

# Oil spill legislation: It's not just for tankers and coastal facilities anymore

By Diane R. Smith, Esq. and Sean M. Sherlock, Esq.

**T**he major oil spills of the late 1980s spawned major legislation to address perceived shortcomings in this highly visible and publicly supported area of environmental protection. The result is a pervasive and stringent oil spill prevention, response and liability scheme which makes the Superfund program look tame by comparison. The oil spill laws are just now being fully implemented, and their effect on the regulated community will be substantial. Both coastal and inland businesses, in addition to owners and users of vessels, need to become familiar with these far reaching statutes.

## The laws: an overview

The federal statutory scheme sets forth spill reporting, contingency planning, financial responsibility and liability provisions. Relevant statutes include Section 311 of the Clean Water Act and the Oil Pollution Act of 1990 (OPA 90). California enacted a companion statute, the 1990 Oil Spill Prevention and Response Act (OSPR), which also establishes requirements for spill reporting, financial responsibility, contingency planning and liability.

The federal and California statutes are very different. While the California scheme is more stringent in some respects, facilities falling within the coverage of both federal and California laws must ensure full compliance with the provisions of each.

Both "vessels" and "facilities" are regulated. As to vessels, both statutes cover marine tankers and barges utilized for the carriage of oil as cargo. OPA 90 even extends to other types of vessels, since it includes within the definition of "vessel" any type of watercraft which stores oil on board - even for propulsion. This means that fishing vessels and other large watercraft are subject to some of the requirements of the statute.

The provisions relating to "facilities" are extremely important, as they sweep a surprisingly large number of probably unsuspecting businesses into the regulatory scheme. Three criteria determine whether a facility is covered: the facility's function, the type of materials it handles, and its potential for a spill which COULD reach a body of water or waterway.

Facilities which store, handle, transfer,

process, produce, transport, drill or explore for oil are covered — not just the expected offshore platforms and marine terminals. Covered facilities also include smaller onshore and offshore operations such as marine fuel docks, storage tanks, pipelines, loading facilities — even mobile facilities such as tanker trucks and rail cars.

The oil spill laws impose requirements only on facilities that handle or process "oil." "Oil" includes waste oil, fuel oil, lubricating oil, diesel, aviation fuel, gasoline, and even liquefied petroleum gas (LPG). The California law defines "oil" even more broadly, as "any kind of liquid hydrocarbons".

Many businesses not in the petroleum industry are likely to wrongly conclude that they are not subject to these laws. They may be covered, however, merely because they have a storage tank for lubricating oil, LPG, or other fuels. Even businesses that have degreasing or other solvent or chemical handling operations may be handling "oil" within the meaning of the oil spill laws, since these substances are typically liquid hydrocarbons.

But the most important criterion for inclusion within the scope of the oil spill laws is a facility's potential for a spill to water. Both offshore and onshore facilities are subject to the laws. Under OPA 90, onshore facilities are subject to contingency planning requirements if they are "capable of causing substantial harm to the environment by discharging oil into the navigable waters of the United States." "Navigable waters" include not only the ocean, but also inland waters such as lakes, rivers, and intermittent streams and creeks which may be dry for long periods. Environmental lawyers joke that "navigable waters" used to mean "will float a boat," but now means "might float a leaf, sometimes."

Onshore facilities are covered by the California statute if they are located where a discharge could impact "marine waters," which are waters subject to tidal influence. In addition to including facilities that adjoin tidal waters, it includes facilities which have the potential to spill oil into rivers, creeks, channels, ravines, or any other type of conduit by which the oil may be carried into tidal waters. This encompasses, for example, potential spills into drainages or even storm sewers where oil can reach harbors, bays, estuaries or the

ocean. This aspect of the California statute dramatically expands the reach of the California statutory scheme. Think about Orange County's stormwater culverts!

## Liabile parties and potential damages

Severe penalties may be imposed on "responsible parties", which include owners, operators, and lessees of covered vessels and facilities. Even persons who only own oil which is handled or transported by others are liable under California law. It is therefore critical for such owners to evaluate the compliance and preparedness of facilities handling their products.

Potential liability under the laws is pervasive, in fact, possibly more extensive than under any other environmental regulatory program. Liability includes not only the "Superfund" type "removal costs" and "natural resources damages", but also many forms of losses which are not included as recoverable under other environmental statutes, such as damage to real or personal property, loss of subsistence use of natural resources, loss of government revenues caused by the spill, loss of profits and earning capacity, and expense for public services. In California, there is an additional element of liability: loss of use and enjoyment of natural resources, public beaches, and other public resources and facilities. Private parties have a right to sue responsible parties - and legal fees are recoverable under the California statute. Local governments may find these laws very useful in obtaining funds to clean up beaches and protect marine and surface water resources and public recreation areas.

Covered facilities must provide evidence that they have the financial resources to clean up spills and pay damages. California financial responsibility requirements are already effective and apply to all "marine facilities." Methods of demonstrating financial responsibility include insurance, self-insurance, surety bonds, letters of credit, third party (usually parent company) guaranties, or combinations of methods approved by Fish and Game.

Penalties for failing to maintain adequate financial responsibility under OSPRA are enormous - up to \$250,000/day. In addition, injunctive relief may be obtained and operations shut down. It is time, as they say, to fish or cut bait.

Both state and federal laws require facility operators to prepare and implement contingency plans.

A contingency plan is a detailed analysis of the facility, including an evaluation of personnel and equipment available to respond to a "worst case" spill under adverse weather conditions, reporting procedures, preventative and mitigation measures to minimize spill impacts, cleanup plans, training, equipment testing and maintenance, plan review and updates, and various other elements.

In California, the Department of Fish and Game Office of Oil Spill Planning and Response (OSPR) has proposed regulations for contingency plans which are even more extensive and stringent than the OPA 90 contingency plans. Final regulations are imminent. Considering the substantial effort necessary to develop a contingency plan, it is critical that affected facilities start preparation now. California plans will be due 90 days from the date the rule is issued. Penalties for failure to prepare an adequate contingency plan under California law are staggering — up to \$250,000/day and a year in prison. In addition, injunctive relief may be sought to shut down operations.

## The bottom line

The new oil spill laws establish a chilling liability scheme, as well as imposing detailed spill reporting, financial responsibility and contingency planning requirements. These requirements are applicable not only to large petroleum operations, but also to unsuspecting businesses, and even mobile sources that store or handle petroleum fuels or other oil. The oil spill laws are evolving, and they present a tremendous threat to the uninformed or unwary, as well as a real opportunity to avoid damage to our most precious and vulnerable resources. Business and industry can avoid massive liability and cost by smart and thorough planning.

Any business that stores, owns, or handles oil should fully evaluate these laws to determine if/how they apply, and assure that all applicable requirements are met. There is likely to be absolutely no regulatory or public sympathy for unpreparedness where California's coasts or water systems are damaged by poor preparation and non-compliance. Those who seek to recover damages resulting from the effects of a spill will have all the tools they need under these powerful new statutes.