Oil Pollution Control Act: An Overview for the Business Lawyer

By Larry Schnapf

The Oil Pollution Control Act of 1990 ("OPA")[1] was enacted in response to the Exxon Valdez spill in 1989. However, OPA's reach extends far beyond oil spills from oil tankers to include property with storage tanks, pipelines and abandoned wells where discharges of oil could escape to surface waters. In addition to the liability, OPA imposes a panoply of structural, equipment and operating requirements that substantially increases responsible parties' operating costs.

Following is an overview of OPA and the section 311 of the federal Clean Water Act (CWA).[2] Other articles in this newsletter will discuss specific liability associated with pipelines and abandoned wells or other structures. Readers should also be aware that parties who are or have "contributed to" the past or current handling, or storage of hazardous wastes that "may" pose an "imminent and substantial endangerment" to human health or the environment could be required to remediate contamination under section 7002 or 7003 of the Resource Conservation and Recovery Act ("RCRA"). [3]

Section 311 of the CWA and OPA are the primary federal programs for responding to oil spills. Section 311 of the CWA imposes liability on owners or operators of vessels and facilities that discharge harmful quantities of oil in into the navigable waters of the United States, adjoining shorelines, the waters of the contiguous zone, in connection with activities under the Outer Continental Shelf Lands Act or when the discharge may affect natural resources of the United States. The Environmental Protection Agency ("EPA") is primarily responsible for regulating non-transportation-related facilities and responding to spills in inland waters while the U.S. Coast Guard is responsible for vessels and marine transportation-related facilities. [4]

To impose liability under OPA, a plaintiff must show that (1) the defendant is a responsible party ("RP"), (2) for a vessel or facility[5], (3) from which there has been a discharge of oil or substantial threat of a discharge of oil, (4) into navigable waters and, (5) that resulted in removal costs and damages.[6] To understand OPA liability, it is necessary to understand the definitions of a couple key terms.

Responsible party -. For purposes of defining a vessel's RP, OPA distinguishes between offshore facilities[7] and onshore facilities.[8] For vessels, an RP is "any person owning, operating, or demise chartering the vessel." [9] Interestingly, this definition does not include the owner of the oil cargo aboard the vessel. Unlike the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), liability is limited to owners and operators of vessels or facilities. Cargo owners who would be akin to arrangers or generators under CERCLA have no liability though an earlier version of OPA did provide for such liability. [10]

For offshore oil facilities, the RP is the lessee, permittee of the area in which the facility is located or the holder of a right of use and easement granted under state law or the Outer Continental Shelf Lands Act ("OCSLA").[11] For onshore facilities and pipelines, an RP is the entity that is "*owning or operating*" the facility or pipeline.[12] For abandoned offshore facilities,

the RP is the entity that owned or operated such facility immediately prior to such abandonment.[13]

Removal costs - includes all expenses incurred to contain or remove a discharge oil from water and shorelines or any actions that are necessary to minimize or mitigate damage to the public health or welfare, including but not limited to fish, shellfish, wildlife, public and private property, shorelines, and beaches.[14] In the case of a substantial threat from a discharge of oil, removal costs includes costs to prevent, minimize, or mitigate impending oil pollution from such a threatened discharge.[15]

Navigable Waters"- The definition of waters under OPA is not necessarily as broad as that under the wetlands program of section 404 of the CWA.[16] Some courts have held that OPA's jurisdiction is limited to what has been considered historically navigable waters.[17]

Scope of OPA Liability

With limited exceptions, RPs are jointly and strictly liable for all removal costs incurred by a governmental authority.[18] RPs are also strictly liable for removal costs that are incurred consistent with the National Contingency Plan and damages to third parties affected by substantial threats of or discharges of oil[19] The following damages may be recovered from RPs:

— Damage to natural resources;

— Injury or economic losses resulting from destruction of real or personal property;

— Damages or loss of use of natural resources used for subsistence;

— Lost tax revenue, royalties, rents, or net profit shares suffered by federal, state, or local governments due to injury to real or personal property;

— Lost profits or impaired earning power because of injury to real or personal property or natural resources;

— The net costs of providing increased or additional public services during or after removal activities.[20]

Limitations on Liability and Exceptions to the Limitations

OPA contains liability limitations for owners or operators of vessels or facilities. The maximum liability limitations are based on the size and nature of the vessel or facility. The liability for responsible parties of vessels greater than 3,000 gross tons is $1,900 per gross ton for each spill with a maximum liability of $16 million for double-hulled oil tankers with single-hull vessels having limits of $3K per gross tone or $22M. For smaller oil tankers, the liability limits are $1, 900 per gross ton or $4 million for double-hulled vessels and $3K per gross ton or $6 million for single-hulled vessels.[21] All other vessels (e.g., dry cargo vessels) face a maximum liability of $950 per gross ton or $800K, whichever is greater.[22]

Owners or operators of offshore facilities that are not deepwater ports, such as oil platforms, are liable for all cleanup costs plus $75 million per oil spill, while the RPfor onshore facilities and deep water ports are liable for up to $350 million per spill.[23]

The liability limitations will not apply and the RP will face unlimited liability if the spill is (1) proximately caused by the gross negligence or willful misconduct of the responsible person, (2) failure to comply with an applicable federal safety, construction, or operating regulation, or (3) failure or refusal to report a spill, to cooperate or assist governmental authorities with a removal action when requested, or to comply with an order without sufficient cause.[24]

Prior to OPA, there was a question whether the liability of vessel owners for oil spills was capped by the Limitation of Liability Act of 1851.[25] Under this statute, the liability of ship owners is limited to the value of the vessel and its cargo. Thus, if a vessel was severely damaged or sank, the liability of its owner could be less than the maximum liability provided in the CWA. However, OPA expressly provides that the Limitation of Liability Act shall not limit the liability imposed on RPs under federal or state laws.[26]

Likewise, prior to OPA, any costs due the U.S. government constituted a maritime lien on the vessel, which could be enforced in an action in rem in any district court where the vessel was located.[27] This provision was deleted by the OPA but it is still possible that the Federal Government and third parties may be able to assert a maritime lien that would have priority over a lender's security interest. Under the U.S. Ship Mortgage Act of 1920, damages arising out of maritime torts are given preferred maritime lien status with priority over ship mortgages and certain other maritime liens. There is no statutory definition of what constitutes a maritime tort; instead it is an evolving concept of case law. In general, however, a maritime tort is one occurring on navigable waters that has some connection with traditional maritime activities. In adopting OPA, Congress did not indicate whether the strict liability under the statute would also constitute a maritime tort that would be afforded preferred maritime lien status. Thus, this issue probably will have to be resolved on a case-by-case basis by the courts.

It is important to note that OPA does not pre-empt state laws. A number of coastal states have enacted oil spill laws that may provide for higher or unlimited liability than those provided for in OPA. For example, of the 24 states that have oil spill statutes, 15 provide for strict liability and in 11 of those states, the liability is unlimited. Thus, Thus RPs that might be able to qualify for one of the OPA liability caps might find themselves subject to additional liability under a state oil spill law or state common law.[28]

Oil Spill Financial Responsibility ("OSFR")

Under OPA, vessels over 300 tons must have evidence of financial resources sufficient to meet the maximum amount of liability that the vessel or facility would be subject to under OPA.[29] Responsible parties for Covered Offshore Facilities ("COF"s) are required to maintain sufficient financial resources based on the worst case oil spill discharge.[30] The minimum OSFR is $35 million per COF located in the Outer Continental Shelf and $10 million per COF located in state waters. The minimum OSFR coverage increases with the worst case spill discharge scenario, maxing out at $150 million for the worst oil spills that exceed 105,000 barrels. OPA does not require evidence of financial resources for onshore facilities.

Defenses to Oil Spill Liability

An RP may avoid liability for removal costs or damages if it can demonstrate that the discharge or substantial threat of a discharge of oil were due to an act of God, an act of war, or a third party. [31]

For all practical purposes, the third-party defense is the only viable defenses available to RPs.[32] To assert this defense, the RP will have to show that the discharge was SOLELY due to an act or omission by a third party who was not an agent or employee of the RP nor in a contractual relationship with the RP.[33] In addition, the RP must show that it exercised due care with respect to the oil that was discharged and took precautions against foreseeable acts or omissions of the third party as well as the foreseeable consequences of those acts or omissions.[34] If the RP can establish this defense, the third party will be considered an RP. The most common third-party claims filed for discharges are due to vandalism but the owner or operator has to show that it took all reasonable precautions to prevent such conduct and inadequate security, particularly during a strike or an ill-conceived Spill Prevention Control and Countermeasure ("SPCC") will prevent the owner or operator from shifting liability to the third party.[35]

The difficulty of asserting the third party defense was illustrated in *Smith Property Holdings v. U.S.*[36] There, a subcontractor of a developer of luxury housing in Washington, DC ruptured a buried culvert during excavation activities that released a substantial quantity of oil-contaminated water onto the site. Approximately 5 gallons of oil were discharged to a nearby creek. The owner filed a spill report within the NRC and complied with an Emergency Removal/Response Administrative Order. The owner than filed a claim with the Oil Spill Fund for reimbursement of its $772,000 in cleanup costs and $1,175,416 in lost profits from oil cleanup-related construction delays. The owner asserted it was not responsible for the oil spill because the oil came from an off-site source, that it had only excavated soil, performed a Phase I and had no reason to know about the abandoned culvert. The Coast Guard denied all but $172,000 of the claim because the owner had failed to establish that the oil had migrated from another source and that the excavation was the cause of the spill. The court upheld the government's view.

An RP will lose its complete defense to liability for removal costs or damages if it (1) fails to comply with its spill reporting obligation, (2) fails to provide "all reasonable cooperation and assistance" requested by the OSC or other responsible officer regarding removal activities, or (3) fails to comply "without sufficient cause" with an order issued under section 311 of the CWA.[37] The likely effect of these broad exceptions to the affirmative defenses is to nullify the ability to use the defenses.

In addition, an RP will not be liable to a claimant to the extent that the incident for which the claimant seeks reimbursement or damages was due to the gross negligence or willful misconduct of the claimant.[38]

The Coast Guard and Maritime Transportation Act of 2004 (CGMTA) [39] created an additional defense to liability known as the innocent landowner defense. This defense provides that an owner or operator of a facility that is the source of a discharge or substantial threat of discharge of oil into the navigable waters or adjoining shorelines or the exclusive economic zone

will not be considered to be in a “contractual relationship” with a responsible party if that entity is able to show that it did not know and had no reason to know that oil that is the subject of the discharge or substantial threat of discharge was located on, in, or at the facility. To establish this showing, the entity has to show that it undertook all appropriate inquiries using generally accepted good commercial and customary standards and practices into the previous use and ownership of the facility. The innocent landowner defense does not apply to parties who fail to comply with spill reporting obligations, fail to cooperate with officials implementing removal actions parties or fail to comply with an order without sufficient cause.[40] In addition, the entity seeking the defense must cooperate with responsible parties conducting removal actions and comply with any land use restrictions.[41] CGMTA also added liability protection to local governments who take title through tax foreclosure or eminent domain. [42]

To facilitate implement the Coast Guard was required to promulgate regulations establishing the standards for satisfying all appropriate inquiries. In 2008, the Coast Guard promulgated its OPA All Appropriate Inquiries (“AAI”).[43] The OPA AAI is consistent with the AAI rule published by the EPA but not identical. Persons seeking to conduct all appropriate inquires Persons conducting all appropriate inquiries may use the procedures included in the ASTM E 1527-05 “Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," standard to comply with this OPA AAI rule but are not required.

Finally, CGMTA added a secured creditor defense that parallels the safe harbor for lenders in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The OPA secured creditor exemption excludes from the definition of owner or operator "a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility” provided that while the borrower is in possession of such vessel or facility the lender does not exercise decision-making control over a vessel's environmental compliance activities or undertake day-to-day management of the vessel. Like its CERCLA counterpart, the OPA secured creditor exemption insulates lenders following foreclosure if the lender sells, re-leases (in the case of lease financing), liquidates, maintains business activities, winds up operations, undertakes an OPA 90 removal action, or takes any other measures to preserve, protect, or prepare the vessel or facility prior to the sale or disposition "at the earliest practicable, commercially reasonable time, on commercially reasonable terms."[44]

Contribution and Indemnity

RPs are authorized to bring contribution actions against persons who may be liable under OPA or any violations of state or federal law.[45] In addition, an RP may file a contribution claim for removal costs or damages incurred above its statutory limit. Contribution actions must be filed within three years of the date of judgment or a judicially-approved settlement.[46]

OPA allows parties to reallocate liability among themselves including indemnity agreements. However, indemnity agreements are only effective between the parties and shall not have the effect of transferring a claim the government or third party may have for damages or removal costs away from the RP.[47]

Oil Spill Liability Trust Fund

OPA created the Oil Spill Liability Trust Fund (the "OSLTF"), which can be used to immediately remove or otherwise respond to discharges or threatened discharges of oil.[48] Parties who have incurred removal costs or damages may file claims against the OSLTF only AFTER they have first presented their claims to the RP or its guarantor.[49] If a claim presented to an RP is not settled within 90 days, the claimant has the option of either commencing a civil action against the RP or submitting its claim to the OSTLF. A claim may not be presented to the OSLTF if the claimant has filed a cost recovery against the RP.[50]

In 1996, Congress required RPs to make interim, short-term damage payments representing less than the full amount of the claims to expedite payment of claims.[51] However, this apparently did not improve claims processing enough so Congress added a loan program in 2004 whereby the OSLTF may award low-interest loans to a "fisherman or aquaculture producer claimant" with pending claims against RPs or where the RP fails to make interim payments. The loans shall be for a period of five years.[52]

RPs also may file claims against the OSTLF, provided they could assert a complete defense to liability and are entitled to a limitation of liability addition.[53] Furthermore, the RP may assert a claim only for the amount of the removal costs, damages, and other monies actually paid by the RP or its guarantor that exceeds the limitation of liability for the particular RP, as provided for under the OPA.[54]

Any action for removal costs must be brought within three years of the termination of the removal action, whereas any action for damages must be filed within three years after the date the loss was reasonably ascertainable or the natural resource damage assessment was completed.[55]

Spill Reporting Requirements

The "person in charge" of a facility or vessel that has discharged "harmful" quantities of oil must report the spill to the National Response Center ("NRC") as soon as that person becomes aware of the discharge. EPA has determined that discharges of oil that result in a "sheen" or cause a violation of an applicable water quality standard are harmful and must be reported. [56]

Spill Prevention

EPA first promulgated SPCC regulations in 1973 with the goal o minimizing the impact of discharges of oil and hazardous substances into navigable waters and adjoining shorelines. [57] In 2008 and 2009, EPA adopted tougher SPCC requirements and expanded the scope of regulated facilities. The new requirements take effect on November 10, 2010. The revised SPCC rule applies to owners or operators of non-transportation-related facilities that:

- have an aboveground oil storage capacity greater than 1,320 U.S. gallons, or completely buried oil storage capacity greater than 42,000 U.S. gallons:

- drill, produce, store, process, refine, transfer, distribute, use, or consume oil or oil products; and
- could reasonably be expected to discharge oil to U.S. navigable waters or adjoining shorelines.

One of the requirements of the SPCC rule is that storage tanks be equipped with secondary containment systems to prevent oil spills from migrating into soil, groundwater, or surface water.[58] It is important to note that currently some states require secondary containment for small aboveground storage tanks ("AST"s). It is also important to note that owners or operators of facilities are not required to submit their SPCC plans to EPA nor are regulated facilities required to register or otherwise notify the EPA that they are subject to the SPCC requirements.

Federal Response Plans

In addition to SPCC plans, a smaller set of facilities are required to prepare Facility Response Plan ("FRP"). Unlike SPCC plans, facilities must submit their FRP plans to EPA. This requirement applies to owners and operators of offshore and onshore facilities that could reasonably be expected to cause "substantial harm" to the environment by discharging oil into or on navigable waters. The FRP requirement applies to both marine-transportation-related facilities and non- transportation-related facilities that handle, store, and transport animal fats and vegetable oils.[59]

The FRP plan describes how the facility will respond to oil spills.[60] The FRP should identify the response personnel and equipment, flow path of potential spills and vulnerable natural resources, evacuation and notification plans, and response training programs, including drills and exercises.

OPA Enforcement

Pursuant to the Federal Civil Penalties Inflation Adjustment act, EPA issued a rule revising the statutory penalties that may be imposed under OPA.[61] Effective January 13, 2009, any person who is an owner, operator, or "person in charge" of a vessel or facility that suffered a discharge may be subject to a civil penalty of up to $37,500 per day or $1,100 per barrel of oil discharged.[62] However, where the discharge was due to gross negligence or willful misconduct, the minimum civil penalty is increased to $140,000 per day or up to $4,300 per barrel of oil.[63]

Persons who fail to remove or carry out a governmental order to remove the oil discharge may be subject to civil penalties of up to $37,500 per day of violation or an amount three times the cost incurred by the OSTLF.[64] Administrative penalties are also available but persons assessed such fines cannot also be liable for a civil penalty.[65]

Criminal penalties are also available. For discharges attributable to the negligent operation of a vessel or facility, the fine ranges from $12,500 to $25,000 and imprisonment of up to one year. The penalty for a release due to a knowing violation is a $5,000 to $50,000 fine and up to three years' imprisonment, while a fine of up to $250,000 and maximum imprisonment of

15 years may be imposed for persons who knowingly place another person in imminent danger of death or serious bodily injury. [66]

Application to Transactions-

In the wake of the Deepwater Horizon explosion, the Enbridge pipeline leak in Michigan and the abandoned well in Louisiana, owners and operators of oil-related facilities are likely to come under increased scrutiny. Thus, it will be important for purchasers of oil-related assets to carefully review potential OPA liability.

Many leases have been held by multiple lessees over the years which might have assignments with a variety of terms and conditions. Often times, the oil related facilities may have been abandoned in connection with a lease. Thus, during a due diligence review, it is important to assess potential historic liabilities that may be associated with abandoned oil production or processing facilities even though those assets are no longer reflected on their books. If a discharge takes place from an abandoned facility or vessel after the effective date of OPA, the owner immediately prior to abandonment could be liable. It is important to review current and historical practices for such structures during due diligence such as maintenance procedures and frequency of maintenance on the facility. [67] Because of enhanced enforcement and the new SPCC requirements, it is advisable that owners of regulated facilities and purchasers review compliance to determine if ASTs must be equipped with secondary containment systems. Even where not required, secondary containment systems may be a best management practice for ASTs because of their location, such as near floor drains, to minimize the possibility that oil could be discharged into the environment.[68]

OPA provides virtually no guidance on what constitutes ownership so courts often defer to state law to determine the owner. Likewise, because OPA does not define "abandonment" liability may hinge on how state law interprets ownership of abandoned oil-related equipment under mineral leases. In some cases, the abandoned equipment may be considered personal property of the lessee but in other instances may be treated as part of the real property. [69]

Parent corporations may also be held liable or their subsidiaries cleanup costs. However, ever since the United States Supreme Court decided *U.S. v. Bestfoods* the ability to go have the parent corporations have been significantly limited..[70] In *Bestfoods* the Court held that a parent corporation may only be liable under CERCLA for the acts of its subsidiary if the corporate veil can be pierced or if the parent directly operated the facility where the discharge originated. The Court in *Bestfoods* did not rule whether state or federal common law would apply to the veil piercing analysis and many subsequent courts have applied state law. However, *Bestfoods* did suggest that a parent's relationship with its subsidiary must be "*eccentric under accepted norms of parental oversight of a subsidiary's facility*" to be liable for damages under CERCLA. [71]

To be liable as an "operator" under CERCLA, the Court decreed that a corporate parent "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations". [72] The Court said there may be three instances where a parent could be held liable as operator of its subsidiary's facility: (1) when the parent operates the facility in

the stead of its subsidiary or alongside the subsidiary in some sort of a joint venture; (2) when a dual officer or director departs so far from the norms of parental influence; and (3)when "an agent of the parent with no hat to wear but the parent's hat" manages or directs activities at the facility.[73] Because CERCLA's definition of "operator" for an onshore facility is virtually identical to OPA's definition of "operator" for an onshore facility, courts frequently apply the *Bestfoods* "operator" analysis in OPA cases involving onshore facilities. For example, in some instances, courts have imposed liability on parent corporations for violations of the CWA where the parent was deemed to be a mere alter ego.[74]

A general tenet of corporate law is that a purchaser of corporate assets is generally not liable for the seller's liabilities unless one of four exceptions apply: (1) the purchaser expressly or impliedly assumed the predecessor's liability, (2) there was a consolidation or merger of the seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations.[75] Because of the broad remedial purposes of environmental laws like CERCLA, there had been a trend of expanding the liability of asset purchasers under the “Substantial Continuity” test which focused on the continuation of the business rather than continuation of the corporate entity.[76] However, following *Bestfoods*, courts are returning to the traditional exceptions to liability for the asset purchasers.[77]

Following the passage of OPA, many tanker operators reorganized their corporate structures to shield parent companies from liability under OPA. A number of fleet owners divested themselves of their tankers and barges, and turned to chartering independently owned vessels to transport oil in US waters.

Because of the high profile oil spills that occurred this year, the prospect of new oil spill legislation, owners, investors and lenders to businesses involved in the petroleum industry should expect increased challenges to new petroleum-related projects under environmental laws like the National Environmental Policy Act and demands for increased regulation such as for the use of hydraulic fracturing to increase production from natural gas shales. Indeed, just recently CERES, a network of socially-conscious investors and environmental groups sent letters to 27 oil and gas companies asking each company to disclose information by Nov. 1 regarding its spill prevention and response plans for offshore operations worldwide. The letter asked for details on the following issues: Investments in spill prevention and response activity, including offshore drilling and spill response capability: Spill contingency plans for managing deepwater blowouts; lessons learned from the BP spill, including their position on possible new regulations and more robust enforcement on offshore drilling in the gulf and elsewhere; possible actions to improve their safety contractor selection and oversight practices; and governance systems for overseeing management of offshore oil and gas operations. CERES also sent a letter to 26 insurance companies that provide insurance for offshore drilling activity, asking if insurers are considering adjustments to their overall exposure to offshore oil and gas operations. This second letter was prompted by estimates developed by Swiss Re suggesting that the total insured losses associated with the Deepwater Horizon explosion and spill could exceed $3.5 billion—which would surpass the $2.2-2.5 billion/year in insurance premiums worldwide for oil and gas exploration

As a result, it is quite possible that the petroleum industry continue to restructuring in the coming years to be shield the parent companies from excessive liability. While such transaction

activity will be good news for business lawyers, it is important that the business lawyers also understand the environmental issues associated with the assets (or understand enough to know when to bring in environmental attorneys to help complete or structure the transaction) being exchanged are carefully examined to minimize environmental liability from historic and current operations. Finally, the business lawyer should not forget that despite the restructuring their may still be the traditional claims such as negligence, nuisance, trespass and strict liability for potential toxic tort and property damage claims.

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[1]. 33 U.S.C. 2701 et sq.

[2]. 33 U.S.C. 1321. Additional federal oil spill provisions are contained in the Trails Alaska Pipeline Authorization Act, 43 U.S.C. 1651 et seq.; Deepwater Ports Act of 1974, 33 U.S.C. 1517(c); and the Outer Continental Shelf Lands Act, 43 U.S.C. 1313(b).

[3] 42 U.S.C. 6972 and 6973, respectively.

[4]. At some facilities, there may be both marine-transportation and non-transportation-related facilities (e.g., storage tanks) In such circumstances, the Coast Guard jurisdiction extends from the vessel to the first valve inside the secondary containment structure around an above-ground storage tank. See 33 CFR 154.1020.

[5] A facility is any structure, group of structures, equipment, or device other than a vessel that may be used to produce, explore, drill, store, handle, transfer, process, or transport oil, including any motor vehicle, rolling stock, or pipeline used for such purposes. 33 U.S.C. 2701(9).

[6] US v Viking Resources, Inc. 607 F. Supp. 2d 808 (S.D. Tx. 2009)

[7] An offshore facility is any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel. 33 U.S.C. 1321(a)(11).

[8] On onshore is any facility located on, in, or under any land and includes motor vehicles and rolling stock. 33 U.S.C. 1321(a)(10).

[9]. 33 U.S.C. 2701(32)(A).

[10] See H.R. 1465. 101st Cong. § 1002(a)(2); 135 Cong. Rec. H8, 151-52 (daily ed. Nov. Nov. 8, 1989)

[11] 33 U.S.C. 2701(32)(C).

[12] 33 U.S.C. 2701(32)(B) and (E), respectively.

[13]. 33 U.S.C. 2701(32)(F).

[14] 33 U.S.C. 2701(30)

[15]. 33 U.S.C. 2701(31).

[16] 33 U.S.C. 1344

[17] Re Needham, 354 F.3d 340, 345 (5th Cir. 2003); Rice v. Harken Exploration Co., 250 F.3d 264, 266 (5th Cir. 2001); US v. Chevron Pipeline Company, 437 F. Supp. 2d 605 (N.D. Tx 2006); Sun Pipeline Company v Conewago Contractors, 1994 U.S. Dist. LEXIS 14070 (M.D. Pa. 8/22/1994)

[18] US v. John Paul Jones, Jr., et al, 267 F. Supp. 2d 1349 (M.D. Ga. 2003)

[19]. 33 U.S.C. 2702(a).

[20]. 33 U.S.C. 2702(b).

[21]. 33 U.S.C. 2704(a)(l).

[22]. 33 U.S.C. 2704(a)(2).

[23]. 33 U.S.C. 2704(a)(3), (4).

[24]. 33 U.S.C. 2704(c).

[25]. 46 U.S.C. 183 et seq.

[26]. 33 U.S.C. 2718(c).

[27]. Id.

[28]. 33 U.S.C. 2718(a).

[29] 42 U.S.C. 2716(a)

[30] 33 U.S.C. 2716 (c). A COF includes any structure and all its components (including wells completed at the structure and the associated pipelines), equipment, pipeline, or device (other than a vessel or other than a pipeline or deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)) used for exploring for, drilling for, or producing oil or for transporting oil from such facilities. This definition includes a well drilled from a mobile offshore drilling unit (MODU) and the associated riser and well control equipment from the moment a drill

shaft or other device first touches the seabed for purposes of exploring for, drilling for, or producing oil, but it does not include the MODU itself. A pipeline can be a COF if it is used to transport oil from a facility engaged in oil exploration, drilling or production. Shore-based petroleum terminals, marinas

[31]. 33 U.S.C. 2703.

[32] See Apex Oil Company, Inc. v. US, 208 F. Supp. 2d 642 (E.D. La. 2002)(rejecting Act of God defense)

[33]. 33 U.S.C. 2703(a)(l)-(3).

[34]. 33 U.S.C. 2703(a)(3)(A)-(B).

[35]. Union Petroleum Corp. v. United States, 651 F.2d 734 (Ct. Cl. 1981).

[36] 311 F.Supp.2d 69 (D.D.C. 2004)

[37]. 33 U.S.C. 2703(c).

[38]. 33 U.S.C. 2703(b).

[39] Pub. L. 108-293 (amending 33 U.S.C. 2703(d)(4))

[40] 33 USC 2703(c)

[41] 33 USC 2703(d)(3)

[42] 33 USC 2703(d)(2)

[43] 73 FR 2146 (1/14/08)

[44] 33 USC 2701(26)

[45]. 33 U.S.C. 2709.

[46]. 33 U.S.C. 2717(f)(3).

[47]. 33 U.S.C. 2710.

[48]. 33 U.S.C. 1321(c).

[49]. 33 U.S.C. 2713.

[50]. 33 U.S.C. 2713(c).

[51] 33 USC 2705(a)

[52] 33 USC 2713(f)

[53]. 33 U.S.C. 2708(a).

[54]. 33 U.S.C. 2708(b).

[55]. 33 U.S.C. 2717(f).

[56]. 40 CFR 110.3

[57]. 40 CFR Part 112

[58]. 40 CFR Part 279, Subpart F (57 FR 41566 September 10, 1992).

[59] 40 CFR 112.2; 33 CFR 154.1020

[60] 40 CFR Part 112.20; 30 CFR Part 254

[61] 73 FR 75340 (12/11/08)

[62]. 33 U.S.C. 1321(b)(7)(A).

[63]. 33 U.S.C. 1321(b)(7)(D).

[64]. 33 U.S.C. 1321(b)(7)(B).

[65]. 33 U.S.C. 1321(b)(7)(F).

[66] 33 U.S.C. 1319(c)

[67] See US v Viking Resources, 607 F.Supp2d 808 (S.D. Tx. 2009)(abandoned “tank battery”)

[69] Compare US v Louisiana Land & Exploration Company, 2006 U.S. Dist. LEXIS 11453 (E.D. La. 2006) with Smith v. Mid-Valley Pipeline Co., 2007 U.S. Dist. LEXIS 33179 (E.D. Ky. 2007)

[70] 524 U.S. 51 (1998)

[71] Id at 71-72

[72] Id. at 66-67

[73] Id at 71

[74] United States v. Ira S. Bushey & Sons Inc., 363 F. Supp. 110 (D. Vt. 1973), aff’d mem., 487 F.2d 1393 (2d Cir. 1973

[75] New York v. Nat'l Serv. Indus., 460 F.3d 201 (2nd Cir. 2006)

[76] B.F. Goodrich v. Betkoski, 99 F.3d 505 (2nd Cir. 1996). Factors courts have looked at in determining if there was substantial continuity between the former corporation and the asset purchaser include whether the "successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers.

[77] New York v. Nat'l Servs. Indus., 352 F.3d 682 (2nd Cir. 2003); Atchison, T. & S.F. Ry. v. Brown & Bryant, 159 F.3d 358 (9th Cir. 1997)