, 425 F.Supp. 777.

Government was entitled to recover actual expenses incurred in cleaning oil spill off river, even if expenses were not reasonable. U. S. v. Beatty, Inc., D.C.Ky.1975, 401 F.Supp. 1049.

34. — Recovery from United States

Claimant cannot be reimbursed for costs incurred in cleaning oil discharged into navigable waters of United States, even if a third party immediately caused the spillage, if claimant does not prove that reasonable sections had been taken to prevent or 194
foresee such intervention by the third party. (Chicago, M. St. P. & P. R. Co. v. U. S., Ct.CL.1975, 575 F.2d 539.)

Owners exercised reasonable care to foresee third party intervention in abandoned meat-packing plant in which burglary opened valves causing oil to seep into navigable waters of United States, where owners had acquired plant only ten days before burglary, valves had been closed and each valve handle protectively removed, entire assemblage was protected against accidental overflow by capped vent pipe, there was perimeter fence around facility and there was outside lighting; thus owners were entitled to be reimbursed by United States for costs incurred in cleanup and removal of the oil. Id.

Failure of owners of property to prepare a spill control and countermeasures plan was not negligence per se but was merely one of many indicia to be considered in determining overall reasonableness of conduct of owners who sought to recover from United States for costs incurred in cleanup and removal of oil discharged into navigable waters of United States from their property. Id.

For purpose of provision of this section which entitles certain parties under certain circumstances to recover from the United States reasonable costs "incurred" in removing oil spills from navigable waters, term "incurred" means to become liable for or subject to: term does not require that party who seeks to recover actually paid for costs of such cleanup. (Quarles Petroleum Co., Inc. v. U. S., 1977, 551 F. 2d 1201, 313 Ct.Cl. 15.)

Corporate owners of tank truck which overturned and ruptured, spilling 6500 gallons of fuel oil, were entitled to recover for and on behalf of their insurance carrier as subrogee, reasonable costs incurred in removing the oil where oil was discharged into navigable waters of the United States solely due to an act or omission of a third party. Id.

Because insurance carrier, as subrogee of owners/operators who incurred expenses for cleaning up an oil spill, could recover under this section only if owners/operators were entitled to recover, allowing such subrogee to recover through its insured would not extend liability or constitute a waiver of sovereign immunity against the United States additional to that entailed by the statutory language which permits an owner/operator who satisfies specific jurisdictional limitations to bring suit against the United States government in the United States Court of Claims to recover such expenses. Id.

Elements of a claim for relief under this section which provides that certain parties may recover from the United States money expended in removing oil spills from navigable waters are: a discharge of a harmful quantity of oil from a facility owned or operated by plaintiff; that the discharge was caused solely by an act or omission of a third party; that the oil was removed in accordance with regulations; and that plaintiff or his subrogee expended money to remove the oil. Id.

35. Damages

Historically, damages to the shore or to shore facilities were not cognizable in admiralty. (Askew v. American Waterways Operators Inc., Fia.1973, 53 S.Ct. 1500, 411 U.S. 333, 56 L.Ed.2d 249, rehearing denied 93 S.Ct. 2748, 419 U.S. 923, 57 L.Ed.2d 162.)

Since Congress, in enacting this chapter, dealt only with "clean-up" costs incurred by reason of oil spills, it left the states free to impose "liability" in damages for losses both by the state and by private interests; the state police power is adequate to impose liability without fault for damages to state and private interests. Id.

36. Penalty—Generally

For purposes of judging amount of penalty to be assessed against corporation under this section because of discharge of oil into navigable waters from corporation's facilities, corporation was not guilty of negligence in failing to lock valves to oil storage tanks where evidence showed that tanks were protected by two high fences topped with barbed wire, entrances to which were securely chained and padlocked, and that premises were controlled by security forces. (U. S. v. General Motors Corp., D.C.Conn.1975, 403 F.Supp. 1151.)

While a penalty automatically attaches at the time of an unlawful discharge of oil or other hazardous substance in violation of this section, it is nevertheless true that any such civil penalty may be compromised and that the gravity of the violation shall be considered in assessing the penalty; and these provisions allow a flexibility which may take into account any defenses which parties may raise in their behalf. (U. S. v. Eureka Pipeline Co., D.C.W.Va.1975, 401 F.Supp. 224.)

Under this section imposition of civil penalty for discharge of oil or other hazardous substances is not limited to compensatory damages; in fashioning such a penalty it does not matter that the quantum of damage is incapable of precise measurement; purpose of such a penalty is to compensate the government for environmental damage determined to result from a discharge of oil or other sub-

30. — Criminal or civil nature
Penalty provided by this section for owner of discharging vessel or facility, as applied to persons who spill oil accidently, report such spills to the appropriate authorities, and clean it up at their own expense, is not really criminal rather than civil and the penalty does not act only as a punishment but serves the ends of civil regulation. U. S. v. Atlantic Richfield Co., D.C.Fla. 1977, 429 F. Supp. 830, affirmed 573 F.2d 1303.

Penalty imposed under this section on owner or operator of vessel or facility from which oil or hazardous substance is discharged in harmful quantities in civil, not criminal penalty. U. S. v. General Motors Corp., D.C.Conn. 1975, 408 F.Supp. 1151.

29. — Excessiveness
Fine of $2,000 for discharge of ten to 15 gallons of oil into river, which caused a sheen upon water, was not excessive. U. S. v. Beatty, Inc., D.C.N.Y. 1975, 401 F.Supp. 1040.

20. — Reduction
Where stipulated evidence showed that discharge of oil from corporation's facility was solely caused by third-party intruder and not contributed to by any negligence on part of corporation, civil penalty imposed by United States Coast Guard under provisions of this section would be reduced from $1,200 to nominal penalty of $1. U. S. v. General Motors Corp., D.C.Conn. 1975, 403 F.Supp. 1151.

Where fine imposed by Coast Guard for discharge of oil into navigable waters was within limits imposed by law, district court had no authority to reduce it or eliminate it. U. S. v. Beatty, Inc., D. C.Ry. 1979, 401 F.Supp. 1040.

§ 1322. Marine sanitation devices

Definitions

(a) For the purpose of this section, the term—

1. "new vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transport of which is initiated under this section;

2. "existing vessels or other artificial contrivances" means of transport of which is initiated under this section;

3. "public vessels and facilities" means of transport issued by the Coast Guard and engaged in commerce

4. "United States" means the countries of American Samoa, the Pacific Islands;

5. "marine sanitation devices" means devices for the treatment, collection, or association of sewage and other wastes on vessels subject to this section;

6. "person" means owner, operator, or association with a vessel;

7. "discharge" means the act of releasing or the process of releasing any water containing sewage and other wastes from an artificial contrivance;

8. "commercial" means the act of releasing or the process of releasing any water containing sewage and other wastes from an artificial contrivance into navigable waters;

9. "graywater" means any water from toilets and other wastes, except that which shall be disposed of through other means of transport.
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§ 1321. Oil and hazardous substance liability

Definitions

(a) For the purpose of this section, the term—

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

(2) "discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 1342 of this title, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 1342 of this title, and subject to a condition in such permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of this title, which are caused by events occurring within the scope of relevant operating or treatment systems;

(See main volume for text of (3) to (16))

(17) "Otherwise subject to the jurisdiction of the United States", means subject to the jurisdiction of the United States citizenship, United States vessel documentation or numbering, or as provided for by international agreement to which the United States is a party.

Congressional declaration of policy against discharges of oil or hazardous substances designation of hazardous substances study of higher standard of care incentives and report to Congress determination of removability liability penalties civil actions penalty limitations separate offenses jurisdiction mitigation of damages and costs recovery of removal costs and alternative remedies

(b) (1) The Congress hereby declares that it is the policy of the United States that there should be no discharges 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, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, operated under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976).

(2) (A) The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States or adjoining shorelines or the waters of the contiguous zone or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, operated under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(B) The Administrator shall within 18 months after November 2, 1978, conduct a study and report to the Congress on methods, mechanisms, and procedures to create incentives to achieve a higher standard of care in all aspects of the management and movement of hazardous substances on the part of owners, operators, or persons in charge of onshore facilities, offshore facilities, or vessels. The Administrator shall include in such study (1) limits of liability, (2) liability for third party damages, (3) penalties and fees, (4) spill prevention plans, (5) current practices in the insurance and banking industries, and (6) whether the penalty enacted in subclause (bb) of clause (III) of subparagraph (B) of subsection (b) (2) of section 311 of Public Law 92-500 should be enacted.

(3) The discharge of oil or navigable waters of the United States is operating of not more than 1,000,000 barrels of oil or a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) of the United States Government in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) of this sub section and which is operated under the jurisdiction of the United States shall be construed to be an onshore facility of the United States, and in the case of such discharge of oil or a hazardous substance, the United States Government in charge of such facility shall be responsible for all reasonable costs and expenses incurred in the protection and preservation of the United States, in connection with oil or a hazardous substance from such facility.

(4) The President shall cause to be devised and submitted to the Congress appropriate regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, operated under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches.

(6) (A) Any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection, or any operator, or person in charge of an onshore facility of the United States, and in the case of such discharge of oil or a hazardous substance, the United States Government in charge of such facility shall be responsible for all reasonable costs and expenses incurred in the protection and preservation of the United States, in connection with oil or a hazardous substance from such facility.
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(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974, or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges of oil into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976), where permitted under the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful.

Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

(5) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge. Any such person (A) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) (i) of this subsection, or (B) in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) (ii) of this subsection and who is otherwise subject to the jurisdiction of the United States at the time of the discharge, or (C) in charge of an onshore facility or an offshore facility, who fails to notify immediately such agency of such discharge, shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. Any notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal or civil proceeding, or in any other judicial proceeding, except as provided in paragraph (6).

(6) (A) Any owner, operator, or person in charge of any onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense. No owner, operator, or person in charge of any vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) (ii) of this subsection, and any owner, operator, or person in charge of a vessel from which oil or a hazardous substance is discharged in violation of paragraph (3) (ii) of this subsection, who is otherwise subject to the jurisdiction of the United States at the time of the discharge, shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5,000 for each offense.

(7) No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to con-
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and the gravity of the violation, shall be considered by such Secretary. The Secretary of the Treasury shall withhold at the request of such Secretary the clearance required by section 91 of Title 46 of the United States Code, when a vessel the owner or operator of which is subject to the foregoing penalty. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to such Secretary.

(B) The Administrator, taking into account the gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge, may commence a civil action against any such person subject to the penalty under subparagraph (A) of this paragraph to impose a penalty based upon consideration of the size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge. The amount of such penalty shall not exceed $50,000, except that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the gravity and knowledge of the owner, operator, or person in charge, such penalty shall not exceed $250,000. Each violation is a separate offense. Any action under this subparagraph may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to assess such penalty. No action may be commenced under this paragraph where a penalty has been assessed under clause (A) of this paragraph.

(C) In addition to establishing a penalty for the discharge of a hazardous substance, the Administrator may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

(D) Any costs of removal incurred in connection with a discharge excluded by subsection (a) (2) (C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 1319 (b) of this title.

(E) Civil penalties shall not be assessed under both this section and section 1319 of this title for the same discharge.

[See main volume for text of (c) to (f)]


References to Text. The penalty enacted by paragraph (b) of this clause (iii) of subparagraph (B) of subsection (b) of section 301 of Public Law 92–500, referred to in subsec. (b)(2)(H), refers to penalty provision classified to former subsec. (b)(2)(H)(ii) of this section prior to amendment by section 1(b)(2) of Pub.L. 95–576, which has provided:

"(b) a penalty determined by the number of units discharged multiplied by the amount established by the Secretary of the Treasury under clause (i) of this subsection, but such penalty shall not be more than $2,000,000 in the case of a discharge from a vessel and $500,000 in the case of a discharge from an onshore or offshore facility."

1978 Amendment. Subsec. (a)(2) Pub.L. 95–576, § 1(b)(1), added discharges described in clauses (A) to (C) from the territory charges.

Subsec. (a)(2). - Pub.L. 95–576, § 1(b)(1), substituted requirement that a study be made respecting methods, mechanisms, and procedures for creating incentives to achieve higher standard of care, management and movement of hazardous substances including consideration of enumerated items, and a report made to Congress within 18 months after Oct. 18, 1972, for prior provisions concerning actual removability of any designated hazardous substance, liability during two year period commencing Oct. 18, 1972 based on toxicity, degradability, and dispersal characteristics of the substance limited to $50,000 and without limitation in cases of willful negligence or willful misconduct, liability after such two year period ranging from $500 to $5,000 based on toxicity, etc., or liability determined by number of units discharged multiplied by amount established for the unit limited to $5,000,000 in the case of a discharge from a vessel and to $500,000 in the case of a discharge from an onshore or offshore facility, establishment by regulation of a unit of measurement based upon the usual trade practice for each designated hazardous substance and establishment for such unit a fixed monetary amount ranging from $100 to $1,000 based on toxicity, etc.

Subsec. (b)(3) Pub.L. 95–576, § 1(b)(4), substituted "such quantities as may be harmful" for "harmful quantities."

Subsec. (b)(4). - Pub.L. 95–576, § 1(b)(5), struck out "...as soon as possible after October 18, 1972."
Naval Water Pollution Control Act

Chapter VII

Removal of Harmful Substances

§ 1321. Removal of hazardous substances

(a) Provision of this section defining terms "removal" and "removal to include removal of oil or hazardous substances from water and shorelines or taking of such other actions as may be necessary to minimize or mitigate damage to public health or welfare does not limit standard of "removability" to actual physical removal of the receiving water body, but sets standard as mitigation of harm through neutralization of a harmful substance. Manufacturing Chemists Ass'n v. Costle, D.C., Oct. 7, 1975, 375 F. Supp. 982.

(b) It is not practicable to develop a totally accurate scheme for determining mitigability of harm for all substances, under all circumstances, and for every conceivable type of spill or receiving body, but some consideration must be given to factor of "removability" in making determination.

(c) Notification of discharge—Generally

Penalties assessed against corporation, pursuant to this section, because of spills of petroleum products were "civil" in nature and, therefore, the use immunity provision of this section did not apply to preclude imposition of such penalties on the basis of information provided by corporation's notification compliance. U.S. v. Allied Towing Corp., C.A., Aug. 7, 1978, 575 F.2d 978.

(d) Immunity from use in criminal prosecution

The scope of use immunity under this section which prohibits use in a criminal case of statutorily mandated notifications concerning discharges of oil or hazardous substances or of information obtained by the exploitation of such notification is solely a matter of statutory construction. U.S. v. Allied Towing Corp., C.A., Aug. 7, 1978, 575 F.2d 978.

(e) Other penalties—Generally

There is a inconsistency between the existence of a maritime tort for oil spillage into the navigable waters of United States and the delineation of the rights of the United States in this chapter setting third-party owner or operator liability at $500 per gross ton of the vessel or $14,000,000, whichever is less. U.S. v. M/V Big San, D.C., Sept. 1978, 454 F. Supp. 1144.

(f) Eilen against vessel

With respect to the maritime tort of oil pollution, the United States has a maritime lien against the vessel causing the discharge of oil into the navigable waters of United States. U.S. v. M/V Big San, D.C., Oct. 3, 1978, 454 F. Supp. 1144.

Although, under this chapter, the statutory lien of United States against a vessel which has caused the discharge of oil from another vessel into the navigable waters of United States is limited to $15,000, under the Government's claims based on maritime tort and 33 U.S.C. § 1321, section 412 of this title, the lien is equal to the amount of the cleanup costs shown by the Government to be reasonable, plus perhaps interest, damages, and costs, subject to the maximum set by the value of the vessel and its cargo.

United States may obtain a statutory lien under this chapter against a vessel which has caused discharge of oil from another vessel into the navigable waters of United States.

Supplementary Index to Notes

A. Validity of particular laws and regulations—

The use immunity provision of this section did not preclude the Government from using information provided by corporation's notification compliance as basis of complaint charging corporation with violations of this section. U.S. v. Allied Towing Corp., C.A., Aug. 7, 1978, 575 F.2d 978.

B. Notification method—

One method set forth in regulations promulgated by Environmental Protection Agency for determining quantity of hazardous substances in chemical substances and thereafter reporting, liability and cleanup scheme for discharge of those substances from offshore facilities, vessels and onshore facilities, including motor vehicles and rolling stock, is arbitrary and capricious and contrary to statutory mandate in that such factors as times, locations, circumstances and conditions are not met and their influence cannot be found in method as promulgated. Manufacturing Chemists Ass'n v. Costle, D.C., Oct. 7, 1975, 375 F. Supp. 982.

C. Regulations—

Regulations of Environmental Protection Agency that treat ten substances listed as hazardous as being removable, and, therefore, non subject to relevant statutory provision because they have characteristics similar to oil, which is actually removable from water under certain circumstances, is arbitrary and, hence, invalid as necessary to statutory mandate setting forth mitigation of harm through neutralization of hazardous substance as standard of care.

D. Removal of hazardous substances—

Provision of this section defining terms "removal" and "removal to include removal of oil or hazardous substances from water and shorelines or taking of such other actions as may be necessary to minimize or mitigate damage to public health or welfare does not limit standard of 'removability' to actual physical removal of the receiving water body, but sets standard as mitigation of harm through neutralization of a harmful substance. Manufacturing Chemists Ass'n v. Costle, D.C., Oct. 7, 1975, 375 F. Supp. 982.

E. It is not practicable to develop a totally accurate scheme for determining mitigability of harm for all substances, under all circumstances, and for every conceivable type of spill or receiving body, but some consideration must be given to factor of 'removability' in making determination.

F. Notification of discharge—Generally

Penalties assessed against corporation, pursuant to this section, because of spills of petroleum products were "civil" in nature and, therefore, the use immunity provision of this section did not apply to preclude imposition of such penalties on the basis of information provided by corporation's notification compliance. U.S. v. Allied Towing Corp., C.A., Aug. 7, 1978, 575 F.2d 978.