



LOUISIANA  
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# LOUISIANA COASTAL LAW

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## LOUISIANA OIL SPILL PREVENTION RESPONSE ACT

Introduction and Comments

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### INTRODUCTION

This paper is intended to be an introductory explanation and limited appraisal of Act 7 of the First Extraordinary Session of the 1991 Louisiana Legislature. Although those interested in detailed analysis of Act 7 should read it, this paper contains detailed extracts and paraphrases from the Act for assessing both the statutory content and the analysis.

### BACKGROUND

On March 24, 1990, the *Exxon Valdez* ran aground on Bligh Reef disgoring approximately 11 million gallons of crude oil into Prince William Sound in Alaska.<sup>1</sup> The regulatory and legislative response to the spill produced an outpouring of policy statements from both state and federal sources. At the federal level, the Oil Pollution Act of 1990 (OPA)-(P.L. 101-380) was signed into law on August 18, 1990. In Louisiana, the first official response was Executive Order BR-90-9 issued on July 9, 1990. The Executive Order followed failed efforts to legislate a comprehensive mechanism during the 1990 Regular Session. The Executive Order stated that 80% of the nation's offshore oil is produced off Louisiana's coast and that the LOOP Superport receives 15% of oil imported to the United States. Also, the Louisiana coastal area harvests 26% of the nation's commercial fisheries, leads the nation in fur production, leads the world in alligator production, and has more overwintering waterfowl than any other state.

The legislature enacted the Oil Spill Prevention and Response Act (hereinafter referred to as the "Act") during the 1991 First Extraordinary Session. The overriding goal of the Act is to "support and complement" OPA and "other" federal law. OPA specifically refrains from any attempt to prevent state governments from participating in the field of oil spill prevention and response.<sup>2</sup> The Louisiana legislature thus fashioned the Act as a cooperative effort between state and federal authority. The Act further allows the agency created for its administration to enter into agreements with other states to form compacts and to participate in development

of multistate and international standards<sup>3</sup>. This is the basis on which Louisiana might participate in a compact with other Gulf Coast states for prevention of and/or response to oil spills beyond the jurisdiction of the Act. Such a compact presently exists among the states of Washington, Oregon, Alaska, and the Canadian province of British Columbia<sup>4</sup>. This is particularly important for Louisiana, a state whose shores could be fouled by oil spilled from nearby Gulf states. The present framework for environmental consolidation is the jurisdiction of EPA Region VI, encompassing the states of Louisiana, Texas, Arkansas, Oklahoma, and New Mexico. A logical geographical approach for a Gulf of Mexico interstate compact would encompass Louisiana, Mississippi, and/or Texas, and possibly Alabama, or even Florida.

### GEOGRAPHICAL JURISDICTION

The Act defines "Coastal Waters" as "...the waters and bed of the Gulf of Mexico within the jurisdiction of the state of Louisiana, including the arms of the Gulf of Mexico subject to tidal influence, estuaries, and any other waters within the state if such other waters are navigated by vessels with a capacity to carry ten thousand gallons or more of oil as fuel or cargo."<sup>5</sup> The Louisiana Oil Spill Coordinator, created to administer the Act, is directed to adopt, by rule, an inland boundary for coastal waters based in part upon data provided by the United States Corps of Engineers, United States Department of the Interior, Minerals Management Service, the Louisiana Department of Natural Resources, and the oil and gas industry<sup>6</sup>. The boundary is to be established as an integral component of the State Oil Spill Contingency Plan (Plan)<sup>7</sup>.

### SCOPE

The Act establishes licensing and other requirements for the following defined entities:

"Deepwater Port"—defined as a facility licensed in accordance with the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524).<sup>8</sup>

"Facility"—defined as any structure, group of structures, equipment, or device other than a vessel which is used for one or more of the following purposes: exploration for, drilling for, producing, storing, handling, transferring, processing, or transporting oil, inclusive of any motor vehicle, rolling stock, or pipeline used for one or more of the above stated purposes.<sup>9</sup>

"Marine Terminal"—defined as any terminal facility within the state of Louisiana used for transferring crude oil to or from vessels.<sup>10</sup>

"Tank Vessel"—defined as a vessel constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo residue, and that is (a) a vessel of the United States, (b) operates on navigable waters, or (c) transfers oil or hazardous material in a place subject to the jurisdiction of the state of Louisiana.<sup>11</sup>

"Vessel"—defined as every description of watercraft or other contrivance used or capable of being used as a means of transportation on water, whether self-propelled or otherwise, including barges.<sup>12</sup>

## ADMINISTRATION

### Administration-Louisiana Oil Spill Coordinator

Administration of the Act is assigned to the Office of the Governor. Primary responsibility for implementation is given to the Louisiana Oil Spill Coordinator, an employee of the Governor's Office.<sup>13</sup>

Placement within the Office of the Governor is presumably intended to enhance the Coordinator's authority. He is empowered to affect the operations of existing cabinet departments. However, the Coordinator's discretion is significantly restricted by several legislative reservations.

First, the coordinator is to be appointed by the Governor, subject to Senate confirmation. Significantly, there are no statutory limitations for the appointee's qualifications. There are no provisions for a list of appointees to be submitted by any outside agency to the Governor for appointment, nor is there a specific term of office established. However, the Executive prerogative as to selection is limited to the same restrictions that apply to cabinet and immediate sub-cabinet level appointments. The implication is that the Coordinator is not intended to function as a personal aide or confidante of the Governor. Placement within the Office of the Governor is more likely the result of either or both:

- (a) the constitutional limitation on the number of cabinet departments, and/or<sup>14</sup>
- (b) a reflection of the futility of trying to locate an agency whose purpose is coordination of existing cabinet or sub-cabinet level departments within one of them.

Secondly, the Coordinator is to be the presiding member of the Interagency Council created under the Act.<sup>15</sup> The Council provides continued legislative input into policy formulation; four members of the thirteen person Council are to be legislative appointees, although they are statutorily prohibited from being sitting legislators. This statutory prohibition may be in deference to the separation of powers mandated by the Constitution of 1974.<sup>16</sup>

Finally, the policies and regulations developed by the Coordinator

are subject to review under the Louisiana Administrative Procedure Act by two, or three, legislative committees, depending upon the nature of the regulation. In all, a total of five legislative committees each retain veto power over regulations promulgated by the Coordinator.<sup>17</sup>

### Administration-Oil Spill Contingency Fund

The coordinator is also charged with administration of the "Oil Spill Contingency Fund" (Fund), for which an annual budget must be submitted to and approved by the legislature.<sup>18</sup> Included among allowable expenditures from the fund are "administrative and personnel expenses" of the Coordinator's office which are statutorily capped at \$250,000. The Fund is to be maintained by the State Treasurer from deposits consisting of all fees, taxes, penalties, judgements, reimbursements, charges, federal funds, and interest on Fund deposit. The Fund is not to exceed \$30 million. The purpose of the Fund is to provide an immediately accessible account for response operations, clean up, damages, and removal costs. Allowable Fund expenditures are:

- (1) Administrative costs—see above.
- (2) Removal costs related to abatement and containment of oil incidental to unauthorized discharge of hazardous substances.
- (3) Removal costs and damages related to unauthorized discharge of oil as authorized under the Act.
- (4) Protection, assessment, restoration, rehabilitation, replacement, or mitigation of natural resource damage.
- (5) Grants, with approval of the Interagency Council (see below), to state institutions of higher education for research, testing, and development of discharge prevention and response technology and related matters. Contracts or agreements relating to wildlife and natural resources protection under the jurisdiction of the Louisiana Department of Wildlife and Fisheries are to be made in coordination with that Department. Coordination with the Louisiana Department of Natural Resources is required for grants relating to wetlands and coastal resources. All other contracts and agreements are to be coordinated with studies being done by other state agencies, the federal government, or private industry. Total annual expenditures for this purpose are limited to an aggregate of \$750,000.
- (6) Operating costs and contracts for response and prevention not to exceed \$500,000.
- (7) Other costs and damages authorized under the Act.

### Administration-Oil Spill Contingency Fee

The Oil Spill Contingency Fee<sup>19</sup> is apparently established independently of the Oil Spill Contingency Fund, but Fee proceeds are probably meant to be deposited in the Fund.

Every person owning crude oil in a vessel at the time the crude is transferred to or from a vessel at a terminal within Louisiana is subject to a charge over and above all taxes and other fees imposed on the crude. The Fee is to be imposed only once on the same crude, and is to be collected quarterly by the terminal operator, and remitted to the Department of Revenue and Taxation, even if collection of the Fee has been suspended during that quarter. The assessment rate is two cents per barrel of crude until the balance of

Fund collections is \$15 million. Collection will then cease, and resume when the net balance of Fee collections falls below \$8 million. The Fee may be doubled to four cents per barrel of crude if (a) the net balance of Fund collections dips below \$8 million, and (b) the coordinator certifies an unauthorized discharge in excess of 100,000 gallons of oil within the immediately preceding thirty days, and (c) the Coordinator and the Interagency Council (see below) establish a reasonable expectancy that the net balance will be depleted by more than fifty percent. The four cent levy will continue until the net balance reaches \$15 million.

The Act does not fully explain the interplay between the Fund and the Fee. It appears that the Fee cap-\$15 million-may be satisfied if total Fund collections amount to \$15 million. It follows that the Fee will probably not be imposed until the balance of the Fund dips below \$8 million. The Act probably does not require a separate net balance be maintained for the collections and expenditures of the Fee. Presumably, if other sources initially provide a net Fund balance in excess of \$15 million, the Fee would not have to be imposed until expenditures from the Fund reduce the initial balance below \$8 million.

Proceeds of the Fund are to be used for purposes not recoverable under OPA, after exhaustion of all federal sources, and limited to all proven and reasonable removal costs incurred by state agencies or local governments. Also, the Fee may be applied to all natural resource damage.

The latter category is not explicitly limited to reimbursement of governmental entities and presumably might encompass non-government claimants.

#### Administration-Interagency Council

The Act<sup>20</sup> creates the Interagency Council, to consist of the following:

- (1) Four non-legislators, one each to be selected by the chairman of the Senate Committee on Natural Resources, the chairman of the Senate Committee on Environmental Quality, the Chairman of the House Committee on Natural Resources, and the Chairman of the House Committee on Appropriations.
- (2) The Secretary of the Department of Wildlife and Fisheries or his designee.
- (3) The Secretary of the Department of Public Safety and Corrections or his designee.
- (4) The Secretary of the Department of Natural Resources or his designee.
- (5) The Secretary of the Department of Environmental Quality or his designee.
- (6) The Attorney General or his designee, who shall serve as a nonvoting member.
- (7) The Executive Assistant for Coastal Activities in the Office of the Governor.
- (8) The Executive Assistant for Environmental Affairs in

the Office of the Governor.

- (9) The Assistant Director of the Office of Emergency Preparedness.
- (10) The Louisiana Oil Spill Coordinator.

The interaction of the Coordinator and the Council on routine matters is not explicitly prescribed. Meetings of the thirteen-member panel are to be convened "as deemed necessary" by the Coordinator, but in no event is the Council to meet less than twice annually.

There are no quorum or other voting requirements stated in the Act. The Act is also devoid of any provisions for the Interagency Council to establish bylaws for procedure, although the Coordinator is clearly given regulatory authority to establish procedural rules. It is unclear whether decisions by the council are to be reached by a vote, although this is the negative implication of designating the Attorney General as a nonvoting member. More importantly, there are no statutory imperatives indicating whether the Coordinator is to be bound by a Council determination if it is expressed by a majority vote.

There are four specific duties assigned to the Council:

First, the Council is to "assist" the Coordinator in development of a Statewide Oil Spill Prevention and Contingency Plan. Interestingly, there is no requirement for council approval of the plan.

On the other hand, the second assigned task of the Council is to "assist" the Coordinator in preparing and approving an "annual work plan", whose purpose is to identify state agency needs which must be met to comply with the aforementioned Contingency Plan. The nature of the "approval" is not explicit. The Act does not explain how it is to be obtained nor whether it is binding on anyone.

Thirdly, the Council is charged with the development of legislative recommendations.

Finally, the Council is to "assist" in "preparing and approving" a budget. The nature and timing of the approval is not given in the legislation. One might speculate that the Act contemplates Council approval of the budget as prepared by the Coordinator prior to submission to the legislature.

#### REGULATORY POWERS

The Act grants the Coordinator broad executive discretion to implement rules and regulations pursuant to the Louisiana Administrative Procedures Act (APA), where applicable, upon approval of the Interagency Council.<sup>21</sup> The Act further empowers the Coordinator to exercise the remaining functions generally associated with regulatory bodies under general principles of administrative law.

The Act allows the coordinator to establish, by rule, procedures under the Louisiana APA for all hearings required by the Act.<sup>22</sup> The coordinator is authorized to act in a quasi-judicial capacity and administer oaths, receive evidence, issue subpoenas related to

hearings, and make findings of fact. There is also a grant of executive investigatory powers to the Coordinator.<sup>23</sup> The investigatory power extends to entrance upon property to conduct either a vessel or terminal-facility audit, inspection, or drill authorized under the Act or to respond to an actual or threatened unauthorized discharge, after making a reasonable effort to obtain consent to enter the property.

An "unauthorized discharge"<sup>24</sup> is defined as "any actual or threatened discharge of oil not authorized by a federal or state permit, and a "discharge of oil"<sup>24</sup> is defined as "an intentional or unintentional act or omission by which harmful quantities of oil are spilled, leaked, pumped, poured, emitted, or dumped into or on coastal waters of the state or at any other place where, unless controlled or removed, they may drain, seep, run, or otherwise enter coastal waters of the state."

### Regulatory Powers-Presumed Validity

The scope of the licensing procedures under the Act is described as follows:

A person may not operate or cause to be operated a terminal facility without a discharge prevention and response certificate issued pursuant to rules promulgated under this chapter; however, such facility may be operated without a certificate for those purposes that do not involve the transfer or storage of oil.<sup>26</sup>

The statute thus establishes a pervasive regulatory framework in which any terminal facility within the state of Louisiana used for transferring crude oil to or from vessels must (a) obtain a Discharge Prevention and Response Certificate issued pursuant to rules promulgated by the Coordinator; (b) file annual reports of compliance during the five-year effective span of the Certificate, as directed by the Coordinator and (c) submit to inspections by the Coordinator.

The inspections to be conducted pursuant to the licensing procedures do not require a warrant. The constitutional requirements for a warrantless regulatory search under the United States Constitution are summarized in New York v. Burger.<sup>27</sup> The investigatory powers granted under the Act appear to comport with constitutional guidelines since the terminal operators subject to search would have a decreased expectation of privacy as a licensee, and the interest of the state of Louisiana in preventing oil spills is evident. Moreover, it is likely the Coordinator could show that a reasonable, warrantless inspection is essential to the implementation of the Act.

The Right of Privacy is specifically protected under the Louisiana Constitution.<sup>27</sup> The state constitutional standards for a warrantless regulatory investigation are slightly more obscure than present federal standards. Pullin v. Louisiana State Racing Com'n<sup>29</sup> initially upheld the warrantless search of a barn on the grounds that the license to race carried with it a requirement that the licensee agree to submit to such searches. The Louisiana Supreme Court reasoned that this requirement was justified because of the strong state interest in assuring the honesty of horse racing. However, this reasoning did not carry the day on rehearing. The Court then found that the search was not conducted by the Louisiana State Racing Commission or a racing steward representing the Commission, but

rather by a Louisiana State Police investigative unit, a separate component of state government. The search was held invalid on rehearing because the Court reasoned that the licensee consented to a search only by the Commission. Thus, the Coordinator will have to be the investigatory agency for any searches conducted pursuant to the Act. But since the Coordinator is limited to an office budget of \$250,000, it is not likely that the legislature intended for the Coordinator or his immediate staff to conduct actual investigations. Pullin seems to say that it would be improper for the Coordinator to delegate his investigatory powers to another agency, even if that agency is represented on the Interagency Council.

Even though the consensual basis for upholding the search and seizure under Pullin was reversed on rehearing, the material seized was nevertheless held admissible and the action of the Louisiana State Racing Commission was upheld. The Court reasoned that the items of seizure were not excludable under the Exclusionary Rule. Citing Allen v. Louisiana State Bd. of Dentistry<sup>30</sup>, the Court in Pullin held that illegally seized materials, while not admissible as evidence in a criminal proceeding, were admissible in a civil proceeding such as that conducted by the Racing Commission. This precedent may be of dubious value for administration of the Act. If the Coordinator routinely relies upon the non-applicability of the Exclusionary Rule to sustain actions based upon illegally obtained evidence, then the judiciary may be prodded into applying higher standards to civil proceedings.

Matter of Mullins & Pritchard, Inc.<sup>31</sup> is an instance where the Louisiana First Circuit upheld warrantless periodic inspections of oil production facilities under a statute authorizing periodic as well as special inspections, when circumstances warrant, as applied to all facilities subject to environmental regulations. The Mullins Court applied three criteria from Burger in upholding a warrantless regulatory inspection: (1) Substantial government interest, (2) the search was necessary to further the regulatory scheme, and (3) the statute was a constitutionally adequate substitute for a search warrant because a), the owner was advised that the search was pursuant to and within the scope of the statute, and b) the discretion of the inspecting officer was limited. Mullins is an indication that the Burger criteria will satisfy Louisiana constitutional requirements relative to privacy rights. In summary, the investigatory powers granted to the Coordinator are probably facially valid under the standards of both Pullin and Mullins. There may be a state constitutional problem under Pullin, however, which could arise from the manner in which the statute is implemented. The issue is one of delegation. This also poses a problem with respect to drills which are to be routinely conducted under the Act, as discussed below.

### Regulatory Powers-Certificates

Discharge prevention and response certificates are to be valid for a period of five years, subject to immediate review during this term if there is a material change affecting the terminal facility's discharge prevention and response plan or response capability. Annual reporting requirements are to be established by the coordinator pursuant to the Louisiana APA.<sup>32</sup> The Act establishes as a precondition to the issuance or renewal of a certificate, that: (a) the applicant has implemented a discharge prevention and response plan consistent with state and federal plans and regulations; and, (b) the applicant can provide directly or through membership

or contract with a discharge cleanup organization all required equipment and personnel to prevent, abate, contain, and remove pollution from an unauthorized discharge of oil as provided by the plan.<sup>33</sup>

A certificate may also be issued upon satisfactory showing of a terminal facility response plan that complies with requirements under federal law and regulations for a terminal facility response.<sup>34</sup>

If the terminal facility is inadequate, the Coordinator may suspend a previously issued certificate only after an adjudicatory hearing.<sup>35</sup> Suspension is permitted only after the Coordinator determines that a terminal facility does not have a "suitable or adequate" discharge prevention and response plan, or that the Certificate holder does not have sufficient containment or cleanup capabilities. This determination entitles the certificate holder to an adjudicatory hearing. There is no explicit provision for an emergency suspension, nor is there explicit authority for the Coordinator to enjoin operation of the facility pending resolution of the matter in an adjudicatory hearing. However, the Louisiana APA provides that, should an agency find that public health, safety, or welfare imperatively requires emergency action, summary suspension of a license may be ordered pending proceedings for revocation or other action.<sup>36</sup>

#### **Regulatory Powers-Scope**

The Act purports to establish the parameters of regulatory authority granted to the Coordinator.<sup>37</sup> The Coordinator is empowered to adopt, amend, and enforce reasonable regulations not in conflict with federal law or regulations, including but not limited to those relating to threatened or actual discharge of oil such as:

- (1) Standards and requirements for discharge prevention programs and response capabilities of terminal facilities and vessels.
- (2) Standards, procedures, and methods consistent with federal law or regulations for designating persons in charge and reporting threatened or actual unauthorized discharges and violations of the Act.
- (3) Standards, procedures, methods, means, and equipment to be used in the abatement, containment, and removal of pollution.
- (4) Development and implementation of criteria and plans of response to unauthorized discharges of various degrees and kinds, including realistically foreseeable worst-case scenarios consistent with federal regulations.
- (5) Requirements for complete and thorough audits of vessel contingency and response plans covered under the Act.
- (6) Requirements for complete and thorough inspections of terminal facilities covered under the Act.
- (7) Certification of discharge cleanup organizations.
- (8) Requirements for the safety and operation of vessels, motor vehicles, motorized equipment, and other equipment involved in the transfer of oil at terminal facilities and the approach and departure from terminal facilities.

(9) Requirements that certain containment equipment be on hand, maintained, and deployed by trained personnel.

(10) Standards for reporting material changes in discharge prevention and response plans and response capability for purposes of terminal facility certificate reviews.

(11) Such other rules and regulations consistent with the Act and appropriate or necessary to carry out the intent of the Act, consistent with federal law or regulations.

#### **STATE OIL SPILL CONTINGENCY PLAN (PLAN)**

The Act mandates a one-year time frame in which the Plan must be "fully operational and implemented".<sup>38</sup> This begins to run on the latest effective date of the area and regional contingency plans designated for Louisiana pursuant to federal law and implemented by the United States Coast Guard and EPA.

The Coordinator is the entity which shall adopt and promulgate the Plan in accordance with procedures provided in the Act. As previously noted, the Council is to "assist" in development of the Plan, but there is no requirement for Council approval in the grant of powers to the Council. There is also no explicit role allotted to the Council as a whole in the statutory requirements for development or content of the plan. However, there are roles given to certain members of the Council as noted below:

- (a) The Department of Environmental Quality, in cooperation with the coordinator, shall recommend provisions of the Plan relating to unauthorized discharges of oil;
- (b) The Department of Wildlife and Fisheries, in cooperation with the Coordinator, shall recommend provisions of the Plan providing for protection, rescue, and rehabilitation of aquatic life and wildlife and appropriate habitats on which they depend under its jurisdiction;
- (c) The Department of Public Safety and Corrections, in cooperation with the coordinator, shall recommend provisions to provide for emergency response coordination to protect life and property, excluding prevention, abatement, containment, and removal of pollution from an unauthorized discharge.

In this respect, the Act appears to establish something more than a mandatory consultative process which the Coordinator is bound to follow. The Act seems to require the "recommendation(s)" to be a part of the Plan as promulgated and presented by the Coordinator rather than recommendations to the Coordinator for his consideration in formulating the Plan. This reading of the Act is consistent with the spirit of the entire section. The Coordinator must provide for clear designation of responsibilities and jurisdiction and avoid unnecessary duplication of expenses, and shall further insure "participation" by local political subdivisions contiguous to coastal waters. The Coordinator's function is essentially to be an arbiter of jurisdictional overlap when existing capacities are applied to threatened or actual discharges. The technical and operational response is left to the agencies of government possessing the inventory and equipment to function in the field. This division of responsibilities may conflict with the duty of the Coordinator to actively direct the response effort. The confusion in duties may be inherent in the Act.

The Coordinator's role upon occurrence of a threatened or actual unauthorized discharge is the element which makes this confusion seem inevitable.<sup>39</sup> The Coordinator is authorized to administer and direct all state discharge response and cleanup operations "in consultation" with the Department of Environmental Quality (DEQ). The same paragraph also describes DEQ as the "lead technical agency of the state for response...and for cleanup".<sup>40</sup> Although DEQ is "under the direction and control of the Coordinator, the Act further states that, after an actual unauthorized discharge, "...nothing in this Chapter shall preclude [DEQ] from, at the earliest time practicable, assuming response and cleanup duties for the discharge of oil pursuant to R.S. 30:2001 et seq., [governing statute of DEQ], provided, however, the [C]oordinator is notified within twenty-four hours."<sup>41</sup>

Thus, the language of the Act seems to foster jurisdictional confusion between the Coordinator and the Louisiana Department of Environmental Quality. The problem is compounded by ambiguity about which entity is designated as the arbiter of such confusion. The Act leaves the question of who is in charge of the response unresolved, since DEQ is charged- apparently simultaneously- with the role of working "in consultation" with and "under the direction and control" of the Coordinator. Yet, DEQ is not precluded from acting alone in an emergency provided it merely "notifies" the Coordinator within twenty-four hours. The authority to resolve this confusion under the Plan or in the field seems to be divided. Since DEQ is the party responsible for "recommending", i.e., developing, the portion of the Plan relating to unauthorized discharges, the legislature is in effect instructing DEQ to detail the procedures under which it would surrender "direction and control" of the agency to the Coordinator. Therefore, DEQ determines when such control could be passed to the Coordinator. On the other hand, the Coordinator is the arbitration agency during the course of the response to an actual spill. If the situation is not clarified in the Plan, then the decision about who is in charge of an actual response effort would have to be made during the response.

There are sixteen statutory mandates of items which must be included in the Plan:

- (1) Detailed emergency procedures for initiating response actions to unauthorized discharges, presumably provided by DEQ.
- (2) A response command structure and state response team.
- (3) An inventory of public and private equipment and its location and a list of available sources of supplies necessary for response.
- (4) A table of organizations with the names, addresses, and telephone numbers of all persons and agencies responsible for implementing each phase of the plan and provisions for notification to such persons and agencies in the event of an unauthorized discharge.
- (5) Plans for practice drills for the response command structure and the state response team.
- (6) Establishment of a single state hot-line for reporting incidents that will satisfy all state notification requirements under the Act and under R.S. 32:1501 et seq., R.S. 30:2025(J), and R.S. 30:2361 et seq.

(7) Provisions for notifying the Department of Environmental Quality under the Plan.

(8) Plans for volunteer coordination and training.

(9) Use of both proven and innovative prevention and response methods and technologies.

(10) The circumstances under which an unauthorized discharge may be declared to be a state of emergency under applicable law.

(11) The circumstances under which the unauthorized discharge may be declared to be abated and pollution may be declared to be satisfactorily removed.

(12) Designation of environmental and other priority zones to determine the sequence and methods of response and cleanup.

(13) Procedures for disposal of removed oil or hazardous substances.

(14) Procedures established in cooperation with the Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources for assessment of natural resources damages and plans for mitigation of damage to and restoration, protection, rehabilitation, or replacement of damaged natural resources.

(15) Any Plan developed by the Coordinator pursuant to the Act shall include appropriate local governmental authorities and shall provide for the participation and involvement of the appropriate local governmental authorities that may be affected by or involved in the prevention, response, and removal of an oil spill.

(16) Any other matter necessary or appropriate to carry out the response activities, including but not limited to preapproval of the use of dispersants.<sup>42</sup>

There may be a jurisdictional problem under (5) above. Under the Act, the Coordinator is presumably responsible for conducting drills. However, it is unlikely that the state response team will be a single organizational unit under the immediate direction and control of the Coordinator. Thus, there may be a significant issue about when the authority of the Coordinator to enter upon property for the purpose of conducting a drill may be invoked, or delegated to members of the response team, some of whom may not even be public employees. This is the same issue which must be resolved with respect to inspections, as per the discussion above.

## RESPONSE

The Act establishes the Coordinator as the entity to take immediate action to (a) assess the discharge, whether threatened or actual, and (b) prevent, abate, or contain any pollution from the discharge, upon notification of a discharge.<sup>43</sup> "Pollution" is defined as the presence of harmful quantities of oil in waters of the state or in or on adjacent shorelines, estuaries, tidal flats, beaches, or marshes.<sup>44</sup> The Act defines "harmful quantity" as that quantity of oil the discharge of which is determined by the Coordinator to be harmful to the environment or public health or welfare or may reasonably be anticipated to present an imminent and substantial danger to the

public health or welfare.<sup>45</sup> "Oil" is defined as oil of any kind or in any form, including but not limited to crude oil, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as hazardous substance under Sub-paragraphs (A) through (F) of Section 101 (14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. § 9601 et seq.) and which is subject to the provisions of that Act.<sup>46</sup>

These provisions establish a presumption that the unauthorized discharge of oil is the basis for response by the Coordinator, without the necessity of first establishing harmful effects upon affected areas. The authority to direct and coordinate efforts is to be established by the mere quantity of the discharge, as defined by the Coordinator. The quantity sufficient to invoke the powers of the Coordinator will presumably be established by rule making since there are significant property interests and operational considerations at stake. Rule making would allow the consequences of regulatory violations to be known in advance by all directly affected parties. Even after harmful quantities would be established by rule making, there seems to remain a presumption that in a close call the Coordinator may unilaterally and conclusively determine the quantity of a particular discharge, threatened or actual.

But since DEQ is empowered to act unilaterally in the event of a threatened or actual spill as long as it notifies the Coordinator within twenty-four hours, it is unclear whether any non-DEQ responder acting pursuant to DEQ authority within the initial twenty-four period before notification of the Coordinator is entitled to qualified immunity (see discussion below). It is equally unclear whether the Act would permit the Coordinator to delegate to DEQ or any other entity, either under the Plan or ad hoc, authority to declare that a harmful quantity of discharge is either threatened or actual. It may be argued that the authority to make both the definition and the finding of a harmful quantity is delegated solely to the Coordinator by the legislature.

This issue is particularly compelling because the Act carefully defines "oil" as not to encompass any substance already listed as a hazardous substance under existing legislation, and therefore outside the purview of the Coordinator. The precise legislative definition of the substance under consideration, and the exclusivity of the tasks assigned to the Coordinator argue for a narrow construction which would find the Coordinator to be the sole authority as to when a harmful quantity of an unauthorized discharge exists. However, the significant role assigned to DEQ as both the party responsible for formulating the Plan for immediate response, and as a unilateral responder in certain situations, once again muddles the issue. The essential problem is that neither DEQ nor the Coordinator may be able to devise a Plan, much less respond to an actual or threatened discharge, with absolute certainty as to the proper division of authority.

#### **Response-Local Government and Other Agencies**

Aside from delegation problems between DEQ and the Coordinator relative to the response effort, the Act directs all persons and all other officers, agencies, and subdivisions of the state government to carry out response and cleanup operations related to unauthorized discharges of oil subject to the Coordinator's authority.<sup>47</sup>

Presumably, this paragraph is a means whereby the Coordinator may delegate other entities such as non-DEQ state agencies or local government bodies whose authority ultimately resides in a state charter to undertake certain aspects of the response effort at the Coordinator's direction. The implication may be that such agencies are not empowered to respond under the protection of the Act absent such notification. A contrary reading might be that such agencies could respond to an emergency prior to notification, but would be compelled to submit to the Coordinator's direction upon notification. It might also suggest that an agency of the state or local government which has not responded in any manner could not reasonably refuse to respond when called upon by the Coordinator. The Plan will probably clarify the legislative intent in this provision.

#### **Response-On-Scene Coordinator**

In a further provision directed at the immediate response to a spill, there is an allowance for the Coordinator, when responding to an actual or threatened unauthorized discharge of oil, to appoint a "state-designated on-scene" coordinator to act in the Coordinator's absence.<sup>48</sup> The emphasis on physical presence at the scene of the discharge is restated in the second sentence of the paragraph, indicating a legislative concern for both the immediacy and comprehensiveness of response. It appears that the designation is to be ad hoc, not on-going, and effective only for the duration required for a response effort. There are no requirements given as to qualifications of the state-designated on-scene coordinator. Hence, the Coordinator could presumably delegate investigatory authority to the state-designated on-scene coordinator, without any statutory requirement that the delegated person be a public employee, otherwise trained and capable of exercising police powers.

Both the Coordinator and/or the state-designated on-scene coordinator are further directed to complement the efforts of any federal on-scene coordinator or other federal agency or official exercising authority under the national contingency plan pursuant to OPA. There are no other explicit provisions as to the conduct of the state-designated on-scene coordinator. The Plan will likely clarify legislative intent as to the parameters of authority capable of being exercised by the state-designated on-scene coordinator. It is particularly important to specify what actions may be taken without having to consult with the Coordinator. This would enable members of the Response Team, and those agencies affected by notification requirements, to rely upon directives of the state-designated on-scene coordinator as consistent with legislative intent, particularly for purposes of qualified immunity (see discussion below).

#### **LIABILITY**

##### **Responsible Party-Definition and Obligations/Rights**

The Act defines "person responsible", "responsible person", or "responsible party" as:

- (a) The owner or operator of a vessel or terminal facility from which an unauthorized discharge of oil emanates or threatens to emanate.
- (b) In the case of an abandoned vessel or terminal facility, the person who would have been the responsible person immediately prior to the abandonment.

(c) Any other person, but not including a person or entity who is rendering care, assistance, or advice in response to a discharge or threatened discharge of another person, who causes, allows, or permits an unauthorized discharge of oil or threatened unauthorized discharge of oil.<sup>49</sup>

"Owner" or "operator" is defined as:

(a) any person owning, operating, or chartering by demise a vessel; or

(b) (1) any person owning a terminal facility, excluding a political subdivision of the state that as owner transfers possession and the right to use a terminal facility to another person by lease, assignment, or permit; or

(b) (2) a person operating a terminal facility by lease, contract, or other form of agreement.<sup>50</sup>

"Person in charge" is defined as the person on the scene who is directly responsible for a terminal facility or vessel when a threatened or unauthorized discharge of oil occurs or a particular duty arises under the Act.<sup>51</sup>

The Act requires any person responsible for an unauthorized discharge of oil or the person in charge of any vessel or a terminal facility from or at which an unauthorized discharge of oil has occurred to immediately act upon knowledge of the discharge by:

(1) Immediately notifying the hot-line, as established under the Plan.

(2) Undertaking all reasonable actions to abate, contain, and remove pollution from the discharge.<sup>52</sup>

There is no statutory limitation on the procedures which are allowable for abatement, containment, or removal. The Plan might address this issue, particularly since there is explicit statutory directive requiring the Coordinator to establish rules for preapproval of the use of dispersants.<sup>53</sup> The use of dispersants has been highly controversial since their widespread application off the French coast after the *Torrey Canyon* spill in 1967.<sup>54</sup> The Act specifically mentions the dispersants issue, as well as authorizing the Coordinator to promulgate within the Plan "[a]ny other matter necessary or appropriate to carry out response activities...". One significant item which might be addressed in the Plan is the use of bio-remediation, particularly with regard to standby plans for immediate response by responsible parties.<sup>55</sup>

If the persons responsible for the spill are unknown or, in the estimation of the Coordinator, are unwilling or unable to abate, contain, or remove pollution from the discharge in an adequate manner, then the Coordinator may undertake remediation, or may contract with and appoint agents who shall operate under the direction of the Coordinator for that purpose. It seems superfluous to give the Coordinator authority to undertake remediation on his own, since his immediate office is limited, at least nominally, to a budget of \$250,000. The evident intent of the legislature is that the Coordinator will always act through the auspices of another entity. Again, the obvious conflict as to who is in charge in the event of a

response is present. The decision to invoke remedial efforts beyond those of the person responsible is clearly given to the Coordinator. Unclear is whether the Coordinator or the leadership of DEQ will exercise finality in substantive decision-making once the Coordinator has decided to go beyond the efforts of the person responsible. At least it can be said the Act implies that the Coordinator will be the source of substantive directives to the responsible party.<sup>56</sup>

### Responsible Party-Damage Assessment

The correctness of the decision by which the Coordinator undertakes a response effort under the aegis of the Act will be of considerable import in terms of liability regarding the property interests affected and to the members of the Response Team.

"Damages"<sup>57</sup> means and includes any of the following:

(a) Natural Resources - damages for injury to, destruction of, loss of, or loss of use of, natural resources as defined in [the Act], including the reasonable costs of assessing the damages, which shall be recoverable by [the state].

(b) Immovable or corporeal movable property - damages for injury to, or economic loss resulting from destruction of, immovable or corporeal movable property, which shall be recoverable by a person who owns or leases that property..." immovable property shall have the same meaning as "immovables" as provided in C.C. Art. 462...<sup>58</sup> "corporeal movable property" shall have the same meaning as "corporeal movables" as provided in C.C. Art. 471.<sup>59</sup>

(c) Subsistence use - damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant whose uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(d) Revenues - damages equal to the net loss of taxes, royalties, rents, fees, or net profit share due to the injury, destruction, or loss of immovable or corporeal movable property, or natural resources, which shall be recoverable by the [state].

(e) Profits and earning capacity - damages equal to loss of profits, or impairment of earning capacity due to the injury, destruction, or loss of immovable or corporeal movable property, or natural resources, which shall be recoverable by those persons entitled to recovery under Subparagraph (b) or (c) [above].

(f) Public services - damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, recoverable by the state of Louisiana or any of its political subdivisions.

In addition to the damages as defined above, the Louisiana Department of Wildlife and Fisheries retains the right to bring a civil suit to recover penalties for the value of each fish, wild bird, wild quadruped, and other wildlife and aquatic life unlawfully



killed, caught, taken, possessed or injured.<sup>60</sup> The Act further creates a presumption of natural resource damages, purporting to vest within the Coordinator the rebuttable presumption of accuracy in an action for recovery of natural resource damages.<sup>61</sup> The rebuttable presumption must be established by written submission to the court of a report of the amounts computed or expended according to the state plan. The report must be prepared in conjunction with "state-designated natural resources trustees" and accord with provisions to be embodied in the state Plan.

There are at least three potential classes of claimants envisioned by the Act: The State of Louisiana, local political subdivisions, and private parties. Private parties presumably would recover under the Act rather than under traditional causes of action because the Act purports to be the exclusive authority on liability and limitations of liability related to oil spills.<sup>62</sup> Moreover, damages may be claimed by non-owners for loss of subsistence use, which may create a right of action for persons whose livelihood is affected by a spill.

#### **Limitation Of Liability**

Liability of the Responsible Party is limited.<sup>63</sup> It should be noted that the liability imposed on the Responsible Party by Louisiana may be levied in addition to further liabilities imposed under OPA or any other appropriate regulatory auspices.

Limitations are applied to three categories of Responsible Parties:

- (1) Tank Vessels. The greater of: (a) \$1,200 per gross ton, or (b) \$10 million for a vessel greater than three thousand gross tons or, (c) for any other vessel, \$600 per gross ton or \$500,000, whichever is greater.
- (2) Onshore facilities, excluding deepwater ports. Total of all removal costs plus \$75,000,000.
- (3) Any onshore facility or a deepwater port. \$350,000,000; provided that any lesser actual limitation imposed under OPA shall reduce the maximum amount levied under the Act.

The limitations listed above do not apply to incidents primarily caused by gross negligence or willful misconduct, or violation of an applicable federal, state, or local safety, construction, or operating regulation by the Responsible Party, an agent or employee of the Responsible Party, or acting pursuant to a contractual relationship with the Responsible Party, except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail. The limitations also do not apply if the Responsible Party does not report the incident as soon as he knows or has reason to know of occurrence.

Curiously, the Act also precludes limitations on liability of the Responsible Party for failure "[t]o provide all reasonable cooperation and assistance requested by a responsible state or federal official in connection with removal activities."

A separate section of the Act allows a responsible party to refuse to comply with directives of the Coordinator or the Coordinator's designee. Refusal is permitted if the responsible person reasonably believes that any such directive will unreasonably endanger public

safety or natural resources or conflict with directions or orders of the federal on-scene coordinator.<sup>64</sup> A statement at the time of refusal for failure to comply is required, followed up by written notice of same within forty-eight hours of the refusal. This provision is an unqualified legislative decree which is probably not amenable to amplification in the rulemaking process, since the procedure for refusal is statutory. There is no indication within the text as to how this section is supposed to work in conjunction with the idea of restricting limitation of liability for refusal to comply with a request, as discussed above. This provision allows the Responsible Party to refuse cooperation if he feels there is an unreasonable endangerment to public safety, natural resources, or a conflict with the federal on-scene coordinator.

The refusal provision may also provide the Responsible Party the basis for a defense of inaction or action not in conformity with a directive(s) of the Coordinator, but it is doubtful that this will provide any basis for a defense as to liability for the spill itself. However, if a directive from the Coordinator vis-a-vis a threatened spill is refused, then the provision represents a substantial curtailment on the power of the Coordinator to effect measures in pursuit of public safety otherwise granted in the Act. The path chosen by the legislature effectively makes the responsible party co-equal with the Coordinator as the arbiter of the public interest, and potentially forces the Coordinator to invoke more costly and less timely measures to pursue the objectives deemed appropriate to the situation. The legislature has, in effect, opted for a plan which has the potential to frustrate an early and adequate response to a spill. Ironically, the Act seems to impede rather than expedite a response.

One alternative would be for the legislature to provide a protest mechanism by which the responsible party could register an objection to the directive, thus preserving any defense which may be desired regarding the response effort, and then proceed to effect the directive. Under the Act, a Responsible Party might exercise the right to refuse cooperation and not waive limitations of liability if he couches his refusal to co-operate in terms of a reasonable belief that his position is covered by one of the exceptions.

#### **Preclusion From Liability**

An absolute bar to liability under the Act is allowed if the discharge results solely from (1) an act of God, war, or terrorism; (2) an act of government, either state, federal, or local; (3) an unforeseeable occurrence exclusively occasioned by the violence of nature without the interference of any human act or omission; (4) willful misconduct or a negligent act or omission of a third party, other than an employee or agent of the person responsible or a third party whose conduct occurs in connection with a contractual relationship with the responsible person, unless the responsible person failed to exercise due care and take precautions against foreseeable conduct of the third party; or, (5) any combination of the above. The Responsible Party may seek redress for any payments made to others pursuant to the Act if the Responsible Party makes the payment(s) on behalf of a third party.<sup>65</sup>

#### **QUALIFIED IMMUNITY**

Qualified immunity from liability for acts or omissions during the clean-up operation is provided to persons other than the Responsible Party.<sup>66</sup> The Responsible Party does not get immunity for clean-up

expenses. However, the limitations cited above apply to "removal costs" as well as damages.

The Act purports to protect "any person, including any discharge cleanup organization..." who "voluntarily" acts to abate, contain, remove, clean up, or otherwise respond to pollution from a threatened or actual unauthorized discharge of oil or refined petroleum product. The use of the term "voluntary" is not explained in the Act, and is of doubtful significance. It is not clear whether professional cleanup organizations which may be organized on a for-profit basis are granted immunity. The Act speaks of voluntary response "or" response based upon either the state Plan or pursuant to an authorized state or federal official's request.<sup>67</sup>

Regardless of whom it covers, Qualified Immunity exempts responders other than the Responsible Party from liability for removal costs, damages, or civil penalties under the Act or other laws of Louisiana, resulting from acts or omissions committed in rendering assistance. The exemption does not apply to actions for personal injury, wrongful death, or acts and omissions arising from gross negligence or willful misconduct.

### SUMMARY

The Act is a lengthy and complex product of the legislative process. Not surprisingly, it bears evidence of bureaucratic wrangling and legislative compromise. It cannot be fully understood without an appreciation of OPA.

The central features of the Act are:

(a) Creation of a weak administrator, while simultaneously trying to provide an effective and comprehensive application of state and local resources to a particular problem.<sup>68</sup>

(b) An attempt to bind all claimants, both public and private, to causes of action for damages arising under the Act.

(c) Recognition of the primacy of federal legislation, and insistence on using federal funds before expenditure of other available funds, where possible.

### ENDNOTES

1. Report of the Alaska Oil Spill Commission, Executive Summary, *Spill: The Wreck of the Exxon Valdez, Implications for Safe Marine Transportation*, January, 1990.
2. 30:2453. B. Act 7 enacts L.S.A.-R.S. 30:2451 through 30:2496. For an overview of OPA, see: The Coastal States Organization, *A Review of the Oil Pollution Act of 1990*, March, 1991.
3. 30:2494.
4. Oil Spill Memorandum of Co-Operation Between The Province of British Columbia, the State of Washington, The State of Oregon, and the State of Alaska, June, 1989. Also, Substitute House Bill No. 1854, 51st Legislative Regular Session, State of Washington.

5. 30:2454. (2)
6. 30:2459. D.
7. 30:2459.
8. 30:2454. (6)
9. 30:2454. (10)
10. 30:2454. (15)
11. 30:2454. (26)
12. 30:2454. (29)
13. 30:2455.
14. L.S.A.-Const. Art.4, §1.(B)
15. 30:2458.
16. L.S.A.-Const. Art. 2, §2.
17. 30:2457. C. (1), (2), (3).
18. 30:2483., et seq.
19. 30:2485., et seq.
20. 30:2458
21. L.S.A.-R.S. 49:950, et seq.
22. 30:2455. C.
23. 30:2455. E.
24. 30:2454. (28)
25. 30:2454. (7)
26. 30:2470. see also 30:2477 for audits, inspections, and drills of vessels.
27. 482 U.S. 691, 700-01 (1987)
27. L.S.A.-Const. Art. 1, §5.
28. 477 So.2d 683 (1985), rehearing 484 So.2d 105 (19)
30. 543 So.2d 908 (19)
31. 549 So.2d 872, 876-7, (La. App. 1st Cir. 1989)
32. 30:2471. A.
33. 30:2470. B. (1)
34. 30:2470. B. (2) ; 30:2472. lists information which must be supplied in certificate application
35. 30:2474.
36. LSA-R.S. 49:961. C.
37. 30:2457.
38. 30:2459., et seq.
38. 30:2462. A.
40. 30:2462. et seq.
41. 30:2462. C.
42. 30:2460.
43. 30:2461.
44. 30:2454. (24)
45. 30:2454. (13)
46. 30:2454. (18)
47. 30:2462. B.
48. 30:2464. A.
49. 30:2454. (22)
50. 30:2454. (20)
51. 30:2454. (21)
52. 30:2463. A.
53. 30:2460. A. (16)
54. Lee Clarke, *Oil Spill Fantasies*, The Atlantic Monthly. pp. 65-77, Nov., 1990.
55. Texas General Land Office, *Mega Borg Oil Spill off the Texas Coast, An Open Water Bioremediation Test*, published July 12, 1990.
56. 30:2463. B.
57. 30:2454. (5) (a)-(f)
58. L.S.A.-C.C. art. 462: Tracts of land, with their component parts, are immovables.
59. L.S.A.-C.C. art. 471: Corporeal movables are things,

whether animate or inanimate, that normally move or can be moved from one place to another.

60. 30:2491. B.
61. 30:2480
62. 30:2491. A. and 30:2496
63. 30:2479., et. seq.
64. 30:2468
65. 30:2481.-2482.
66. 30:2466., et. seq.
67. 30:2454 (8) defines "discharge cleanup organization" but does not answer this question.
68. For example, see 30:2469. dealing with derelict vessels and structures. The Coordinator is given the authority to

remove any structure or vessel involved in an actual or threatened discharge of oil and to recover removal costs from the owner. Also, DEQ may petition the coordinator for removal of such vessel or structure, and the Coordinator is required to either comply or submit the matter to the Interagency Council for review. The Act therefore allows DEQ to activate the powers of the Coordinator.

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