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**CONTENTS:**

LIABILITY FOR OFFSHORE OIL SPILLS.....P. 1  
HAZARDOUS WASTE CONTROL IN LA. ....P. 3

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## **Oil Spill Liability Fund**

The risk of oil pollution and the threat of damage to public and private interests are expected to increase as the United States accelerates oil and gas activity on the Outer Continental Shelf. To provide for prompt removal of any oil spilled and for payment of damages caused by oil pollution, Congress included the Offshore Oil Spill Pollution Fund as Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (P.L. 95-372, Sept. 18, 1978).

The idea behind Title III is relatively simple. As a general proposition, owners and operators of offshore facilities and vessels will be liable for removal costs and damages incurred as a result of oil pollution caused by them. In the event owners and operators cannot, will not or are not required to pay for the damages, the Fund will fill the gap. The Fund will be maintained at a level of not less than \$100 million nor more than \$200 million. It will consist of money generated from a per barrel fee of up to three cents assessed on oil produced on the OCS and money obtained by the Fund through fines, penalties and reimbursements.

### **Losses Covered and Claims Allowed**

Two types of economic losses are covered by Title III. The first is removal costs --those costs incurred by government entities or private parties to remove spilled oil and to cleanup the spill area. The second type of loss is listed in Title III as "damages," defined broadly to mean compensation sought by any person suffering any direct and actual injury proximately caused by the discharge of oil from an offshore facility or vessel; the term does not include cleanup costs, which are covered under the first category of economic loss. The Title lists six types of damages included within the term, but the list does

not appear to be exhaustive. Among damages listed are (a) injury to or destruction of real or personal property; (b) loss of use of real or personal property; (c) injury to or destruction of natural resources; (d) loss of use of natural resources; (e) loss of profits or impairment of earning capacity due to injury to or destruction of real or personal property or natural resources; and (f) loss of tax revenue for a period of one year due to injury to real or personal property.

In connection with the two categories of economic loss, Title III states which claimants are allowed to assert claims for the particular losses involved.

Any claimant, including the owner or operator of the vessel or offshore facility involved in the oil pollution incident, may seek recovery of removal costs, but the owner or operator will be allowed to recover these costs only under certain circumstances, as will be discussed.

United States claimants (i.e., any person residing in the U.S., the U.S. Government or one of its agencies, the government of a state or one of its political subdivisions) may assert claims for injury to, destruction of or loss of use of property and for loss of use of natural resources if the property involved is owned or leased by the claimant or the natural resource is utilized by him. This provision, for example, might allow fishermen whose fishing area is marred by an oil spill to collect for loss of natural resource, i.e., the fishery. Claims for injury to or destruction of natural resources may be asserted by the President as trustee for natural resources over which the federal government has sovereign rights or exercises exclusive management authority. The states may also assert similar claims for natural resources within their management territory. If a United States claimant derives at least 25% of his earnings from activities which utilize the property or natural resource he may assert a claim for loss of profits or impairment of earning capacity for injury to

or destruction of the property or resource. The federal government and the states (including political subdivisions) can claim tax revenue losses under the legislation, and foreign claimants can assert claims under particular circumstances outlined in the Title.

### Liability

Title III's liability provisions speak in terms of owners and operators of offshore facilities and vessels, excluding public vessels. Offshore facility includes any oil refinery, drilling structure, oil storage or transfer terminal or pipeline used to drill for, produce, store, handle, transfer, process or transport oil produced from the OCS. The facility must also be located on the OCS. The term "vessel" means every description of watercraft operating in waters above the OCS and which is transporting oil directly from an offshore facility.

#### A. Liability of Owners and Operators

Unless they have a defense or are entitled to a limitation of liability under the provisions of Title III, owners and operators of vessels and offshore facilities will be held strictly liable for any removal costs or damages caused by oil pollution attributable to them. The concept of strict liability means simply liability regardless of fault or negligence.

The defenses to liability of owners and operators to private parties for removal costs or damages are enumerated in Title III as acts of war, unanticipated and unavoidable grave natural disasters, or intentional or negligent acts of a party claiming damages or of a third party. No defenses, exceptions or limitations will, however, relieve an owner or operator of liability for removal costs incurred by any federal, state or local government entity.

An owner or operator will be entitled to limit his liability for damages arising out of an oil pollution incident if the incident has not been caused by willful misconduct or gross negligence within the privity or knowledge of the owner or operator or by violation of an applicable safety, construction or operating standard of the federal government. In the case of vessels, liability may be limited to the greater of \$250,000 or \$300 per gross ton. To claim

limitation, the vessel owner or operator must provide reasonable cooperation and assistance to the federal official in charge of cleanup operations. In the case of an offshore facility, liability for damages may be limited to \$35 million, but there is no limitation for removal and cleanup costs. Besides the monetary limitation, the key difference between the limitation provision for vessels and that for offshore facilities is that vessels are allowed to limit their liability for removal costs as well as for damages, except to the extent removal costs are incurred by a governmental entity.

In a situation where a vessel or offshore facility admits liability, claims for damages must be asserted against the owners or operators. Claims can be brought against the Fund only to the extent that the owners or operators deny liability, limit liability or are incapable of paying.

#### B. Liability of the Fund

The Fund is liable without limitation to any person not connected with the incident to the extent losses are not otherwise compensated. Claimants who are causally connected with the pollution incident may collect against the Fund under specified circumstances.

##### 1. Claims by Persons Not Connected With the Incident

If a person suffers loss due to oil pollution and cannot collect against an owner, operator or guarantor for any reason, he may assert a claim against the Fund. A person may be unable to collect against the owner, operator or guarantor if the latter denies liability, if he has a defense, if he invokes the limitation of liability provisions or if he is insolvent. If the person to whom the claim is presented denies liability or fails to settle the claim within a certain specified period, the claimant may elect to sue the party in court or to present his claim to the Fund. The election in such a case is irrevocable and exclusive. If the claim against the owner or operator goes unsatisfied or only partially satisfied because of liability limitation or financial insolvency, the claim can be presented to the Fund for the uncompensated damages.

The Fund is also liable for any damages caused by oil pollution from a public vessel.

## 2. Claims by Persons Involved in the Incident

### (a) Removal Costs

If the owner or operator of a vessel or facility involved in an incident has a defense to liability, he may recover from the Fund removal costs incurred by him or by another private party to whom he has reimbursed removal costs. For example, if a grave, unanticipated and unavoidable natural disaster causes an oil pipeline to erupt on the OCS, the owner or operator of the pipeline should be able to recover all removal costs incurred by him or by a private party he has paid. As noted above, however, removal costs incurred by any government entity must be borne by the facility or vessel involved in the incident.

Vessels are given an additional remedy for recovering removal costs. If the vessel is not entitled to a defense, but is entitled to limit its liability as discussed above, the vessel can recover removal costs to the extent those costs exceed the vessel's liability limitation. In reality, this remedy appears to be a hollow one because few vessel owners will incur or pay removal costs when they are entitled to invoke liability limitations. This additional remedy is not given to offshore facilities because their liability is unlimited as to removal costs.

### (b) Other Losses

In certain situations claimants, including owners and operators of facilities and vessels, will be able to recover from the Fund damages (as defined by Title III) they suffer as a result of an oil pollution incident in which they are involved. To the extent the incident or economic loss is not caused by the negligence of the claimant, the claimant may recover for his damages against the Fund. In cases where the incident or loss is caused in whole or in part by a claimant's gross negligence or willful misconduct, the claimant may not recover at all from the Fund.

The losses envisioned in the preceding paragraph are those that result directly from the oil pollution. An example would be the case where oil leaks from a vessel, catches fire and destroys the vessel. Absent gross

negligence or willful misconduct, the vessel owner should be able to collect for his loss from the Fund to the extent he is not negligent and is not otherwise compensated. Because of the subrogation provisions of the legislation, there may also be situations in which owners or operators--and their insurers and guarantors--may recover against the Fund for claims paid by them to third persons. The subrogation section of Title III provides that any person or governmental entity, including the Fund, who pays the claim of a third person will be subrogated to the rights of the claimant under Title III. Although the legislation is not clear in this respect, its provisions seem to allow insurance companies who pay claims submitted to their insureds to seek reimbursement from the Fund in cases where their insureds could seek reimbursement.

### Relationship to Other Law

The Act does not preempt existing state liability statutes nor prohibit a state from imposing additional requirements or liability for any discharge of oil resulting in damages or removal costs within the jurisdiction of the state. The legislation precludes a claimant from receiving dual compensation--if he has recovered under Title III, he cannot recover under any other law. The legislation precludes states from requiring evidence of financial responsibility from an owner or operator if the owner or operator has complied with the financial responsibility provision of this law.

The limitation of liability provisions of Title III, to the extent they conflict with other liability or limitation laws, will supercede the other laws, including the federal statute which allows shipowners to limit their liability (46 U.S.C. 183(a)).

## Hazardous Waste Control

In 1978 the Louisiana Legislature, acting under provisions of federal legislation which allow states to develop their own hazardous waste programs, passed Act 334, providing for the development of a comprehensive hazardous waste control program by the Louisiana Department of Natural Resources (DNR). Under Act 334, DNR has identified 40,000 pits, ponds and lagoons used for hazardous

waste storage in Louisiana. Although about half of those are used for storage of oil well brine, which has not yet been classified as a hazardous waste, the large number of the remaining facilities provides a good indication of why federal and state government have addressed the hazardous waste problem. Another indication is the incidence of accidents and even death associated with hazardous waste disposal in the United States. Indeed, the Louisiana legislation preceded by only a few months the death of a 19-year-old truck driver who died while unloading toxic chemical waste into a pit in Iberville Parish.

Congress, aware of the increasing volume of hazardous wastes, including solid wastes, addressed the problem with passage of the Resource Conservation and Recovery Act (RCRA) of 1976 (P.L. 94-580, Oct. 21, 1976). Subtitle C of RCRA requires the Environmental Protection Agency (EPA) to develop and implement a hazardous waste management program, identify and list wastes which pose serious threats to human health and the environment, and enact regulations governing persons who generate, transport, treat, store or dispose of hazardous wastes. Section 3006 of RCRA allows a state to develop and carry out its own hazardous waste program, in lieu of the federal program, if the state program is approved by the Administrator of the EPA. Louisiana's Act 334 was a response to this section.

Under the provisions of Act 334, hazardous wastes must be identified and listed according to factors such as toxicity, persistence, degradability in nature and other hazardous characteristics. Regulations will be adopted for the safe handling of hazardous waste from its generation to its treatment, storage or disposal. As an effort to facilitate the orderly tracking of such waste, the Act requires the use of a manifest system which, at a minimum, must designate the generator of the waste, each transporter of it, the disposal facility, and the type and quantity of waste involved.

### Major Features of Act 334

#### Identification of Wastes; Exemptions

The Louisiana DNR is required to develop "objective criteria" for identifying hazardous waste characteristics and listing wastes which will be subject to the Act.

The Act defines "hazardous waste" as:

any waste, or combination of wastes, which because of its quantity, concentration, physical, chemical or infectious characteristics may (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise managed.

Exempted from the Act's coverage are radioactive products and by-products regulated by the U. S. Nuclear Regulatory Commission; homeowners and farmers who generate only small amounts of hazardous wastes; and any other person DNR determines generates only small amounts of hazardous waste on an infrequent basis.

#### Generators of Hazardous Wastes

Generators of hazardous waste will be subject to such standards promulgated by the DNR as are "necessary to protect public health and the environment."

At a minimum the standards must include requirements for: (1) record keeping sufficient to identify the quantity and type of hazardous waste and the disposition of the waste; (2) labelling containers used for storage, transport or disposal of wastes to accurately identify the waste; (3) use of appropriate containers for wastes; (4) furnishing information as to chemical composition to persons transporting, treating, storing, or disposing of the waste; (5) use of a manifest system to assure that all hazardous waste is designated to be treated, stored, or disposed of in facilities which have received the proper permits from DNR. (A manifest system would not be required if treatment, storage or disposal takes place on the premises where the waste is generated, but the generator would still have to obtain a permit for the treatment, storage or disposal facility); and (6) identification of all hazardous waste generators within the state and of those outside the state which ship the wastes into Louisiana for treatment, storage or disposal.

Generators of hazardous waste must dispose of such wastes in accordance with one of the following methods which are to be set out more fully in DNR regulations:

- by disposing of the wastes at the generator's own private site, if the site is operated under a valid DNR permit.
- by disposing of the wastes at a privately operated disposal site or a public site, if the site is operated under a valid DNR permit, or if located out of state, is approved by such state's designated authority.
- by contracting with a private transporter to transport the wastes provided the transporter is operating under a valid license.

### Transporters

The Louisiana Department of Public Safety (DPS) is required to promulgate regulations and oversee compliance therewith governing the transportation of hazardous wastes by any means of commercial or private transport. DNR is required to advise and cooperate with DPS in the promulgation of these rules. DPS is required to issue regulations which at a minimum provide for record keeping, adherence to a manifest system and equipment standards to assure safe handling and transport of wastes. Additionally, and importantly, transporters must be licensed and must furnish a surety bond in favor of the state to assure financial responsibility in the event of damages resulting from an accident or negligence.

Political subdivisions of the state which operate hazardous waste transportation systems with their own personnel are not required to obtain a surety bond but will be liable for damages resulting from accidents or negligence in transport.

### Treatment, Storage, and Disposal

The Act requires the DNR, with the assistance of the Department of Health and Human Resources and the Department of Wildlife and Fisheries, to issue regulations for the identification and regulation of "offsite" hazardous waste treatment, storage and disposal facilities. (Facilities located on the generation premises are

regulated under a different section, as indicated above). Regulations at a minimum must require permit or license procedures for the operation of all treatment, storage, and disposal facilities; standards for design, construction and operation which will assure safe disposition "without" substantial risk to the environment, water supplies, air, and human health..." Also, treatment, storage and disposal facilities must provide a surety bond in favor of the state to assure financial responsibility in the event of accidents or negligence and to assure that operations continue in the event of shut down or operator changes. Exempted from the bond requirement are political subdivisions which operate facilities with their own personnel; however, political subdivisions will be liable for any damages caused by their facilities. The regulations must also require the classification of facilities which handle only certain types of hazardous wastes.

The permitting and licensing provisions are applicable not only to new transporters and treatment, storage and disposal facilities, but also to existing operations. Persons subject to the Act must file a notice of their operations with DNR not later than 90 days after the effective date of regulations.

### General Powers and Duties of the Department of Natural Resources (DNR)

The Act requires DNR, in conjunction with its regulatory function, to assess an initial fee and an annual monitoring fee for all permits and licenses issued under the hazardous waste program. The fees will be determined on a graduated basis according to a formula to be adopted by the Secretary. DNR personnel may also inspect private or public facilities and obtain samples to assure compliance with the program.

### Procedure

DNR must furnish copies of each permit or license application to the Louisiana Stream Control Commission, the Louisiana Air Control Commission, the Bureau of Environmental Services of the Louisiana Department of Health and Human Resources, the Louisiana Department of Wildlife and Fisheries, the Office of Public Works within

the Louisiana Department of Transportation and Development and the local governing authorities of any parish or municipality within whose territorial jurisdiction the facility or activity is or will be located. Each of the governmental units will be given sufficient time to comment. An important provision of the Act states that no facility or activity can be granted a permit or license if the location thereof violates a parish or municipal land use or zoning ordinance.

### Enforcement

Persons who violate the regulations will be required to pay damages in an amount equal to cost of restoring the affected area to its condition prior to the violation plus the cost of investigations. The Act also provides for injunctive relief and for civil penalties up to \$25,000 per day of violation for knowingly violating any provisions of the Act or any written order or regulation in pursuance of the Act.

### Regulations; Approval

The Act requires DNR to hold at least three public hearings for the purpose of receiving public comment on regulations re-

quired under provisions of the Act for the implementation of the state's hazardous waste control program. The regulations are required to be promulgated on or before October 21, 1980.

Five public hearings have already been held, and three additional ones are planned following the release by DNR of a draft of proposed regulations in early March (1979). DNR recently released the draft regulations.

The Act requires that all rules and regulations made pursuant to the Act by DNR be submitted to both the House and Senate Natural Resources Committees. If the committees should object, they must do so in writing to the Governor who has 5 days in which to disapprove the action of the committees. If he does not disapprove of the action of the committees, the rule or regulation cannot be adopted by DNR.

### COASTAL ZONE MANAGEMENT ACT AMENDMENTS

The Outer Continental Shelf Lands Act Amendments of 1978, discussed above in relation to the oil spill liability fund, also contained amendments to the Coastal Zone Management Act of 1972. Because these amendments have been discussed elsewhere, we have chosen not to feature them in Louisiana Coastal Law. However, if you would like more information concerning these amendments, please contact the Sea Grant Legal Program.

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