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HIGHLIGHTS:
THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

- A court of appeal has held that an environmental impact report is not required for preexisting environmental conditions (p. 64)

WATER QUALITY CONTROL

- Compliance with Clean Water Act citizen suit notice requirements is a mandatory prerequisite to suit (p. 67)

HAZARDOUS WASTE AND TOXIC SUBSTANCE CONTROL

- A Special Topics Column addresses statute of limitations issues in cost recovery actions (p. 73)

LAND USE AND ENVIRONMENTAL PLANNING

- The fact a growth control initiative was invalid did not effect a per se taking (p. 76)

- A county ordinance establishing a timber harvesting buffer zone is not preempted by the Forest Practice Act (p. 77)

Matthew Bender
Times Mirror Books

Riding the New Wave of Oil Spill Liability in California

*by Alex Moghaddam**

I. Introduction

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (the "Act") was enacted by California in September 1990 in the wake of the March 1989 EXXON VALDEZ oil spill in Prince William Sound in Alaska and the February 1990 AMERICAN TRADER spill in the waters off of Huntington Beach in California. In doing so, California rode the tidal wave of environmentalism sweeping the country, hastily producing a statute that may be the most punitive of its kind and, not surprisingly, one that is rife with ambiguities.[1]

The Act consists of three parts. Gov. Code §§ 8670.1-8670.70 comprise the main body of the Act and cover, among other things, oil spill response, contingency planning, financial responsibility requirements, and liability for damages after an oil spill. The Office of Oil Spill Prevention and Response ("OSPR") within the Department of Fish and Game is the agency primarily responsible for the Act's enforcement. An "administrator" appointed by the governor oversees the OSPR [Gov. Code §§ 8670.4-8670.15].

The other two parts of the Act are found in Gov. Code §§ 8574.1-8574.15 and Pub. Res. Code §§ 8750-8760. These parts provide for (1) the establishment of a state oil spill contingency plan and (2) the inspection and regulation by the State Lands Commission of marine oil terminals and facilities, respectively.

continued on page 58

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CONTENTS:

continued from page 57

This article reviews only the first of the three parts and then only the liability and damages provisions of that part as applied to vessel-source oil spills. In particular, it attempts to understand (1) who exactly is liable or responsible under the Act for an oil spill from a tanker or barge and (2) the duties and liabilities of such person(s) after an oil spill. As the following discussion suggests, in the rush to send a clear message to would-be polluters, California enacted a statute that in substantial part is anything but clear.

II. The "Responsible Parties"

In the event of an oil spill from a tanker or barge, who is liable? The Act does not provide a ready answer.

The Act somewhat obliquely defines "responsible party" or "party responsible," in relevant part, as any of the following:

(1) The owner or transporter of oil or a person or entity accepting responsibility for the oil.

(2) The owner, operator, or lessee of, or person who charters by demise, any vessel ... , or a person or entity accepting responsibility for the vessel ... [Gov. Code § 8670.3(o)].

A "vessel" is defined as a tanker or barge that carries oil in commercial quantities as cargo [Gov. Code § 8670.3(w)]. The "owner" or "operator" of a vessel is defined as "any person who owns, has an ownership interest in, operates, charters by demise, or leases, the vessel," but does not include any person who "without participating in the management of a vessel ... holds indicia of ownership primarily to protect his or her security interest in the vessel ..." [Gov. Code §§ 8670.3(l)(1)(A), 8670.3(l)(2)].

The Act's definition of "responsible party" begs a number of questions. For example, what is meant by the "transporter" of the oil? Can it mean someone other than the operator of the vessel?

What exactly does it mean to "accept responsibility" for the oil or the vessel? Might a marine terminal, for instance, be deemed to accept responsibility for a vessel or its oil after the vessel has been anchored at the terminal?

Is a time charterer a responsible party? The reference to "lessee" or to persons "accepting responsibility" might be deemed to include time charterers. On the other hand, a time charterer, which typically would *not* be responsible for the

operation of the vessel, might reasonably contend that the Act's specific reference to demise charterers evinces a legislative intent to exclude all other kinds of charterers.[2]

Finally, in addition to the above ambiguities, the Act is surprisingly vague as to whether, in the event of an oil spill, all persons who qualify as responsible parties are jointly and severally liable. On the one hand, the Act provides that the "certificate of financial responsibility shall be conclusive evidence that the person or entity holding the certificate is the party responsible for the specified vessel ... or oil for purposes of determining liability pursuant to this chapter" [Gov. Code § 8670.37.52]. Since the Act requires only one certificate for either the vessel or the oil cargo [Gov. Code § 8670.37.51], the quoted provision would seem to mean that *only* that party may be held liable under the Act.

On the other hand, as more fully discussed below, various of the Act's liability and damages provisions both expressly and impliedly suggest that joint and several liability of *all* "responsible parties" was intended.

III. Liability

The liability provisions of the Act may be loosely divided into three broad categories: (1) responsibility for cleaning up an oil spill; (2) liability for damages caused by or arising out of an oil spill; and (3) liability for criminal and civil penalties. These provisions are no less cryptic.

A. Cleaning Up the Mess

The Act contains various provisions that attempt to impose both an affirmative obligation to clean up an oil spill and liability for cleanup costs incurred by the state.

Article 4, titled "Oil Spill Response," begins by requiring, that "*any* person who, without regard to intent or negligence, *causes or permits* any oil to be discharged ... [to] immediately contain, clean up, and remove the oil in the most effective manner ... in accordance with the applicable contingency plans," unless the administrator or Coast Guard orders otherwise [Gov. Code § 8670.25 (emphasis added)]. This section clearly imposes an affirmative duty to clean up a spill.

Less clear is what exactly the Legislature meant by "any person" or what exactly it means to "permit" oil to be discharged. At least one author has opined that the state intended a broad construction of "any person." Thus, for example, "parties who collide with vessels, causing spills" would also be subject to the above cleanup duties.[3] Construing § 8670.25 as a whole, however, it is at least arguable that only persons with "applicable contingency plans" are covered, in which case "any person" would effectively mean the vessel owner or operator. *See* Gov. Code § 8670.28 et seq. This construction may be more sensible, since the party with a contingency plan would presumably be in a better position to respond to a spill.

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Section 8670.25 also imposes a cleanup duty on any person who "permits" oil to be discharged. This would plainly cover the operator of the spilling oil. But would it, for example, extend to the nonoperating owner of the vessel or to the owner of the oil? Or, if the spill occurs after a vessel has anchored at a marine terminal but before it has begun transferring oil, would the terminal operator or owner be deemed to be a person who is "permitting" the discharge of oil?

Adding to the confusion, § 8670.27 of Article 4 requires "all parties responsible or potentially responsible for the discharged oil, the tanker, barge, or marine facility from which the oil was discharged, all of their agents and employees ... and all state and local agencies" to undertake cleanup operations pursuant to "applicable contingency plans," unless the administrator or the Coast Guard directs otherwise. Orders of the administrator must be followed, provided that they are not "inconsistent" with any issued by the Coast Guard.

Under the same section, a responsible or potentially responsible party, however, may refuse to comply with any cleanup directions or orders of the administrator if it "reasonably ... and in good faith" believes that such orders "will substantially endanger the public safety or the environment" [Gov. Code § 8670.27(b)]. The refusing party must give written notice of its refusal within 48 hours of the refusal and will bear the burden of proving "by clear and convincing evidence" in any ensuing civil or criminal proceeding that its inaction was justified.

Thus, § 8670.27, except as noted, also imposes a mandatory duty to clean up an oil spill. However, unlike § 8670.25, this section is limited to "all parties responsible or potentially responsible." Like § 8670.25, however, the qualification that all responsible parties undertake to clean up the oil pursuant to "applicable contingency plans" might also be construed to mean that only a "responsible party" that has prepared a contingency plan is responsible for cleanup.

Furthermore, the Act does not define a "potentially responsible" party. In view of the status-based definition of "responsible party" (*e.g.*, owner of the oil), the reference to "potentially responsible" party seems particularly misplaced. After all, either a party is or is not the owner of the oil or the owner or operator of the vessel.

Finally, Article 9 of the Act, titled "Enforcement," authorizes the administrator to order clean up. It provides in relevant part that "*any person who discharges oil* into marine waters, upon order of the administrator," shall, *inter alia*, "clean up the oil" and "abate the effects of the discharge" [Gov. Code § 8670.62(a) (emphasis added)]. It also provides that in the event any state governmental agency expends any money in cleaning up or abating the effects of an oil spill, the person(s) "who discharged" the oil shall be liable for the "reasonable costs actually incurred" by the government agency [Gov. Code § 8670.62(d)].

This section, therefore, is by its terms limited to persons who discharge oil. As such, it would appear that the administrator lacks the authority to order the owner of the oil, for example, and arguably the owner of the vessel, without more, to clean up a spill.

The apparent inconsistencies in the above cleanup provisions of the Act and the failure of the legislature consistently to use well-defined terms will doubtless fuel costly litigation.

B. Damages

The Act broadly imposes on "any responsible party" "absolute[] liab[ility] without regard to fault ... for any damages incurred by any injured party which arise out of, or are caused by," the discharge of oil into state waters [Gov. Code § 8670.56.5(a)].

Damages for which "responsible parties" are liable are defined in Article 8.5 of the Act and consist generally of cleanup costs, economic losses, and natural resource damages.[4] Gov. Code § 8670.56.5(h) provides for "joint and several" liability. It also provides that "this section does not bar a cause of action that a responsible party has or would have, by reason of subrogation or otherwise, against any person." These provisions appear to evidence a legislative intent to hold all "responsible parties" jointly and severally liable for the damages outlined below. As noted above, however, this result seemingly conflicts with the provision of the Act that the person holding the certificate of financial responsibility is the responsible party for purposes of liability.

1. Cleanup Costs

Article 8.5 addresses, *inter alia*, liability for cleanup and related costs. "Damages for which responsible parties are liable" include:

> All costs of response, containment, cleanup, removal, and treatment, including, but not limited to, monitoring and administration costs incurred pursuant to the state oil spill contingency plan or actions taken pursuant to directions by the administrator [Gov. Code § 8670.56.5(g)(1)].

It is not clear whether a responsible party can avoid cleanup costs incurred by the state pursuant to § 8670.27(b), which, as discussed above, permits a responsible party to refuse to follow the administrator's cleanup order on a good faith belief that the order would substantially endanger public safety or the environment. In the event, for example, that no order is issued because of an inability to immediately identify the responsible party and the state undertakes cleanup activities at its own expense, could the responsible party avoid liability for the state's cleanup costs by showing that it *would* have been justified in refusing to follow a cleanup order? On the other hand, a technical reading of § 8670.27(b) would seem to require the existence of a specific order as a precondition to any good faith refusal to clean up a spill or to pay for the State's cleanup costs.

2. Economic Damages

Recoverable economic damages include the following:

(1) Injury to, or economic losses resulting from destruction of or injury to, real or personal property, which shall be recoverable by any claimant who has an ownership or leasehold interest in property.

(2) Loss of subsistence use of natural resources which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost.

(3) Loss of taxes, royalties, rents, or net profit shares caused by the injury, destruction, loss, or impairment of use of real property, personal property, or natural resources.

(4) Loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant who derives at least 25 percent of his or her earnings from the activities which utilize the property or natural resources, or, if those activities are seasonal in nature, 25 percent of his or her earnings during the applicable season [Gov. Code § 8670.56.5(g)(2), (4), (5), (6)].

To the extent any of these provisions permits a claimant to recover economic losses not accompanied by physical damage to a proprietary interest of the claimant, it may be deemed unenforceable under the well-settled maritime law doctrine of *Robins Dry Dock & Repair Co. v. Flint* [(1927) 275 U.S. 303]. Under *Robins Dry Dock*, a claimant who alleges a nonintentional maritime tort may not recover economic damages absent physical damage to a proprietary interest. The only generally recognized exception to this bright line rule is that for claims brought by commercial fishermen for foregone revenue. *See Union Oil Co. v. Oppen* [(9th Cir. 1974) 501 F.2d 558].

Of the four categories of economic damages outlined above, the fourth, in particular, clearly contemplates recovery of economic losses by persons, whether or not fishermen, who have not themselves suffered physical damage to a proprietary interest. For example, marina and boat rental operator shops would almost certainly qualify as covered claimants under that provision, but under *Robins Dry Dock* would be barred from recovery. *See Louisiana ex rel. Guste v. M/V TESTBANK* [524 F.Supp. 1170, 1174, *aff'd en banc*, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986)].

3. Natural Resource Damages

Responsible parties are also liable for various natural resource damages:

(1) Injury to, or destruction of, natural resources, including, but not limited to, the reasonable costs of rehabilitation of the damaged or destroyed resources; "any reasonable method" may be used to determine damages for the loss of a natural resource, including, for example, the costs of restoring the lost resource.

(2) The reasonable costs of assessing the injury or loss.

(3) The loss of use and enjoyment of natural resources, public beaches, and other public resources or facilities in an action brought by a governmental agency [*See* Gov. Code § 8670.56.5(g)(3), (7)].

It may be noteworthy that the Act does not specifically refer to "nonuse value" damages, the wild card of natural resource damages. Nonuse value "damages" represent in part an attempt to measure the psychological value attached to a damaged or lost natural resource by persons who are aware of the existence of the particular natural resource, but who do not intend to actually use or enjoy the natural resource. To the extent the Act specifically refers to "loss of *use and enjoyment* of natural resources" as a measure of recoverable damages, it might be argued that *nonuse* values were by implication not contemplated.

The Act also contains a separate section devoted to wildlife rehabilitation. Gov. Code § 8670.61.5 requires, *inter alia*, that responsible parties "fully mitigate adverse impacts to wildlife, fisheries, wildlife habitat, and fisheries habitat" [Gov. Code § 8670.61.5(b)]. Full mitigation is defined as environmental restoration projects undertaken either by responsible parties or the Department of Fish and

Game. The responsible parties are liable for any costs incurred by the Department of Fish and Game in implementing these provisions.

4. Defenses to Liability

A responsible person is not liable to an injured party for any of the following:

(1) Damages, other than costs of removal incurred by the state or a local government, caused solely by any act of war, hostilities, civil war, or insurrection or by an unanticipated grave natural disaster or other act of God of an exceptional, inevitable, and irresistible character, which could not have been prevented or avoided by the exercise of due care or foresight.

(2) Damages caused solely by the negligence or intentional malfeasance of that injured party.

(3) Damages caused solely by the criminal act of a third party other than the defendant or an agent or employee of the defendant.

(4) Natural seepage not caused by a responsible party.

(5) Discharge or leaking of oil or natural gas from a private pleasure boat or vessel.

(6) Damages which arise out of, or are caused by, a discharge which is authorized by a state or federal permit [Gov. Code § 8670.56.5(b)].

These defenses, however, will not be available to a responsible person who fails to comply with the cleanup and reporting requirements discussed above [Gov. Code § 8670.56.5(b)].

It is interesting — and perhaps inadvertent — that while the Act exempts the state's costs of removal from the first of the above-enumerated defenses, it does not exempt the same costs from any of the other defenses. Thus, for example, a responsible person remains liable for the state's cost of removing an oil spill caused solely by an act of God or war, while it can apparently avoid liability for such costs in the case of a spill caused solely by the criminal act of a third party. The distinction here between a spill caused by an act of God and a spill caused by the act of a criminal is difficult to discern.

Moreover, the Act's requirement of "sole" causation for each of the first three defenses as a practical matter renders the defenses illusory. For example, when a spill is found to have been caused 99 percent by the criminal act of a third party, and one percent by the vessel operator, the operator will still be held 100 percent liable. A literal reading of the second defense leads to an even more bizarre result, namely, an injured claimant whose own negligence or intentional malfeasance is 99 percent to blame for a spill presumably can still recover 100 percent of his damages from a vessel operator only one percent at fault. Equally inexplicable is the state's failure to allow a complete defense to liability for a spill caused by a combination of one or more of the enumerated defenses.

C. Criminal and Civil Penalties

The Act also imposes severe criminal and civil penalties.

1. Criminal Penalties

Criminal penalties are imposed on various knowing violations of the Act or orders of the administrator.

Imprisonment in the county jail or state prison for not more than one year *shall* be imposed, upon conviction, on "any person" who knowingly (1) fails to follow the orders of the administrator, except as noted above (*i.e.*, reasonable and good faith belief that the order will endanger public safety or the environment), (2) fails to notify the Coast Guard within one hour of a tanker's disability, (3) discharges oil without appropriate authorization, or (4) fails to begin cleanup operations as required by the Act [Gov. Code § 8670.64(a)]. A fine not less than $5,000 and not more than $500,000 shall be imposed for each violation; "each day or partial day" on which a violation occurs constitutes a separate violation [Gov. Code § 8670.64(b)].

Criminal sanctions are also imposed on "any person" who knowingly (1) fails to report an oil spill, (2) operates a vessel without the requisite contingency plan, and (3) fails to follow applicable contingency plans [*See* Gov. Code § 8670.64(c)]. A fine not less than $2,500 or more than $250,000 or imprisonment for not more than one year, or both the fine and imprisonment, shall be imposed upon conviction for any of these violations. A conviction for a second or subsequent violation will result in an increase of the fine to an amount not less than $5,000 or more than $500,000 [Gov. Code § 8670.64(c)].

Any other knowing violation of the Act or any "permit, rule, regulation, standard, cease and desist order, or requirement issued or adopted" thereunder will be punished by a fine of not more than $50,000 or imprisonment for not more than one year or both [Gov. Code § 8670.65].

These criminal penalties are clearly a powerful deterrent weapon in the state's arsenal. But might they also be double-

edged swords? What would be the consequence of, for example, a spill caused solely by the vessel operator's "knowing" discharge of oil or of damages caused solely by the operator's "knowing" failure to follow the applicable contingency plan? Under § 8670.56.5(b)(3), as a criminal act of a third party, either criminal violation would provide all other "responsible parties" with an absolute defense to liability for any damages caused by the spill. Thus, the owner of the oil and the nonoperating owner of the tanker or barge would be relieved of all liability.

To complicate matters further, what if, as permitted under the Act, the owner of the vessel, and *not* the operator, holds the certificate of financial responsibility? Might the P & I Club or other insurer nonetheless be required to extend coverage notwithstanding its insured's immunity from liability in the underlying litigation?

2. Civil Penalties

The Act provides for either court-ordered or administrative civil penalties for negligent or intentional misconduct, as well as administrative strict liability penalties based on the number of unrecovered gallons of spilled oil.

A court-ordered or an administrative civil penalty is imposed on any person who intentionally or negligently (1) fails to follow orders of the administrator, except as discussed above, (2) fails to notify the U.S. Coast Guard within one hour of a tanker's disability, (3) discharges oil without appropriate authorization, or (4) fails to begin cleanup operations as required by the Act [Gov. Code §§ 8670.66, 8670.67]. The court-ordered penalty shall not be less than $25,000 or more than $500,000 for each violation [Gov. Code § 8670.66(a)]. The administrative penalty shall not exceed $100,000 [Gov. Code § 8670.67(a)].

Any other intentional or negligent violation of the Act or regulation or order, *inter alia*, issued pursuant to the Act will be subject to a court-ordered penalty not to exceed $250,000 or an administrative penalty not to exceed $100,000 for each violation [Gov. Code §§ 8670.66(b), 8670.67(b)].

The Act specifically bars the imposition of both a court-ordered civil penalty and an administrative penalty under § 8670.67 [*See* Gov. Code §§ 8670.66(c), 8670.67(c)]. In view of the substantially more onerous penalty scheme available to a court, a party potentially subject to a penalty would clearly prefer an administrative penalty. It is unclear, however, how precisely the choice between the two penalties would be made, particularly since both penalties are mandatory. For example, it is conceivable that the administrator would commence a penalty hearing, while the Attorney General, who has independent enforcement authority under the Act, prosecutes a separate action in court in which penalties are also demanded [*See* Gov. Code § 8670.63]. A logical resolution might be a first in time rule.

Finally, any person who causes or "permits" oil to be discharged may be subject to a per-gallon administrative penalty not to exceed $10 per gallon of discharged oil [Gov. Code § 8670.67.5(b)]. Where the discharge results from "gross negligence or reckless conduct," however, the administrator *shall* impose a penalty in the amount of $30 per gallon [Gov. Code § 8670.67.5(c)]. In either case, the amount of the penalty is reduced for every gallon of discharged oil that is recovered [Gov. Code § 8670.67.5(b), (c)].

The Act is silent as to whether either of the per-gallon penalties may be imposed *in addition to* either of the civil penalties discussed above. In light of the fact that the Act expressly treats the latter penalties as mutually exclusive, by implication, the per-gallon penalty is arguably intended to be an additional penalty.

IV. Conclusion

The state's inexplicable failure to use clearly defined terms, to use them consistently, and to address obvious questions, only some of which are raised above, has resulted in a legislative mess. That mess will doubtless spill into the courtrooms of the state, where judges will once again be called upon to clean it all up.

ENDNOTES

[1] In the intervening years, the Act has been substantially revised, and extensive regulations regarding various sections of the Act have been promulgated. In the meantime, additional amendments to the Act are anticipated, and a long list of other regulations are in the seemingly endless administrative pipeline.

[2] Regulations regarding the liability and damages provisions of the Act have not yet been promulgated. Regulations regarding, inter alia, the contingency planning and financial responsibility requirements of the Act have, however, been issued. Interestingly, the former mirror the Act's definition of owner or operator, while the regulations implementing the latter add to the definition of responsible party any person "accepting responsibility for the oil who has applied for a certificate of financial responsibility, including, but not limited to, time charterers or charterers" [14 Cal. Code Reg. § 790(x)(2)].

[3] J.D. Edgcomb, Responding to an Oil Spill in California, 5 U.S.F.Mar.L.J. 389, 405 (1993).

[4] The Act permits the award of reasonable attorney's fees and costs and the costs of necessary expert witnesses to any prevailing plaintiff. Fees and costs of suit may be awarded to a prevailing defendant, but only if it is found that the plaintiff brought suit in bad faith or solely to harass the defendant [Gov. Code § 8670.56.5(e)]. By implication, a prevailing plaintiff need not prove that the defendant's defense of the action was in bad faith in order to recover fees.