Oil Spill Liability and Regulatory Regime

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AUSTRALIA

OIL SPILL LIABILITY AND REGULATORY REGIME

Executive Summary

Australian law does not place any caps on the liability of operators of offshore petroleum facilities in terms of the clean-up and remedial costs resulting from oil spills. Civil penalties, criminal offenses, and actions in tort may also be applicable. Oil companies are required to have adequate insurance coverage for the expenses and liabilities that may arise from oil spills. A National Plan sets out the responsibilities of different entities in responding to an oil spill, with the oil company having primary operational responsibility and assistance being made available from a range of sources.

I. Introduction

Australia has enacted a number of changes relating to the regulation of offshore petroleum activities in recent years. In particular, the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)[1] (OPGGS Act) is now the primary legislation that sets out the lease, license, and permit requirements relating to petroleum exploration and recovery in offshore areas. Regulations authorized by the OPGGS Act govern specific aspects such as environmental[2] and safety[3] matters. Each of the six states and the Northern Territory (NT) also have legislation governing petroleum activities in coastal areas and relevant state/NT agencies play a central role in administering the regulatory regime.

In terms of the arrangements for responding to oil spills in the marine environment, the National Plan to Combat Pollution of the Sea by Oil and Other Noxious

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[1] *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/C6672EC2444B2894CA2576F6000032F4?OpenDocument&mostrecent=1.

[2] *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009*, *available at* http://www.comlaw.gov.au/ComLaw/legislation/legislativeinstrumentcompilation1.nsf/current/bytitle/155E3908BB3F2E7BCA257690001104CA?OpenDocument&mostrecent=1.

[3] *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009*, *available at* http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/current/bytitle/B07E4BE0CFA4D33CCA25773B00269ED9?OpenDocument&mostrecent=1.

and Hazardous Substances[4] (the National Plan) sits alongside the regulatory regime[5] and sets out information about the roles and responsibilities of a number of different entities.[6] The National Plan also maintains a number of contingency plans at the national and state/NT level,[7] and institutes a comprehensive training program.[8] It is described as "a national integrated Government and industry framework enabling effective response to marine pollution incidents."[9]

The National Plan arrangements, as well as other regulatory instruments and structures that deal with compensation and funding arrangements, are primarily focused on spills emanating from ships, although there are some specific references to offshore facilities in terms of response arrangements. The need for more detailed guidelines and requirements relating to spills from offshore facilities is likely to be the subject of further consideration by the government.

This report utilizes information prepared by Australian government agencies in the context of inquiry processes that were established to examine the circumstances of, and response to, the major spill incident that occurred following a blowout at the Montara wellhead platform in August 2009.[10] In particular, a Commission of Inquiry on the

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[4] Australian Maritime Safety Authority (AMSA), The National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances (Updated 2007) (National Plan), *available at* http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Nationalplan_2007_Overview.pdf. *See also*, AMSA, The National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances (website), http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/ (last visited June 17, 2010). The National Plan was first established in 1973. Summary information about the National Plan is set out in a factsheet that is *available at* http://www.amsa.gov.au/Publications/Fact_sheets/National_Plan_Fact_Sheet.pdf. An additional factsheet explains how Australia responds to oil and chemical spills in the marine environment and is *available at* http://www.amsa.gov.au/Publications/Fact_sheets/How_Australia_Responds_to_Oil_and_Chemical_spills.pdf.

[5] *See* Submission by the Australian Maritime Safety Authority – Commission of Inquiry into the Uncontrolled Release of Oil and Gas from the Montara Wellhead Platform in the Timor Sea (AMSA Montara Submission) 2, *available at* http://www.montarainquiry.gov.au/downloads/SUBM.3001.0001.0001.pdf, stating that "the National Plan framework and operation is not prescribed in legislation."

[6] National Plan, *supra* note 4, at 4. *See also* Inter-Governmental Agreement on the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances (May 2002) (Inter-Governmental Agreement), *available at* http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Inter_Governmental_Agreement.asp.

[7] *See* AMSA, The National Plan Contingency Plans and Management, http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Contingency_Plans_and_Management/index.asp (last visited June 17, 2010).

[8] *See* AMSA, National Plan Training Program July 2009 – June 2010, http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Training_Program/index06.asp (last visited June 17, 2010).

[9] National Plan, *supra* note 4.

[10] *See* AMSA, Major Oil Spill – Montara Well Head Platform, http://www.amsa.gov.au/Marine_Environment_Protection/Major_Oil_Spills_in_Australia/Montara_Wellhead/index.asp (last visited June 17, 2010).

incident was due to make its final report by June 18, 2010.[11] Changes to the regulatory regime for offshore petroleum activities may be made in response to the Commission's recommendations.

II. Oil Spill Liability

A. General

The general approach to oil spill liability in Australia reflects the application of the "polluter pays" principle.[12] However, while detailed funding, compensation and cost recovery arrangements apply in the event of ship-sourced oil spills occurring in Australian waters,[13] the situation with respect to spills from offshore petroleum facilities or installations is less clear. Unlike ships, companies that conduct offshore activities in Australia are not currently required to pay the Protection of the Sea Levy[14] or contribute to funds established under relevant International Maritime Organization conventions that have been adopted by Australia.[15]

There are therefore no statutory limits or caps on the liability of oil companies for costs associated with cleaning up and remediating the effects of an oil spill from an offshore facility.

There are some civil and criminal liability provisions in the Commonwealth legislation, and additional offenses and penalties may apply at the state/NT level. For example, the OPGGS contains provisions stating that a holder of a petroleum permit or production license commits an offense if they engage in conduct that breaches the requirement to "control the flow, and prevent the waste or escape, in the permit area, lease area or licence area, of petroleum or water."[16] However, these provisions appear to

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[11] Montara Commission of Inquiry, http://www.montarainquiry.gov.au/ (last visited June 17, 2010).

[12] *See* AMSA, Protecting Our Seas (Revised 2010), *available at* http://www.amsa.gov.au/Publications/Marine_Environment_Protection/POS.pdf.

[13] The relevant statutes include the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (Cth), *Protection of the Sea (Civil Liability) Act 1981* (Cth), *Protection of the Sea (Oil Pollution Compensation Funds) Act 1993* (Cth), *Protection of the Sea (Civil Liability for Bunker Oil Pollution Damage) Act 2008* (Cth), *Protection of the Sea (Shipping Levy) Act 1981* (Cth). These statutes are *available at* http://www.comlaw.gov.au/ComLaw/legislation/actcompilation1.nsf/browseview?openform&VIEW=current&ORDER=bytitle&CATEGORY=actcompilation-Pr. *See also* Australian Maritime Safety Authority, Oil Spills from Ships – Who Pays? (January 2010), *available at* http://www.amsa.gov.au/Publications/Fact_sheets/Oil_Spills_From_Ships_Fact_Sheet.pdf.

[14] This levy is payable under the *Protection of the Sea (Shipping Levy) Act 1981* (Cth) s 5 and funds the operation of the National Plan.

[15] In particular, Australia has given statutory effect to the International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage and the International Convention on Civil Liability for Oil Pollution Damage. *See* Protecting Our Seas, *supra* note 12, at 2.

[16] *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 569.

be aimed at minor events, with the penalty set at AU$11,000(approximately US$9,564.14).

In addition, a strict liability offense applies for failing to comply with an approved environment plan under the relevant regulations.[17] It is also an offense to fail to comply with a safety case.[18] Again, these offenses appear to be aimed at smaller scale events, with penalties set at AU$8,800 (US$7,653.25).

There may be liability to third parties for economic loss under general tort law.[19] In the context of personal injury claims, different states have different compensation legislation that may apply, including provisions that limit the amount of damages that can be awarded.[20]

B. Insurance Requirements

The OPGGS Act requires the holder of a permit, lease or license related to an offshore petroleum facility to maintain adequate insurance against expenses and liabilities that may arise in connection with the activity, including "insurance against expenses of complying with directions relating to the clean‑up or other remediation of the effects of the escape of petroleum."[21] The Australian Maritime Safety Authority (AMSA) states that, in general:

> insurance amounts of between $100 and $300 million (US) dollars are considered to be standard practice in the offshore petroleum industry (not including third party claims). The amount of coverage for specific activities is set by the operator in consultation with the insurer and its underwriter, and is based on an expert assessment of all potential liabilities.[22]

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[17] *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) reg 7.

[18] *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (Cth) reg 2.45.

[19] *See Caltex Oil (Australia) v. Dredge "Willemstad"* [1976] HCA 65, *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1976/65.html. In this case damages for pure economic loss were found to be available if a duty of care exists. The case related to an oil pipeline being damaged by a dredge as a result of negligent navigating on the part of the Willemstad, resulting in closure of the pipeline and the need to use more expensive means for transporting the petroleum products during the repair work.

[20] There has been considerable emphasis on tort reform in Australia in the last decade, particularly in relation to personal injury, including a review of the law of negligence in 2002. *See* The Treasury, Review of the Law of Negligence, http://revofneg.treasury.gov.au/content/home.asp (last visited June 18, 2010). An overview of various reforms, including the caps on damages in the different states and territories, is provided in a report published by a major law firm: MINTER ELLISON, TORT REFORM THROUGHOUT AUSTRALIA (7th ed, Oct. 2007), *available at* http://www.minterellison.com/public/resources/file/ebd8820c7e809c5/RG-TortLawReform_0710.pdf.

[21] *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 571.

[22] AMSA, Response to the Montara Wellhead Platform Incident – Report of the Incident Analysis Team (March 2010) (AMSA Montara Report) 15, *available at* http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Incident_and_Exercise_Reports/documents/Montara_IAT_Report.pdf.

The relevant government authority may challenge the insurance amounts if it considers them to be too low.[23]

In addition, approvals granted under the Environmental Protection and Biodiversity Conservation Act (Cth) (EPBC Act) for offshore petroleum facilities "typically include a requirement for the OSCP [Oil Spill contingency Plan] to detail the insurance arrangements that have been made in respect of the costs associated with repairing any environmental damage. Draft OSCPs with inadequate insurance arrangements would not be approved by the Minister or their delegate."[24]

C. Oil Spill Response Costs

Under the "polluter pays" principle reflected in the National Plan arrangements, operators of offshore facilities are expected to meet the full costs associated with responding to an oil spill, including any ongoing remediation work.[25] To assist with meeting this expectation, the oil industry has established the Australian Marine Oil Spill Centre (AMOSC), which collects levies from participating companies and other subscriber companies in order to maintain a central stockpile of oil spill response equipment and to provide access expert assistance in the event of a spill.[26] AMOSC's activities are integrated into the National Plan.

The government may seek to recover any costs that it incurs from the polluter. As noted above, in the case of oil spills from ships, there are legislative provisions and arrangements associated with the cost recovery and compensation that allow the government to recover its costs if the ship cannot pay in full or cannot be identified.[27] However, "the recovery of costs in relation to an oil spill from a platform is less clear."[28] Specific arrangements appear to be needed on a case by case basis. For example, in the case of the Montara incident, AMSA sought and received written confirmation from the oil company that it would be responsible for all costs in relation to the response, including by providing a fund to support ongoing response operations.[29]

If a company failed to pay all costs associated with a spill, this would "significantly affect a company's ability to gain further petroleum titles in Australia's offshore areas or remove its access to its primary asset, the petroleum resource."[30]

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[23] *Id.*

[24] *Id.*

[25] *See* National Plan, *supra* note 4, at 8.

[26] *See* Australian Marine Oil Spill Centre, About AMOSC, http://www.aip.com.au/amosc/about/index.htm (last visited June 14, 2010).

[27] Oil Spills from Ships – Who Pays?, *supra* note 13.

[28] AMSA Montara Submission, *supra* note 5, at 22.

[29] *Id.*

[30] AMSA Montara Report, *supra* note 22, at 15.

The issue of the National Plan not receiving any funding from the offshore oil industry will be considered in a review of the National Plan to be conducted this year.[31] In its recent report on the response to the Montara incident, AMSA also stated that:

> While the National Plan stakeholders are aware of the comprehensive insurance and compensation arrangements in place with regard to oil spills from ships, there is a general lack of awareness with regard to cost recovery following incidents involving the offshore petroleum exploration and production industry. To enhance clarity for all stakeholders a review should be undertaken regarding industry arrangements and outcomes widely circulated.[32]

D. Actions under Environmental Legislation

As discussed below, assessments and approvals are required under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)[33] (EPBC Act) in most circumstances involving offshore petroleum activities, with conditions likely to be attached to those approvals. The EPBC Act imposes civil penalties of up to AU$1.1 million (US$871,238.96) for corporations that violate any conditions.[34] It is also a criminal offense for a person to recklessly violate a condition, where this results in a significant impact on a protected environmental matter (which includes the Commonwealth marine environment).[35] A corporation is subject to a fine of AU$66,000 (US$57,498.39) under this provision.

A Notice of Exemption has been issued under the EPBC Act by the relevant Minister, with the effect that any response actions taken in accordance with the National Plan are exempt from the application of the EPBC Act. Any response action contrary to the National Plan would therefore be subject to the EPBC Act.[36]

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[31] AMSA Montara Submission, *supra* note 5, at 22.

[32] AMSA Montara Report, *supra* note 22, at x.

[33] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/CF1BFB521C9ABD19CA25774400247593?OpenDocument&mostrecent=1.

[34] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 142.

[35] *Id.* s 142A.

[36] National Marine Oil Spill Contingency Plan (January 2010), 32, *available at* http://www.amsa.gov.au/Marine_Environment_Protection/National_plan/Contingency_Plans_and_Management/Oil_Spill_Contingency_Plan.asp.

III. Offshore Petroleum Regulatory Regime

A. General

Offshore petroleum activities are subject to regulation at both the Commonwealth and state/NT levels. The OPGGS Act reflects an intergovernmental agreement that provides for the states/NT to have jurisdiction over the first three miles of the territorial sea (referred to in the legislation as "coastal waters"), and the Commonwealth government to have jurisdiction over the waters beyond that point (referred to as "offshore areas").[37] The OPGGS Act establishes that the administration of the legislation is divided between a "Joint Authority" (constituted by the responsible Minister in each state/NT and the responsible Commonwealth Minister) and the "Designated Authority" (which is the responsible state/NT Minister).[38] Legislation that essentially mirrors the OPGGS Act has been enacted in each state/NT.

The day to day administration of the legislation is conducted on the Commonwealth's behalf by a particular state/NT agency with delegated responsibility for regulating offshore petroleum activities.[39] In addition to these resource agencies, and others that may have responsibility for environmental and safety matters at the state/NT level, the key Commonwealth government agencies involved in the administration of the OPGGS Act and other relevant statutes are:

- The Department of Resources, Energy and Tourism is the central agency responsible for administering all offshore petroleum legislation that falls within the portfolio of Commonwealth Minister of Resources and Energy, including the OPGGS Act.[40] The Department provides advice to the government on this legislation and, in cooperation with the states and territories, regulates offshore petroleum activities.[41]

- The Australian Taxation Office administers legislation relating to the Petroleum Resource Rent Tax.[42]

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[37] *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (*Cth) s 5.

[38] *Id.* ss 4, 56, 70.

[39] *See* Department of Resources, Energy and Tourism, Offshore Petroleum Exploration Acreage Release, Joint Authority/Designated Authority (2010), *available at* http://www.ret.gov.au/Documents/par/fact/documents/Joint%20Authority.pdf.

[40] Department of Resources, Energy and Tourism, Submission to the Montara Commission of Inquiry 2, *available at* http://www.montarainquiry.gov.au/downloads/SUBM.3005.0001.0001.pdf.

[41] Department of Resources, Energy and Tourism, Upstream Petroleum, http://www.ret.gov.au/RESOURCES/UPSTREAM_PETROLEUM/Pages/UpstreamPetroleum.aspx (last visited June 17, 2010).

[42] *Petroleum Resource Rent Tax Assessment Act 1987* (Cth) s 15, *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/E80F2BC72F42B958CA257653007D0167?OpenDocument&mostrecent=1. *See also* Australian Taxation Office, Petroleum Resource Rent Tax, http://www.ato.gov.au/businesses/pathway.asp?pc=001/003/117 (last visited June 17, 2010).

- The National Offshore Petroleum Safety Authority (NOPSA) is responsible for the administration of occupational health and safety provisions in the IPGGS Act and the associated safety regulations.[43]

- The Department for the Environment, Water, Heritage and the Arts (DEWHA) administers the EPBC Act, which sets out the Environmental Impact Assessment regime that is applicable to offshore petroleum activities.[44]

- The Australian Maritime Safety Authority (AMSA) has statutory authority for marine pollution matters under the Australian Maritime Safety Authority Act 1990[45] and is the managing agency of the National Plan.[46]

Broadly, the legislation reflects a performance-based system, with oil companies required to prepare various planning documents detailing particular safeguards, which are then submitted for approval by the relevant government agencies. The agencies then conduct inspections and audits to verify that the commitments made in these plans and any additional conditions are being complied with.

The approvals needed in order for an oil company to be granted the necessary licenses and permits to conduct offshore activities include:

- *Well operations management plan*
  The Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004 (Cth) require that a well operation management plan (WOMP) be submitted to the Designated Authority for approval.[47] The WOMP must explain the design of the well and possible production activities, and show that well activities "will be carried out in accordance with good oil-field practice."[48]

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[43] *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s 4 & pt 6.9. *See also* http://www.nopsa.gov.au/.

[44] *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth). *See also* Department of the Environment, Water, Heritage and the Arts, Submission to the Commission of Inquiry Established to Report on the Uncontrolled Release of Hydrocarbons from the Montara Well Head Platform and Subsequent Events (DEWHA Montara Submission), *available at* http://www.montarainquiry.gov.au/downloads/DEWHA/SUBM.3002.0001.0002.pdf.

[45] *Australian Maritime Safety Authority Act 1990* (Cth), s 6(1)(a), *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/20F203B50467F763CA2575DD00235652?OpenDocument&mostrecent=1.

[46] *See* Inter-Governmental Agreement, *supra* note 6, Recital C.

[47] *Petroleum (Submerged Lands) (Management of Well Operations) Regulations 2004* (Cth) reg 5, *available at* http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/C1781DB1F08281F8CA256F70008111D0?OpenDocument.

[48] *Id.* reg 6(2)(b).

- *Pipeline management plan*
  The Petroleum (Submerged Lands) (Pipelines) Regulations 2001 (Cth) requires that a pipeline management plan be approved by the Designated Authority in order for a pipeline to be constructed or operated.[49] The regulations set out what must be included in the pipeline management plan, including design descriptions and safe operating limits.[50]

- *Safety case*
  The Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009 (Cth) require that a safety case be prepared and accepted by NOPSA before an operator can undertake activities at a facility.[51] This must include a detailed description of a comprehensive safety management system.[52]

- *Environment plan*
  The Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth) requires that an environment plan be approved by the Designated Authority before an operator carries out an activity in a permit or license area.[53] The environment plan establishes the legally binding environmental management conditions that an operator of an offshore petroleum activity must meet.[54] The plan must include the matters set out in the regulations, including an Oil Spill Contingency Plan.[55]

- *Environmental Impact Assessment*
  The EPBC Act provides that a person proposing to take an action, or a government body aware of a proposal, may refer the proposal to DEWHA for environmental impact assessment. Approval of a proposal is required if it is a "controlled action."[56] This essentially means that any offshore petroleum activity that has, or will have, the potential to have a significant impact on the Commonwealth marine environment must be referred to DEWHA for

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[49] *Petroleum (Submerged Lands) (Pipelines) Regulations 2001* (Cth) regs 11 & 17, *available at* http://www.comlaw.gov.au/ComLaw/legislation/legislativeinstrumentcompilation1.nsf/current/bytitle/B53C9CD16FFB96B2CA257694002EBDBA?OpenDocument&mostrecent=1

[50] *Id.* div 3.2.

[51] *Offshore Petroleum and Greenhouse Gas Storage (Safety) Regulations 2009* (Cth) reg 2.44

[52] *Id.* reg 2.5(3).

[53] *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) reg 6.

[54] *Id.* reg 7.

[55] *Id.* div 2.3.

[56] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 66. For a description of the environmental assessment and approval framework, *see* DEWHA Montara Submission, *supra* note 44, at 4-7.

assessment. DEWHA typically requires approval of an Oil Spill Contingency Plan.[57] Specific conditions are likely to be attached to any approval.[58]

B. Distinctions Between Deep and Shallow Water

The OPGGS Act and associated regulations do not distinguish between offshore petroleum activities in deep and shallow water. There is, however, some discussion about the possible need to move towards greater regulation in relation to deeper waters.[59] It is worth noting that a number of areas open for exploration in the 2010 Offshore Petroleum Exploration Release are areas of large depths.[60]

The current regulatory regime may allow for any additional or particular risks associated with offshore petroleum activities in deep water to be taken into account as part of the planning requirements and approvals process.

C. Division of Responsibilities in Responding to Oil Spills

The division of responsibility for combating oil spills is defined in an intergovernmental agreement (IGA) within the auspices of the National Plan arrangements.[61]

The IGA provides for two lead agencies in the event of an oil spill – one with responsibility for overseeing the response action ("Statutory Agency") and one with operational responsibility to undertake preventive and cleanup action ("Combat Agency"). For spills from offshore petroleum operations, the Statutory Agency is the relevant state/NT agency (i.e. the Designated Authority),[62] and the Combat Agency is the relevant oil company, with assistance from the Statutory Agency as required.[63]

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[57] AMSA Montara Report, *supra* note 22, at 18.

[58] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 134.

[59] *See* Paul Cleary, *Double Disasters Rouse the Regulators and May Still the Drills in Risky Deep-Sea Oil Probes*, THE AUSTRALIAN, May 22, 2010, *available at* http://www.theaustralian.com.au/news/opinion/double-disasters-rouse-the-regulators-and-may-still-the-drills-in-risky-deep-sea-oil-probes/story-e6frg6zo-1225869545938.

[60] *See* Department of Resources, Energy and Tourism, Offshore Petroleum Exploration Acreage Release 2010 – Release Areas and Geology, http://www.ret.gov.au/Documents/par/geology/index.html (last visited June 17, 2010).

[61] Inter-Governmental Agreement, *supra* note 6. *See also* National Plan, *supra* note 4, at 4.

[62] *Id.* sch 1, cl. 5.

[63] *Id.* sch 1, cl. 6(vii). Note that other National Plan documents state that the Combat Agency is "the relevant company with assistance from the Statutory Agency and other National Plan stakeholders as required," National Oil Spill Contingency Plan, *supra* note 36, at 14, and "the relevant oil company, with assistance, as required, from the National Plan State Committee or AMSA, depending on the area of jurisdiction." The National Plan, *supra* note 4, at 5.

A special Protocol provides for the Combat Agency role in relation to spill events from offshore petroleum operations to be transferred in two circumstances:

- The Combat Agency may request another agency act on its behalf; or
- The incident has exceeded or is likely to exceed the capacity of the Combat Agency to respond effectively or the response is not being conducted effectively, the Statutory Agency may assume control of the response.[64]

For example, in the Montara incident, the oil company recognized that the response was beyond its capacity and quickly passed Combat Agency responsibility to AMSA.[65]

In the event of a spill, the Statutory Agency establishes a local response organization with representatives from relevant agencies and stakeholders. A Marine Pollution Controller with overall responsibility for ensuring that a response is managed and coordinated appropriately is appointed.[66] In addition to other relevant state/NT agencies and AMOSC, specialist advice and assistance may be made available by agencies such as AMSA, Emergency Management Australia, and DEWHA. A National Response Team, consisting of sixty-three people (nine people from the relevant agencies of each state/NT) covering all key oil spill response roles, can also assist. International assistance may also be sought. [67]

The IGA provides that the Statutory Agency is responsible for instituting any legal proceedings and for the recovery of clean up costs on behalf of all participating agencies.[68]

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[64] The Protocol is attached to the National Marine Oil Spill Contingency Plan, *supra* note 36, at 59.

[65] AMSA Montara Submission, *supra* note 5, at 8.

[66] Inter-Governmental Agreement, *supra* note 6, sch 1, cl. 13-14.

[67] National Marine Oil Spill Contingency Plan, *supra* note 36, at 22-24.

[68] Inter-Governmental Agreement, *supra* note 6, sch 1, cl. 10.

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BRAZIL

OIL SPILL LIABILITY AND REGULATORY REGIME

Executive Summary

Constitutional principles grant to everyone the right to an ecologically balanced environment and the duty to defend and preserve it. The government is charged with the responsibility of controlling the activities that may pose a risk to life and the environment. Damages to the environment are punishable both administratively and criminally, without prejudice to the duty to repair the harm caused.

Law No. 9,966 of April 28, 2000, governs the prevention, control, and monitoring of pollution caused by the spill of oil and other harmful or dangerous substances on waters under national jurisdiction and determines the essential rules to handle oil and other harmful or dangerous substances.

Petroleum, natural gas, and the biofuel industry are regulated by the Petroleum National Agency (ANP – Agência Nacional do Petróleo, Gás Natural e Biocombustíveis), a federal agency subordinated to the Ministry of Mines and Energy. Additionally, several other agencies are involved in the process of environmental control and licensing related activities.

I. Introduction

This report provides the constitutional principles that grant to the Brazilian people a right to an ecologically balanced environment, establish the government's duty to supervise the activities that may cause damage to the environment, and dictate that violators must be punished. The report lists the numerous laws and regulations that govern damages to the environment, oil spills, breach of concession contracts, and operational safety rules for the drilling and production of oil and natural gas and describes the roles of the agencies involved with such activities.

II. Oil Spill Liability

A. Constitutional Principle

The Brazilian Constitution of 1988 declares that everyone has the right to an ecologically balanced environment, which is a public good for the people's use and is essential for a healthy

life.[1] It further determines that the government and the community have a duty to defend and preserve the environment for present and future generations.[2]

To this end, it is the responsibility of the government to, among other things, require a prior environmental impact study as provided by law, which must be made public, for the installation of works or activities that may cause significant degradation of the environment;[3] and to control the production, commercialization, and employment of techniques, methods, and substances that carry a risk to life, the quality of life, and the environment.[4]

Behaviors and activities considered harmful to the environment must subject violators, individuals or legal entities, to criminal and administrative sanctions, irrespective of the obligation to repair the damages caused.[5]

B. Environmental Protection

Without prejudice to the penalties established by federal, state and municipal laws, failure to comply with measures necessary to preserve or correct inconveniences and damages caused by the degradation of environmental quality subjects violators[6] to fines;[7] loss or restriction of tax incentives and benefits;[8] loss or suspension of official financing,[9] or suspension of the violator's activities.[10]

As for civil liability, independently of being found guilty and without prejudice to the application of the penalties provided for in Article 14 of Law No. 6,938 of August 31, 1981, a violator is obligated to compensate or repair the damage to the environment and third parties affected by his activities.[11] Article 14 does not provide any limitation on compensation.

The violator who exposes to danger human, animal, or plant safety, or makes more serious an existing hazardous situation, may be subject to one to three years in prison and a fine.[12] The punishment is doubled if, as a result of the violation, irreversible damage to the

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[1] CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL DE 1988 [C.F.] art. 225, *available at* the website of the Brazilian Presidency, http://www.planalto.gov.br/ccivil_03/Constitu icao/Constituiçao.htm.

[2] *Id.*

[3] *Id.* art. 225(§1)(IV).

[4] *Id.* art. 225(§1)(V).

[5] *Id.* art. 225(§3).

[6] Lei No. 6.938, de 31 de Agosto de 1981, art. 14, https://www.planalto.gov.br/ccivil_03/leis/L6938 compilada.htm.

[7] *Id.* art. 14(I).

[8] *Id.* at (II).

[9] *Id.* at (III).

[10] *Id.* at (IV).

[11] *Id.* art. 14(§1).

[12] *Id.* art. 15.

fauna, flora, or the environment[13] or serious bodily injury[14] is caused. The same criminal liability is incurred by the competent authority who does not enforce the measures to prevent the commission of the conduct described in Article 15 of Law No. 6,938.[15]

On July 22, 2008, Decree No. 6,514[16] was enacted establishing the conduct that is considered an infraction against the environment and the pertinent administrative sanctions imposed for such conduct.[17] Article 61 of Decree No. 6,514 punishes with a fine whoever causes pollution of any kind at such levels that results or may result in harm to human health or causes the death of animals or significant destruction of biodiversity.

C. Criminal Liability

On February 12, 1998, the government issued Law No. 9,605 defining the crimes against the environment; the punishment for such crimes, which can be in the form of incarceration for a certain period of time and the payment of a fine, or the payment of a fine only; and the necessary procedures to be followed for the application of the law.[18]

To cause pollution of any kind at such levels that results or may result in harm to human health, or cause the death of animals or significant destruction of flora is punished with one to four years in prison and a fine.[19]

A violator may be punished with one to five years in prison if the crime makes an area, urban or rural, unfit for human occupation;[20] causes air pollution, which results in the removal, even briefly, of the inhabitants of the affected areas, or which causes direct harm to public health;[21] causes water pollution that makes it necessary to interrupt the public water supply of a community;[22] obstructs or impedes the public use of beaches;[23] or occurs due to the release of solid, liquid, or gaseous residues or debris, oil, or oily substances, in violation of the requirements established in laws or regulations.[24]

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[13] *Id.* art. 15(§1)(I)(a).

[14] *Id.* art. 15(§1)(I)(b).

[15] *Id.* art. 15(§2).

[16] Decreto No. 6.514, de 22 de Julho de 2008, *available at* the website of the Brazilian Presidency, http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2008/Decreto/D6514.htm#art153.

[17] Decree No. 6.514 revoked Decree No. 3.179 of September 21, 1999, which specified the administrative sanctions applicable to conduct considered to be an infraction to the environment.

[18] Lei No. 9.605, de 12 de Fevereiro de 1998, *available at* the website of the Brazilian Presidency, http://www.planalto.gov.br/ccivil_03/Leis/L9605.htm.

[19] *Id.* art. 54.

[20] *Id.* art. 54(§2)(I).

[21] *Id.* at (II).

[22] *Id.* at (III).

[23] *Id.* at (IV).

[24] *Id.* at (V).

The same punishment established in Article 54(§2) of Law No. 9,605 of February 12, 1998, applies to whoever fails to adopt, when so required by the competent authority, precautions against any risk of serious or irreversible environmental damage.[25]

In cases involving crimes against the environment, several provisions of the Brazilian Penal Code,[26] as well as the procedures determined by the Code of Criminal Procedure,[27] are also applicable.

D. Prevention, Control, and Inspection

Law No. 9,966 of April 28, 2000, provides for the prevention, control and monitoring of pollution caused by the release of oil and other harmful or dangerous substances in waters under national jurisdiction.[28] In addition, Law No. 9,966 establishes the basic principles to be followed when handling oil and other harmful or dangerous substances at organized ports, port facilities, platforms and vessels in waters under Brazilian jurisdiction.[29] Law No. 9,966 defines, inter alia, that the maritime authority is exercised directly by the Navy Commander, who is responsible for the protection of human life and the safety of navigation on open sea and inland waterways as well as the prevention of environmental pollution caused by ships, platforms and their supporting facilities.[30]

Article 5 of Law No. 9,966 determines that every organized port, port facility and platform, as well as their supporting facilities, must have facilities or adequate means for the receipt and processing of various types of residue and for the combat of pollution. The ports, platforms and facilities must observe the rules and criteria established by the competent environmental agency.[31]

Operators of organized ports and port facilities and owners or operators of platforms must establish an internal procedures manual for managing the risks of pollution and the various residues generated or originated from the handling and storage of oil and harmful or dangerous substances, which must be approved by the competent environmental authority in accordance with the laws, rules and technical guidelines in force.[32]

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[25] *Id.* art. 54(§3).

[26] Código Penal, Decreto-Lei No. 2.848, de 7 de Dezembro de 1940, *available at* the website of the Brazilian Presidency, http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848.htm.

[27] Código de Processo Penal, Decreto-Lei No. 3.689, de 3 de Outubro de 1941, *available at* the website of the Brazilian Presidency, http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del3689.htm.

[28] Lei No. 9.966, de 28 de Abril de 2000, http://www.planalto.gov.br/ccivil_03/Leis/L9966.htm.

[29] *Id.* art. 1.

[30] *Id.* art. 2(XXII).

[31] *Id.* art. 5.

[32] *Id.* art. 6.

The organized ports, port facilities, platforms, as well as their supporting facilities, must have Individual Emergency Plans[33] to combat pollution caused by oil and hazardous and harmful substances, which must be submitted to the competent environmental agency for approval.[34]

Any incident that occurs in organized ports, port facilities, pipelines, ships, platforms, and their supporting facilities, which might cause pollution of waters under national jurisdiction, must be immediately reported to the competent environmental authority, the Harbor Authority (*Capitania dos Portos*) and the oil industry regulator, regardless of the measures taken for its control.[35]

Failure to comply with the provisions of Articles 5, 6 and 7 of Law No. 9,966 subjects the violator to a daily fine[36] and the noncompliance with the provisions established in Article 22 subjects the violator to a fine.[37]

The Maritime Authority,[38] the federal agency for the environment,[39] the state agency of the environment,[40] the municipal agency for the environment,[41] and the regulatory agency of the petroleum industry[42] are the entities responsible for the fulfillment of Law No, 9,966.

The specification of penalties for violations of rules on the prevention, control, and monitoring of pollution caused by the dumping of oil and other harmful or dangerous substances in waters under national jurisdiction, as provided for in Law 9,966 of April 28, 2000, are provided by Decree No. 4,136 of February 20, 2002,[43] and Decree No. 4,871, of November 6, 2003, provides for the establishment of Area Plans for combating oil pollution in waters under national jurisdiction.[44]

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[33] Administrative Act No. 398 of June 11, 2008 (*Resolução CONAMA No. 398, de 11 de Junho de 2008*) issued by the National Council of Environment (*CONAMA – Conselho Nacional do Meio Ambiente*) provides for the minimum content of the Individual Emergency Plan for oil pollution incidents in waters under national jurisdiction, originated in organized ports, port facilities, terminals, pipelines, land rigs, platforms and their support facilities, refineries, shipyards, marinas, yacht clubs and similar facilities, and guides its development. Resolução CONAMA No. 398, de 11 de Junho de 2008 is *available at* http://nxt.anp.gov.br/NXT/gateway.dll/leg/folder_resolucoes/resolucoes_conama/2008/rconama%20398%20-%202008.xml.

[34] Lei No. 9.966 art. 7.

[35] *Id.* art. 22.

[36] *Id.* art. 25(I).

[37] *Id.* art. 25(II).

[38] *Id.* art. 27(I).

[39] *Id.* art. 27(II).

[40] *Id.* art. 27(III).

[41] *Id.* art. 27(IV).

[42] *Id.* art. 27(V).

[43] Decreto No. 4.136, de 20 de Fevereiro de 2002, http://www.planalto.gov.br/ccivil_03/decreto/2002/D4136.htm.

[44] Decreto No. 4,871, de 6 de Novembro de 2003, http://www.planalto.gov.br/ccivil_03/decreto/2003/D4871.htm.

E. Breach of Concession Contract

On August 12, 2003, the National Agency of Petroleum (*ANP – Agência Nacional do Petróleo, Gás Natural e Biocombustíveis*) issued Administrative Act (*Portaria*) No. 234, which approved the regulation defining the procedures for imposing penalties (*RPIP - Regulamento de Procedimento de Imposição de Penalidades*) applicable to violators of the provisions and terms of concession contracts for the exploration of oil, bidding invitations (*edital de licitação*) and applicable laws.[45]

Article 2 of Administrative Act No. 234 defines the administrative sanctions imposed for a breach of obligations contained in a concession contract, which do not preclude the application of criminal and civil sanctions.[46]

Failure to notify ANP, in the given period of time, of the occurrence of any event arising from the exercise of the activities described on RPIP, which has led to damage to public health, to third parties or the environment, including loss or spillage of oil or natural gas, indicating the causes of their origin, as well as the measures taken to remedy or reduce their impact, in accordance with applicable law is punishable with a fine of R$500.000 (approximately US$278,000).[47]

The entity responsible for any event arising from the exercise of the activities covered on RPIP, which leads to damage to public health, to third parties, or the environment, including loss or spillage of oil or natural gas, is punished with a fine of R$1.000.000 (approximately US$556,000).[48]

The penalty in case of breach of any obligation that is not corrected by the holder of the concession within the time specified by a notification issued by ANP is termination of the concession contract.[49] Once the concession contracted is terminated, those responsible for the entity or entities that signed the concession contract will be barred for five years from exercising any activities covered by RPIP.[50]

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[45] Portaria ANP No. 234, de 12 de Agosto de 2003, art. 1, *available at* the website of the National Agency of Petroleum, http://nxt.anp.gov.br/NXT/gateway.dll/leg/folder_portarias_anp/portarias_anp_tec/2003/agosto/panp%20234%20-%202003.xml.

[46] Portaria ANP No. 234, de 12 de Agosto de 2003, Regulamento de Procedimento de Imposição de Penalidades, art. 2, http://nxt.anp.gov.br/NXT/gateway.dll/leg/folder_portarias_anp/portarias_anp_tec/2003/agosto/panp%20234%20-%202003.xml.

[47] *Id.* art. 5(XVIII).

[48] *Id.* art. 5(XIX).

[49] *Id.* art. 10.

[50] *Id.* § 2.

RPIP defines as the competent authorities to draw up contract breach orders (*autos de infração*) and to prosecute the breach of contract administratively, employees of ANP or of participating organisms designated by ANP to carry out inspection activities.[51]

Contract breaches go through an administrative process that determines the nature of the violation and the penalty, and guarantees the right to a full defense, according to an administrative procedure as established in Decree No. 2,953 of January 28, 1999.[52]

F. Operational Security

On May 31, 2000, the National Agency of Petroleum (ANP) issued the Administrative Act (*Portaria*) No. 90, which approved the Technical Regulation of the Development Plan (*Regulamento Técnico do Plano de Desenvolvimento*).[53] The Technical Regulation defines the content and establishes the procedures on how to present the Development Plan for the oil and natural gas fields, as established in article 44(IV) of Law No. 9,478 of August 6, 1997.

Article 2 of the Act makes it mandatory that, within the time limit established in the concession contract, the concession holder presents to ANP a Development Plan. In the area of operational security, section 1.3 of the Technical Regulation, determines that the development proposed for each field of oil or natural gas must meet the following basic principles, which are mandatory for approval of the Development Plan:

> a) Ensure the conservation of petroleum resources, which means the efficient recovery of oil in existing oil fields, and control the decline of the reserves and minimize losses on the surface;
>
> b) Ensure operational safety requiring the use of norms and procedures related to occupational safety and the prevention of operational accidents;
>
> c) Ensure environmental preservation, which implies the use of processes that minimize the impact of operations on the environment.

According to Mr. Heller Redo Barroso, a Brazilian attorney who is an expert on petroleum regulation:

> Under [the] Brazilian regulatory framework, Concessionaires [Franchisees] must, before starting oil field development activities, submit a Development Plan to ANP's approval. Regulated under Portaria [Ordinance] 90 of 2000, the Development Plan encompasses several aspects of an oil field development, identified by a given technical depth, including field production system installation activities and production per se, and information on production pace and the like.

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[51] *Id.* art. 15.

[52] *Id.* art. 16.

[53] Portaria ANP No. 90, de 31 de Maio de 2000, http://nxt.anp.gov.br/NXT/gateway.dll?f=templates&fn=default.htm&vid=anp:10.1048/enu.

> . . .
> [W]e understand that, based on "assurances/warranties of operational security and safety and prevention of operational accidents" ANP may dismiss Development Plans that do not have subsea projects that meet the required operational safety and security standards … [T]he regulation allowed ANP to reject a development plan that lacks equipment designed for maximum safety and security.
> . . .
> There has been a heated debate about the possibility of legislation to impose specific safety and security requirements. [However,] such regulations would not be in line with the dynamics of the oil and gas industry, [which are] always subject to technological developments. Therefore, refusal of a development plan seems a more effective way to enforce such preventive control.[54]

On December 06, 2007, ANP issued Administrative Act (*Resolução*) No. 43, which created the Operational Safety Rules for Drilling and Production Facilities of Oil and Natural Gas (*Regime de Segurança Operacional para as Instalações de Perfuração e Produção de Petróleo e Gás Natural*).[55] The rules consist of the regulatory framework established by ANP to ensure operational safety, considering the responsibilities of the concession holder and the functions of ANP in the conduct of drilling and production activities of oil and natural gas.[56]

The Act also approved the Technical Regulation for the Management System of Operational Safety of Drilling and Production Facilities of Oil and Natural Gas (*SGSO – Regulamento Técnico do Sistema de Gerenciamento da Segurança Operacional para as Instalações de Perfuração e Produção de Petróleo e Gás Natural*).[57]

SGSO's objective is to establish the requirements and guidelines for the implementation and operation of a Management System of Operational Safety, aimed at the operational safety of offshore drilling and production facilities of oil and natural gas, in order to protect human life and the environment through the adoption of seventeen management practices.[58]

II. Regulatory Distinctions Between Shallow Water and Deep Water

The petroleum industry is regulated by Law No. 9,478 of August 6, 1997 (Petroleum Law), without distinctions regarding exploration of petroleum in shallow or deep waters.[59]

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[54] Email from Mr. Heller Redo Barroso, a Brazilian attorney who is the Head of Heller Redo Barroso Advogados, a law firm dedicated, inter alia, to the petroleum and natural gas industry (June 21, 2010) (on file with author), following a telephone interview with Mr. Marcos Macedo, who is associated with the company.

[55] Resolução ANP No. 43, de 6 de Dezembro de 2007, art. 1, http://nxt.anp.gov.br/NXT/gateway.dll/leg/resolucoes_anp/2007/dezembro/ranp%2043%20-%202007.xml.

[56] *Id.* art. 1(§1).

[57] *Id.* art. 2.

[58] Regulamento Técnico do Sistema de Gerenciamento da Segurança Operacional das Instalações Marítimas de Perfuração e Produção de Petróleo e Gás Natural, http://nxt.anp.gov.br/NXT/gateway.dll/leg/resolucoes_anp/2007/dezembro/ranp%2043%20-%202007.xml.

[59] Lei No. 9,478 de 6 de Agosto de 1997, http://www.planalto.gov.br/ccivil_03/Leis/L9478.htm.

However, recent discoveries of petroleum in deep waters located on the Brazilian coast led the government to propose new regulations for this type of exploration.

According to the proposal, the new law will regulate the exploration and production of petroleum, natural gas, and other hydrocarbons in pre-salt areas[60] and in strategic areas, and amends Law No. 9,478.[61]

On March 10, 2010, the proposal was voted on and approved by the Chamber of Deputies and on March 17, 2010, the proposal was forwarded to the Federal Senate, where it is being discussed.

III. Regulatory Agencies

A. Petrobrás

In Brazil, petroleum, natural gas, and other fluid hydrocarbons belong to the federal government,[62] which retains the monopoly to the exploration and production of petroleum[63] through its state company, Petrobrás.[64] Law No. 2,004 created Petrobrás in October 3, 1953, with the objective of executing, on behalf of the federal government, the activities of the oil sector in Brazil.[65]

B. National Agency of Petroleum

In 1997, Law No. 9,478 of August 6, 1997, opened the activities of the Brazilian oil industry to private initiative and created the National Petroleum Agency (*Agência Nacional de Petróleo, Gás Natural e Biocombustíveis - ANP*), a federal autarchy subordinated to the Ministry of Mines and Energy responsible for the regulation, making of contracts, and inspection of the economic activities of the petroleum industry in Brazil.[66] Decree No. 2.455 of January 14, 1998, further regulates ANP.[67]

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[60] The term pre-salt refers to a group of rocks located in the marine portions of most of the Brazilian coast, with potential for the generation and accumulation of petroleum. It was conventionally called pre-salt because it forms a range of rocks that stretches under an extensive layer of salt, which in some areas of the coast reaches a thickness of up to 2,000 meters. The term pre is used because, over time, these rocks have been deposited before the layer of salt. The total depth of these rocks, which is the distance between the sea surface and oil reservoirs beneath the salt layer, can reach over 7,000 meters, Petrobrás/Pré-sal, *O que é o pré-sal?*, http://www2.petrobras.com.br/presal/perguntas-respostas/.

[61] Projeto de Lei da Câmara dos Deputados No. 5.938-A de 2009, Redação Final, art. 1, *available at* the website of the Chamber of Deputies, http://www.camara.gov.br/sileg/integras/744347.pdf.

[62] Lei No. 9,478, de 6 de Agosto de 1997, art. 3, http://www.planalto.gov.br/ccivil_03/Leis/L9478.htm.

[63] C.F. art. 177.

[64] Petrobrás, http://www.petrobras.com.br/pt/quem-somos/nossa-historia/.

[65] Lei No. 2004, de 3 de Outubro de 1953, art. 5, http://www.planalto.gov.br/ccivil_03/Leis/L2004.htm. On August 6, 1997, Article 83 of Law No. 9,478 revoked Law No. 2004 of October 3, 1953.

[66] Lei No. 9,478 arts. 7, 8.

[67] Decreto No. 2.455, de 14 de Janeiro de 1998, http://www.planalto.gov.br/ccivil_03/decreto/D2455.htm.

Aligned with Constitutional principles that call for the protection of the environment, on August 2, 2004, ANP issued Administrative Act (*Portaria*) No. 160,[68] which approved ANP's bylaws and created CMA (*CMA - Coordenadoria de Meio Ambiente*), an administrative unit subordinated to ANP's Superintendence of Planning, Research and Statistics (*SPP – Superintendência de Planejamento, Pesquisa e Estatística*)[69] responsible for coordinating the actions involving environmental aspects and operational security that are directly related to ANP's actions.[70]

C. National Council of the Environment

In 1990, Law No. 8,028[71] amended Law No. 6,938 of August 31, 1981,[72] to conform it to the Brazilian Constitution of 1988. Article 1 of Law No. 6,938 established the National Environmental Policy (*Política Nacional de Meio Ambiente*) and the National System of the Environment (*SISNAMA – Sistema Nacional do Meio Ambiente*), and created the National Council of the Environment (*CONAMA - Conselho Nacional do Meio Ambiente*).[73]

The objective of the National Environmental Policy is the preservation, improvement, and recuperation of environmental qualities proper to life, and to guarantee the necessary conditions for the social and economic development of the country, its national security interests, and the protection of the dignity of human life, in accordance with the principles listed in the law.[74]

The National System of the Environment is composed of agencies and entities of the federal government (*União*), States, Federal District, Territories, and Municipalities, as well as the foundations created by the government (*Poder Público*), which are responsible for the protection and improvement of environmental quality.[75]

The purpose of the National Council of the Environment is to advise, study, and propose to the Council of Government (*Conselho de Governo*)[76] directives for government policies for

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[68] Portaria No. 160, de 2 de Agosto de 2004, *available at* the website of ANP, http://nxt.anp.gov.br/nxt/gateway.dll/leg/folder_portarias_anp/portarias_anp_admin/2004/agosto/panp%20160%20-%202004.xml#anexoII_art32.

[69] *Id.* art. 2(7).

[70] Resolução de Diretoria No. 372, de 24 de Agosto de 2004, *available at* the website of ANP, http://rd.anp.gov.br/NXT/gateway.dll/atas/2004/reuni%C3%A3o%20n%C2%BA%20315%20-%2024.08.2004/rd372%2Br315%2B2004.xml?f=templates$fn=document-frame.htm$3.0$q=$x.

[71] Lei No. 8.028, de 12 de Abril de 1990, http://www. planalto.gov.br/ccivil_03/Leis/L8028.htm.

[72] Lei No. 6.938, de 31 de Agosto de 1981, http://www.planalto.gov.br/ccivil_03/Leis/L6938.htm.

[73] *Id.* art. 6(II).

[74] *Id.* art. 2.

[75] *Id.* art. 6.

[76] The Council of Government is defined by Article 6(I) of Law No. 6,938 of August 31, 1981, as modified by Law No. 8,028 of April 12, 1990, as a superior agency, which is part of the National System of the Environment, with the function of advising the President of the Republic on the preparation of national policies for the environment and environmental resources.

the environment and natural resources,[77] and to establish, according to the proposals made by the Brazilian Institute of the Environment and Renewable Natural Resources (*IBAMA – Instituto Brasileito do Meio Ambiente e dos Recursos Naturais Renováveis*), norms and criteria for the licensing of activities offering effective or potential risk of polluting the environment, to be issued by the federal government (*União*), States, Federal District, and Municipalities under the supervision of the Institute.[78]

Law No. 6,938 is regulated by Decree No. 99,274 of June 6, 1990, which further details the execution of the National Environmental Policy,[79] the organizational structure of the National System of the Environment,[80] and the composition[81] and competency of the National Council of the Environment.[82]

D. Brazilian Institute of the Environment and Renewable Natural Resources

The Brazilian Institute of the Environment and Renewable Natural Resources was created by Law No. 7.735 of February 22, 1989, as modified by Law No. 11.516 of August 28, 2007,[83] as a federal agency subordinated to the Ministry of Environment, for the purpose of exercising the environmental police power;[84] executing actions in connection with the national policies for the environment that are related to the federal powers regarding environmental licensing, environmental quality control, authorization for the use of natural resources, and the inspection, monitoring, and control of the environment, in accordance with the directives issued by the Ministry of the Environment.[85] The agency also performs supplementary government actions within the government's federal jurisdiction in compliance with the environmental laws in force.[86]

E. Navy

The navigation safety on waters under national jurisdiction is governed by Law No, 9,537 of December 11, 1997.[87] Article 3 determines that it is for the maritime authority[88] to promote

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[77] *Id.* art. 6(II).

[78] Decreto No. 99.274, de 6 de Junho de 1990, art. 7(I), http://www.planalto.gov.br/ccivil_03/decreto/Antigos/D99274.htm.

[79] *Id.* art. 1.

[80] *Id.* art. 3.

[81] *Id.* art. 4.

[82] *Id.* art. 7.

[83] Lei No. 7.735, de 22 de Fevereiro de 1989, art. 2, http://www.planalto.gov.br/ccivil_03/LEIS/L7735.htm#art2.

[84] *Id.* art. 2(I).

[85] *Id.* art. 2(II).

[86] *Id.* art. 2(III).

[87] Lei No. 9.537, de 11 de Dezembro de 1997, art. 1, https://www.planalto.gov.br/ccivil_03/leis/l9537.htm.

the implementation and enforcement of Law No. 9,537, in order to ensure the safety of life and the safety of navigation on open sea and inland waterways, and the prevention of environmental pollution caused by vessels, platforms or their supporting facilities.

The duties of the maritime authority include,[89] among other things, to determine the equipment and supplies that must be approved for use on board ships and platforms, and establish requirements for approval;[90] establish a minimum allocation of safety equipment for vessels and platforms;[91] establish the requirements concerning safety and livability and to prevent pollution by vessels, platforms, or their supporting facilities;[92] and to perform surveys, directly or through delegation to specialized agencies.[93]

Administrative Act (*Portaria*) No. 19 of November 22, 2002, issued by the Director-General of the Directorate of Ports and Coasts (*Diretoria de Portos e Costas*) further determines that it is the competence of the Directorate to contribute to the prevention of pollution by vessels, platforms and their supporting stations.[94] To achieve its purposes, it is the duty of the Directorate to establish safety and livability requirements and for the prevention of pollution caused by vessels, platforms or their supporting facilities.[95] Norm No. 7 of the Maritime Authority determines that it is the competence of the Director of the Ports and Coasts, as the representative of the Maritime Authority for the environment, to coordinate the actions arising from the application of environmental legislation by the Maritime Authority agents.[96]

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June 2010

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[88] Article 22(XXII) of Law No. 9,966 of April 28, 2000, defines, inter alia, that the maritime authority is exercised directly by the Navy Commander, who is responsible for the protection of human life and the safety of navigation on open sea and inland waterways as well as the prevention of environmental pollution caused by ships, platforms and their supporting facilities.

[89] Lei No. 9.537, art. 4.

[90] *Id.* art. 4(IV).

[91] *Id.* at V.

[92] *Id.* at VII.

[93] *Id.* at X.

[94] Portaria No. 19, de 22 de Novembro de 2002, art. 2(III), *available at* the website of the Directorate of Ports and Coasts, https://www.dpc.mar.mil.br/info_dpc/missao.htm.

[95] *Id.* art. 3(VII).

[96] Norma da Autoridade Marítima No. 7, Capítulo 4, Seção 0403, Letra c, https://www.dpc.mar.mil.br/normam/N_07/N7_CAP4.pdf.

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CANADA

OIL SPILL LIABILITY AND REGULATORY REGIME

Executive Summary

Offshore drilling in Canada is regulated by the federal government on the West Coast and in the Arctic, and by joint federal-provincial bodies off the coasts of Newfoundland and Nova Scotia. The applicable laws establish safety standards, liability, limits on liability where there is no illegality or negligence, and punishments. Responsibilities for responding to oil spills is shared by many federal and provincial agencies. On the federal level, major responsibilities are assigned to Environment Canada, the Department of Indian and Northern Affairs, the Coast Guard, and the National Energy Board. On federal lands, the National Energy Board issues exploration and production licenses. In the east, licenses are granted by the Canada-Newfoundland Offshore Petroleum Board and its counterpart in Nova Scotia.

I. Offshore Drilling in Canada

Canada is the world's sixth largest producer of petroleum and the largest supplier of crude oil imports to the United States.[1] In fact, Canada currently supplies approximately 19% of those imports.[2] Nevertheless, drilling for petroleum off the country's lengthy coastlines has yet to be commenced on a large scale. There are only three offshore rigs currently in operation, as opposed to the thousands operating in the Gulf of Mexico, even though Canada appears to have large offshore reserves. These vast deposits are believed to exist off both the East and West Coasts and in the Arctic. However, drilling in the Arctic is difficult and expensive, the proven East Coast reserves are almost 350 miles offshore and in some very deep waters, and drilling off the West Coast is currently prohibited as the result of the federal government's moratorium on oil and gas exploration off the coast of British Columbia in the early 1970s in the wake of the oil spill near Santa Barbara, California in 1969. The depth of the waters and the narrowness of the straits were thought to pose great dangers to the environment.

In recent years, the Government of British Columbia has been trying to persuade the federal government to allow exploration in some offshore areas to promote economic growth despite the continuing opposition of strong environmental organizations and public concerns. It argues that the West Coast is being deprived of economic opportunities by the only federal

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[1] Canada, Department of Foreign Affairs and International Trade, *Canada-U.S. Energy Relations*, http://www.canadainternational.gc.ca/washington/bilat_can/energy-energie.aspx?lang=eng (last visited June 21, 2010).

[2] *Id.*

moratorium on offshore drilling. The federal government has considered the possibility of allowing some West Coast exploration, but has not formulated any plans to open up areas off the West Coast to private companies. In fact, in the aftermath of the Gulf of Mexico disaster, the federal Minister of the Environment announced that the moratorium will not be lifted "anytime soon."[3]

In the Arctic, one license to drill offshore was granted by the National Energy Board, but there is no oil currently being produced in the offshore areas of Canada's far north.[4] Licensing of companies to explore the region has commenced in recent years, but a number of companies that have submitted bids and been awarded exploration licenses have asked the federal government to relax its safety standards in order to make drilling in the Arctic more economically competitive. Some regulations have been amended in recent years. A critic with the World Wildlife Fund stated that "the federal government has shifted away from a prescriptive regulatory framework to one that encourages industry to meet soft regulatory outcomes" and that "this shift is a leap of faith that industry will put the public-interest in front of self-interest and shareholder profits."[5] However, it appears that Canada still requires companies to be prepared to immediately construct a relief well in the event of a blowout while the industry has been contending that technological advances no longer make this necessary. These companies have also argued that the short drilling season in the Arctic makes the immediate construction of a relief well extremely difficult, if not impossible, in most cases.[6] However, Prime Minister Harper has repeatedly stated that the requirements respecting the construction of relief wells will not be relaxed since they recently came under intense scrutiny.[7] Critics contend that these requirements are inadequate and support the reintroduction of the rule that relief wells must be drilled at the same time primary extraction wells are drilled in the ocean floor.[8]

The region in which significant offshore oil production is underway is off the coast of Newfoundland. Three large projects are already in production and more exploration was approved prior to the Gulf disaster. While oil and gas production in the Arctic falls entirely under federal jurisdiction, responsibility for regulating oil and gas drilling off the coast of Newfoundland is shared under an agreement with the province. A federal-provincial board has been established to manage the offshore petroleum resources of Newfoundland.

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[3] Larry Pynn, *B.C. Offshore Drilling Moratorium Stays: Prentice*, VANCOUVER SUN, May 21, 2010, http://www.canada.com/news/offshore+drilling+moratorium+stays+Prentice/3058241/story.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3a+canwest%2fF75+(canada.com+National+News).

[4] Telephone Interview with National Energy Board, Calgary (June 21, 2010).

[5] Andrew Mayeda, *Canadian Offshore Drilling Regulations Relaxed Last Year*, VANCOUVER SUN, May 10, 2010, http://www.vancouversun.com/technology/Canadian+offshore+drilling+regulations+relaxed+last+year/3010351/story.html.

[6] Peter Overby, *BP Sought to Ease Canada's Policies on Relief Wells*, NPR, June 3, 2010, http://www.npr.org/templates/story/story.php?storyId=127381814&ft=1&f=1003.

[7] Allison Cross & Lynn Moore, *Canada Will Not Weaken Drilling Standards: Harper*, VANCOUVER SUN, May 3, 2010, http://www.vancouversun.com/life/green-living/featured-articles/Canada+will+weaken+drilling+standards+Harper/2981979/story.html.

[8] *Id.*

The Gulf disaster recently elicited a response from the Canada-Newfoundland Offshore Petroleum Board. The Board had already approved exploratory drilling by Chevron in the Orphan Basin, about 430 kilometers northeast of St. John's, and operations commenced this month. The project is known as Lona O-55. At 2,600 meters (1.62 miles) below sea level, it will reportedly set a record for the deepest offshore project drilled in Canada.[9]

On May 20, 2010, the Board announced it was imposing "special oversight measures" on the project "in light of the situation unfolding in the Gulf of Mexico and heightened public concern over drilling operations currently underway in the Newfoundland and Labrador offshore area." The Board stated that "prior to penetrating any of the targets, Chevron must hold an operations timeout to review and verify, to the satisfaction of the chief safety officer and the chief conservation officer, that all appropriate equipment, systems and procedures are in place to allow operations to proceed safely and without polluting the environment."[10] Under the new measures, Chevron must provide daily reports on its drilling program to a team of board members and must meet with the oversight team every two weeks. The Board's actions have been summarized as follows:

> Chevron also must provide field reports regarding the rig's blowout preventer and all associated backup equipment. The company will be expected to monitor the massive oil spill caused by a blowout at the Deepwater Horizon rig in the Gulf of Mexico, and report any "lessons learned" from the incident.
>
> The audits and inspections aboard the Stena Carron drill ship, which will drill the well, have been increased to every three or four weeks from every three or four months.[11]

Board spokesman Sean Kelly reportedly stated as follows:

> We recognize that there's a lot of public interest in this, and there's concern about whether [a spill] could happen here. Part [of] our review is to say, "Well, what else can we do that would help address some of those concerns?"[12]

The federal government also shares regulatory responsibility for oil and gas exploration off the coast of Nova Scotia with the government of that province. However, while natural gas reserves are being tapped off the coast of Nova Scotia, petroleum is not currently being extracted in that area.

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[9] *Canada: Authorities Stop Chevron Drilling Project Off Newfoundland*, OFFSHORE ENERGY TODAY.COM, May 21, 2010, http://www.offshoreenergytoday.com/canada-authorities-stop-chevron-drilling-project-off-newfoundland/.

[10] *Id.*

[11] *Id.*

[12] *Id.*

II. Oil Spill Liability

A. Insurance Requirements

Section 27 of the Canada Oil and Gas Operations Act (COGOA) provides that companies who apply for exploration or production permits or licenses must provide "proof of financial responsibility in the form of a letter of credit, a guarantee or indemnity bond or in any other form satisfactory to the National Energy Board [NEB], in an amount satisfactory to the Board."[13] Holders of permits or licenses are required to prove that their letter of credit, guarantee, or indemnity will remain in force for the duration of the work.[14] The NEB can order money to be paid out of the funds available under the letter of credit, guarantee, or indemnity bond in respect of any claim for which proceedings may be instituted, regardless of whether legal proceedings have been commenced.[15] Amounts so paid out are deducted from any subsequent awards.[16]

The federal government has thus decided to give the NEB broad powers to decide what types of financial guarantees are acceptable and what the amount of a particular guarantee should be. There are no fixed insurance requirements.

B. Response Costs

COGOA generally prohibits oil spills and requires all spills to be reported.[17] Persons who are responsible for an oil spill are required to "take all reasonable measures consistent with safety and the protection of the environment to prevent any further spill, to repair or remedy any condition resulting from the spill and to reduce or mitigate any danger to life, health, property or the environment that results or may reasonably be expected to result from the spill."[18] The Chief Conservation Officer in the NEB can step in to take any actions that he deems necessary.[19] This official can also bring in other parties to do work that is not being done by the polluter.[20] The costs are to be borne by the polluter and constitute a debt owed to the government.[21] Third parties hired by the government are not liable for any damages unless they act unreasonably.[22]

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[13] Canada Oil and Gas Operations Act, R.S.C. ch. O-7, § 27(1) (1985), *as amended*, *available at* http://laws.justice.gc.ca/eng/O-7/page-8.html#anchorbo-ga:l_I-gb:s_24.

[14] *Id.* § 27(1.1).

[15] *Id.* § 27(2).

[16] *Id.* § 27(4).

[17] *Id.* §§ 25(1), 25(2).

[18] *Id.* § 25(3).

[19] *Id.* § 25(4).

[20] *Id.* § 25(5).

[21] *Id.* § 25(6).

[22] *Id.* § 25(9).

C. Limits on Liability

Persons who cause oil spills are also generally liable for damages caused to third parties without proof of fault or negligence, subject to limits established by applicable regulations.[23] This is the principle of limited strict liability. In Canada, the limits on liability are generally relatively low. In the Arctic and Northern Canada, the general limit on liability to third parties is generally Can$40 million (about US$38.98 million). In non-prescribed areas the limit is Can$30 million. (about US$29.24 million).[24] These limits do not apply to damages caused by fault, negligence, or violations of COGOA.[25] There is a six-year limitation period on the filing of claims.[26]

D. Offenses and Punishments

COGOA provides that the following acts are criminal offenses:

(1) Making false statements, reports, or documents;

(2) Knowingly destroying, mutilating, or falsifying any report, record, or other document;

(3) Contravening the Act or regulations;

(4) Producing oil under an amended agreement that has not been filed;

(5) Undertaking unapproved work; and

(6) Failing to comply with a direction, requirement, or order of a safety officer.[27]

All of the above offenses are punishable with a fine of up to Can$100,000 (about US$97,256) and imprisonment for up to one year if they are prosecuted in summary proceeding. The same offenses are punishable with fines of up to Can$1 million (about US$972,930) and imprisonment for up to five years if they are prosecuted by way of an indictment.[28] The distinction between summary and indictable offenses is similar to the distinction between misdemeanors and felonies in the United States. The decision as to whether an accused should be tried summarily or by way of an indictment rests with the government.

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[23] *Id.* § 26.

[24] Regulations Respecting Limits of Liability for Spills, Authorized Discharges and Debris Emanating or Originating from Work or Activity Related to the Exploration For Or Production Of Oil and Gas, SOR/87-331, *available at* http://laws-lois.justice.gc.ca/eng/SOR-87-331/page-2.html (last visited June 22, 2010).

[25] Canada Oil and Gas Operations Act, R.S.C. ch. O-7, § 26(2)(b) (1985), *as amended*, *available at* http://laws.justice.gc.ca/eng/O-7/page-8.html#anchorbo-ga:l_I-gb:s_24.

[26] *Id.* § 26(5).

[27] *Id.* §§ 59-60.

[28] *Id.* § 60(2).

III. Offshore Petroleum Regulatory Regime

A. General

1. The National Energy Board

Canada's National Energy Board (NEB) has broad responsibilities in the field of oil and gas exploration. The Board has described its role as follows:

> The Board regulates Frontier lands and offshore areas not covered by provincial/federal management agreements.
>
> Responsibilities include the regulation of oil and gas exploration, development and production, enhancing worker safety, and protecting the environment. Other Frontier activities include the calculation of discovered and undiscovered hydrocarbon resources, the development of emergency environmental contingency plans, and fostering research programs which support and complement the Board's regulatory responsibilities.[29]

In short, the NEB is primarily responsible for establishing drilling standards outside of the offshore areas adjacent to Newfoundland and Nova Scotia.

2. Indian and Northern Affairs

The Department of Indian and Northern Affairs (INAC) also has important regulatory functions in the area of offshore oil and gas exploration in the Arctic. The Department has described its role as follows:

> Oil and gas exploration and development are key to Canada's economic well-being. One quarter of Canada's remaining discovered resources of conventional petroleum is in the North as well as one third to one half of the country's estimated potential.
>
> INAC works in partnership with Northern and Aboriginal governments and people to:
>
> - govern the allocation of Crown lands to the private sector for oil and gas exploration;
> - develop the regulatory environment;
> - set and collect royalties; and
> - approve benefit plans before development takes place in a given area.
>
> Benefit plans define oil and gas operators' policies and activities to maximize employment and training prospects for Northerners. The plans also ensure that Northern businesses have opportunities to supply goods and services on a competitive basis.[30]

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[29] National Energy Board, *Our Responsibilities*, http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rrspnsblt-eng.html#s4 (last visited June 21, 2010).

[30] Indian and Northern Affairs Canada, *Northern Oil and Gas*, http://www.ainc-inac.gc.ca/nth/og/index-eng.asp (last visited June 22, 2010).

In short, INA is also involved in the approval of licenses to drill for oil on gas. Its major field of concentration is on economic development.

3. Environment Canada

Environment Canada is Canada's federal environmental protection agency. Its role in preventing and addressing oil spills is described under subsection C, below .

4. Canadian Coast Guard

The Canadian Coast Guard is an agency in the Department of Fisheries and Oceans. The Coast Guard has primary responsibility for managing and cleaning up oil spills from tankers and ships. These responsibilities have been described as follows:

> The Canadian Coast Guard is the lead federal agency for the response component of Canada's Marine Oil Spill Preparedness Response Regime. The Environmental Response program monitors or manages the clean-up efforts for any ship-source or mystery source pollution incident in waters under Canadian jurisdiction.
>
> ER's specific mission objectives are to:
>
> - Minimize the impact of marine pollution incidents on public safety;
> - Minimize the environmental impact of marine pollution incidents; and,
> - Minimize the economic impact of marine pollution incidents.[31]

5. Canadian Wildlife Service

The Canadian Wildlife Service coordinates the rescue and treatment of migratory birds and endangered species The Service also assesses damages caused by oil spills to wildlife and habitats to help determine whether responsible parties should be prosecuted and the costs that they should bear. Studies are also conducted to determine the status of recovery efforts.[32]

6. Canada-Newfoundland Offshore Petroleum Board

The Canada-Newfoundland and Labrador Offshore Petroleum Board describes its responsibilities as follows:

> The Canada-Newfoundland and Labrador Offshore Petroleum Board has the responsibility to ensure that offshore oil and gas industrial activities proceed in an environmentally acceptable manner. The Environmental Affairs department of the Board plays a key role in carrying out this mandate by evaluating the effect of the offshore

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[31] Canadian Coast Guard, *Environmental Response*, http://www.ccg-gcc.gc.ca/e0005567 (last visited June 21, 2010).

[32] Environment Canada, *Environmental Emergencies: Who We Are*, http://ec.gc.ca/ee-ue/default.asp?lang=En&n=FDBFAF6B-1 (last visited June 21, 2010).

environment upon the safety of offshore activities and by ensuring protection of the environment during the conduct of these activities.

Working in close consultation with the C-NLOPB's Operations and Safety department, Environmental Affairs assesses the potential effects of environmental conditions (such as winds, waves and ice conditions) in the Newfoundland offshore area upon the safety of operations that are proposed for that area and of the facilities that are proposed to do the work.

The two departments also work closely together in reviewing operational procedures such as ice management plans, and in monitoring the conduct of offshore operations that are in progress. In addition, Environmental Affairs reviews operators' plans for collecting the weather, oceanographic and ice data that they are required to measure at offshore drilling and production sites.

The Board reviews proposals for all physical activities offshore—from seismic surveys to production projects—to identify their potential effects upon the natural environment or upon other users of that environment (such as the fishery). It also evaluates measures that are proposed to prevent or mitigate these effects. This activity includes reviewing operators' contingency plans for environmental emergencies—especially oil spills—to ensure that adequate response measures, people and equipment are in place in the event of an accident.

In all these reviews, the Board's Environmental Affairs department also consults with a number of environmental advisory agencies in the federal and provincial governments, and occasionally in other Canadian or international jurisdictions. In the case of large projects, it also helps to design and implement the process through which the public may participate in the review.

The Board also reviews, and monitors the operation of, the "nuts and bolts" of environmental management offshore—the systems and procedures that make environmental protection happen in an offshore operation. The number and complexity of these may vary depending on the scale of the project or activity itself. For a production project, they include:

- Waste treatment and compliance monitoring equipment and procedures;
- Offshore chemical selection and management procedures;
- Waste management plans;
- Field programs to detect effects upon the natural environment;
- Compensation programs for those affected by accidental events; and
- Exercises and drills of environmental emergency response plans.

The C-NLOPB's Environmental Affairs department acts as a source of information on any or all of the above matters for the general public, government agencies, and industry, and provides advice on behalf of the Board to government and industry bodies that conduct environmental research and development relating to the Newfoundland and Labrador offshore area.[33]

[33] Canada-Newfoundland and Labrador Offshore Petroleum Board, *Environment: About Environment*, http://www.cnlopb.nl.ca/env_about.shtml (last visited June 21, 2010).

Thus, offshore drilling off the coast of Newfoundland is regulated by a joint federal and provincial board that establishes its own rules, standards, and guidelines. This regulation extends to all aspects of a drilling project, from the granting of licenses to explore, to production permits, to monitoring of operations. However, there is considerable overlap between the federal laws applicable to the Arctic.

B. Distinctions Between Deep and Shallow Water Drilling

The regulations pertaining to offshore drilling established by the National Energy Board for the Arctic[34] and the Canada-Newfoundland and Labrador Board[35] do not establish special rules for drilling in deep waters. However, regulatory authorities can take the depth of drilling into account in determining whether the proposed safety standards to be followed are adequate in reviewing a license to drill.

In light of the BP disaster in the Gulf of Mexico, Canada may adopt stricter rules specifically for deep water drilling. On June 10, 2010, the National Energy Board issued a news release in which it stated as follows:

> The National Energy Board (NEB) is inviting participation in its public review of Arctic offshore drilling requirements.
>
> The NEB, which has regulatory oversight for offshore drilling in the Canadian Arctic, announced on 11 May that it would be looking into Arctic safety and environmental offshore drilling requirements. The NEB expects to complete this review before receiving applications for drilling in the Arctic offshore.
>
> A preliminary scope of the review is available on the NEB website at www.neb-one.gc.ca. The preliminary scope includes topics such as drilling safely while protecting the environment, responding effectively when things go wrong, and lessons learned from major accidents elsewhere.[36]

C. Division of Responsibilities in Responding to Oil Spills

The Environmental Emergencies Program (EEP) of Environment Canada is responsible for responding to environmental emergencies and the uncontrolled or accidental release of hazardous substances. The program is implemented through the Environmental Emergencies Division, which has its central headquarters in the Ottawa region and regional offices in five

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[34] National Energy Board, Drilling and Production Regulations, SOR/2009-315, http://laws.justice.gc.ca/eng/SOR-2009-315/index.html (last visited June 21, 2010).

[35] Newfoundland Offshore Petroleum Installation Regulations, SOR/95-104, *available at* http://laws.justice.gc.ca/en/C-7.5/SOR-95-104/text.html (last visited June 21, 2010).

[36] Press Release, National Energy Board, National Energy Board Invites Participation in the Public Review of the Proposed Arctic Offshore Drilling Requirements (June 10, 2010), http://www.neb-one.gc.ca/clf-nsi/rthnb/nwsrls/2010/nwsrls14-eng.html.

provinces. The EEP response unit, the National Environmental Emergencies Centre, assists the regional emergency offices in providing and coordinating responses.[37]

Canada's Environmental Science and Technology Centre (ESTC) is the agency within Environment Canada that is primarily responsible for responding to oil spills and other pollution emergencies, and which corresponds most closely with the U.S. Minerals Management Service (recently renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement). ESTC is involved in the development of decontamination technologies. Research and development is cost-shared. ESTC shares national and international technologies with Canadian companies and develops prototype equipment for water treatment.[38]

In response to the possibility of an oil spill, ESTC has developed in situ countermeasures. This includes the development of treatment guidelines and evaluating treatments and their effects with respect to their effectiveness and toxicity. ESTC tests protocols and performance standards and burning technologies.[39]

The Western Office of ESTC is responsible for developing technologies and transferring technologies on the cleanup of oil on shorelines even though there is a moratorium on offshore drilling off the coast of British Columbia. This Office also evaluates oil spill countermeasures, biomediation, and the environmental effects of spilled substances.

ESTC has one DC-3 and one Convair 580, which are equipped with Laser Environmental Airborne Fluorosensers that were designed by a consortium led by Environment Canada and the U.S. Minerals Management Service.[40] This technology has been tested by ESTC over Santa Barbara, California.

Environment Canada began a special Arctic and Marine Oilspill Program (AMOP) in 1978. In 2008, this program's annual seminar was combined with two others to create the AMOP Technical Seminar on Environmental Contamination and Response. One of the major purposes of this international seminar is to facilitate the transfer of technology.[41] Operational guides, manuals, and training are all provided to spill responders and others. Research and development priorities are established by Canadian and international government agencies.

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[37] Environment Canada, *Environmental Emergencies: Who We Are*, http://ec.gc.ca/ee-ue/default.asp?lang=En&n=FDBFAF6B-1 (last visited June 21, 2010).

[38] Environment Canada, *Clean Water*, http://www.etc-cte.ec.gc.ca/home/water_e.html (last visited June 21, 2010).

[39] *Id.*

[40] Environment Canada, *AMOP Technical Seminar on Environmental Contamination and Response*, http://www.ec.gc.ca/scitech/default.asp?lang=En&n=66A57AF7-1 (last visited June 21, 2010).

[41] *Id.*

IV. Conclusion

The BP Gulf disaster has been followed with great interest in Canada. Because its system for approving drilling and responding to oil spills is similar to those used in the United States, many questions have been asked about the adequacy of Canada's current regulations and policies. The Prime Minister has stated that Canada has stricter rules and more oversight than the United States. Nevertheless, the largest exploration project off the shore of Newfoundland has been temporarily halted and a review of the regulations pertaining to the Arctic is already underway. Aspects of Canadian law that have been criticized include the low limits on liability for accidents that were not the result of illegality or negligence and the absence of requirements for the simultaneous drilling of primary and relief wells.

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NORWAY

OIL SPILL LIABILITY AND REGULATORY REGIME

Executive Summary

Under the Petroleum Activities Act (PAA), Norway generally imposes strict liability for pollution damage from petroleum-related activities and has no cap on liability for offshore drilling. Special provisions apply to compensation for Norwegian fishermen. Criminal liability applies to willful or negligent acts in violation of PAA provisions and to complicit acts, but if the violation could entail a more severe penalty "under any other statutory provision," the PAA penal provisions will not apply. The PAA does not appear to distinguish between deepwater and shallow water activities for purposes of liability for oil spills. Proof of insurance is required for petroleum-related activities, under both the PAA and the Norwegian standard joint venture agreement. Major regulatory bodies include the Ministry of Petroleum and Energy, the Norwegian Petroleum Directorate, and the Petroleum Safety Authority Norway.[*]

I. Background

Oil production on the Norwegian continental shelf began on June 15, 1971, at the Ekofisk field, which is still one of the largest among Norway's oil producing areas and whose production is expected to continue until 2050. It is estimated that only 35% of the country's continental shelf resources have been exploited thus far. The petroleum industry, the largest Norwegian industrial sector, accounted for 26% of added value in Norway in 2006. That year, Norway ranked as the world's fifth largest oil exporter, the tenth largest oil producer, the third largest gas exporter, and the fifth largest gas producer.[1] In 2008, it was the sixth largest net oil exporter and the eleventh top oil producer, and it remains the largest oil producer in Europe.[2]

As of January 2008, Norway's continental shelf had seen one major oil blowout from a facility during the operations phase of petroleum extraction: the 1977 Ekofisk Bravo accident, which resulted from the failure of a bottom valve in a production well in connection with an

[*] This report is limited to relevant material available in English translation.

[1] Ministry of Petroleum and Energy (MPE), *Oil and Gas*, http://www.regjeringen.no/en/dep/oed/Subject/Oil-and-Gas.html?id=1003 (last visited June 10, 2010).

[2] U.S. Energy Information Administration, *Country Energy Profiles*, http://www.eia.doe.gov/country/index.cfm (last visited June 21, 2010) (*see* chart on right of screen).

overhaul.[3] Although there were no deaths from the accident, 9,000 tons of oil in one week spilled into the sea before operators regained control of the well.[4]

II. Legal Regime

A. Constitution

The Norwegian Constitution has provisions on general protection of the environment and natural resources. It states in Article 110b that every person has a right to an environment conducive to good health and "to a natural environment whose productivity and diversity are maintained. Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well" (para. 1). To safeguard this right, "citizens are entitled to information on the state of the natural environment and on the effects of any encroachment on nature that is planned or carried out" (para. 2). State authorities are to issue specific provisions for implementation of these principles (para. 3).[5]

B. Pollution Control Act

The Norway Pollution Control Act[6] (PCA) stipulates in general under Article 2, on guidelines, that efforts are to be made to prevent any occurrence or increase of pollution and to limit any pollution that does occur (item 1); that the costs of preventing or limiting pollution are to be met by the person responsible for the pollution (item 5); and that pollution resulting from activities in Norwegian territory will be counteracted to the same extent, irrespective of whether the damage arises within or outside Norway. The PCA defines pollution as, among other things, "the introduction of solids, liquids or gases to air, water or ground" and "anything that may aggravate the damage or nuisance caused by earlier pollution, or that together with environmental impacts such as [those listed above] causes or may cause damage or nuisance to the environment" (art. 6).

The PCA imposes a duty to avoid pollution, whereby, for example,

> If there is a danger of pollution contrary to this Act or decisions made pursuant thereto, the person responsible for the pollution shall ensure that measures are taken to prevent such pollution from occurring. If pollution has already occurred, the said person shall ensure that measures are taken to stop or remove the pollution or limit its effects.

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[3] Petroleum Safety Authority Norway (PSA), *Well Control and Well Integrity*, Jan. 29, 2008, http://www.ptil.no/ well-integrity/well-control-and-well-integrity-article4156-145.html.

[4] *Id.*

[5] *The Constitution – Complete Text*, Stortinget (Norwegian Parliament) website, http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/ (last visited June 18, 2010) (unofficial source; in English); Kongeriget Norges Grundlov [Constitution of the Kingdom of Norway] (May 17, 1814, *as amended* June 18, 2006), LOVDATA, http://www.lovdata.no/all/nl-18140517-000.html (in Norwegian).

[6] Act of 13 March 1981 No. 6 Concerning Protection Against Pollution and Concerning Waste, Government.no website, http://www.regjeringen.no/en/doc/Laws/Acts/pollution-control-act.html?id=171893 (last visited June 18, 2010).

> The person responsible also has a duty to take steps to mitigate any damage or nuisance resulting from the pollution or from measures to counteract it. The duty laid down in this paragraph applies to measures that are in reasonable proportion to the damage and nuisance to be avoided. (art. 7, para. 2.)

However, such provisions do not apply to measures to prevent or stop acute pollution (art. 4, para. 1).

Special rules apply to liability for pollution damage, the scope of which is covered in Article 53 of the PCA, under Chapter 8, "Compensation for Pollution Damage." Chapter 8 is applicable "insofar as the question of liability is not separately regulated by other legislation or a contract." (art. 53, para. 1). Because the Petroleum Activities Act (*see below*) covers liability for such activities in the Norwegian realm, it seems that the PCA's liability provisions do not apply to those activities.

C. Petroleum Activities Act

The Petroleum Activities Act[7] (Nov. 1996, No. 72) (PAA) is the key item of legislation applicable to oil spill liability. It "applies to petroleum activities in connection with subsea petroleum deposits under Norwegian jurisdiction" and "to petroleum activities inside and outside the realm and the Norwegian continental shelf to the extent such application follows from international law or from agreement with a foreign state"(art. 1-4, para. 1). It is also applicable to utilization of petroleum production on Norwegian land territory or seabed subject to private property rights, when that utilization "is necessary to or constitutes an integrated part of production or transportation of petroleum" (art. 1-4, para. 2). The King has the authority to issue regulations to supplement or delimit this condition of utilization (art. 1-4, para. 7). The PAA applies as well to a pipeline in Norwegian territorial jurisdiction that originates outside it should the King decide, insofar as it follows from international law, to apply relevant provisions of the PAA to the pipeline and associated equipment (art. 1-4, para. 3). The PAA does not apply to the internal waters and territorial sea of the Svalbard Islands (art. 1-4, para. 5).

1. Liability for Damage for Pollution in General Under the PAA

Provisions in Chapter 7 of the PAA apply to liability for damage from pollution and for damage arising as a result of pollution and waste (art. 1-4, para. 6). Pollution damage under the PAA refers to "damage or loss caused by pollution as a consequence of effluence or discharge of petroleum from a facility, including a well, and costs of reasonable measures to avert or limit such damage or such loss, as well as damage or loss as a consequence of such measures" and "[d]amage or loss incurred by fishermen as a consequence of reduced possibilities for fishing … ." (art. 7-1, para. 1). Ships used for stationary drilling are deemed a facility; ships that store petroleum in conjunction with production facilities are regarded as part of the facility, as are ships for transport of petroleum when loading from the facility occurs (art. 7-1, para. 2).

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[7] Act of Nov. 29, 1996, No. 72, Relating to Petroleum Activities, *last amended by* Act of June 19, 2009, No. 104, Norwegian Petroleum Directorate (NPD) website, http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/ (last visited June 10, 2010); Lov om petroleumsvirksomhet, LOVDATA, http://www.lovdata.no/all/tl-19961129-072-001.html (last visited June 10, 2010).

Chapter 7 provisions apply to such pollution damage that takes place "in Norway or inside the outer limits of the Norwegian continental shelf or affects a Norwegian vessel, Norwegian hunting or catching equipment or Norwegian facility in adjacent sea areas" (art. 7-2, para. 1). The provisions also apply when that damage occurs in onshore or offshore territory belonging to a party to the Nordic Environmental Protection Convention (art. 7-2, para. 2).[8] The King has the authority, irrespective of the PAA provisions, to issue rules on pollution damage liability by agreement with a foreign state, but the rules may not restrict the right to compensation based on the PAA in regard to any injured party under Norwegian jurisdiction (art. 7-2, para. 3).

In general, the PAA imposes strict liability for pollution damage on the licensee; licensee liability provisions also apply to an operator who is not a licensee subject to a Ministry of Petroleum and Energy decision in connection with the operator status approval (art. 7-3, para. 1). The PAA does not impose a liability cap for offshore drilling. If a license covers several licensees, one of which is the operator, the compensation claims will be initially directed to the operator. If the operator leaves any part of the compensation unpaid on the due date, that part is to be covered by the licensees proportionate to their participating interest in the license; if one fails to cover his share, it is to be allocated proportionately among the others (art. 7-3, para. 2). Liability may be reduced "to the extent it is reasonable" in cases of a force majeure demonstrably contributing "to a considerable degree to the damage or its extent," beyond the liable party's control. Particular consideration in such circumstances is given "to the scope of the activity, the situation of the party that has sustained damage and the opportunity for taking out insurance on both sides" (art. 7-3, para. 3). If pollution damage is from a facility in an area outside the Norwegian continental shelf, the party who has the competent authority's approval to conduct facility-related activities will be deemed a licensee (art. 7-3, para. 4).

As for the channeling of liability of a licensee, it may only be claimed pursuant to the PAA's provisions, and cannot be claimed against certain other specified actors, e.g., anyone who has performed tasks or worked in connection with the petroleum activities by agreement with a licensee or his contractors or anyone employed by a licensee (art. 7-4, paras. 1&2). If the licensee has been ordered to pay compensation but fails to pay it within the time limit stipulated by the judgment, the damaged party may bring action against the perpetrator of the damage, to the same extent as the licensee may bring action for recourse against the perpetrator; a similar rule applies to a licensee claiming compensation from the party that caused him pollution damage (art. 7-4, paras. 3&4).

The PAA does not permit a licensee to claim recourse for damage that is exempt from liability under the liability channeling provisions, except in cases where the person "or someone in his service has acted wilfully or by gross negligence" (art. 7-5, para. 1). Moreover, recourse liability may be mitigated to the extent "considered reasonable" on the basis of conduct, economic ability, and the general circumstances (art. 7-5, para. 2). To the extent recourse is

[8] The Nordic Environmental Protection Convention, Feb. 19, 1974, *entry into force* Oct. 5, 1976, ECOLEX database, http://www.ecolex.org/server2.php/libcat/docs/multilateral/en/TRE000491.txt (unofficial source).

claimed against a person entitled to limitation of liability under the rules of the Maritime Act of June 24, 1994, the relevant provisions of that Act will apply (art. 7-5, para. 3).[9]

Where pollution damage occurs in connection with petroleum activities conducted without a license, the party that carried out such activities, as well as others who took part and who knew, or should have known, that they were conducted without a license, will be liable for the damage regardless of fault (art. 7-6).

The operator is obliged under the PAA, "unless the Ministry considers it obviously unnecessary," to provide "without undue delay," by means of public announcement, information on the party to whom the compensation claims will be directed and the period of limitation (art. 7-7, para. 1). The announcement is to be made by placement of an advertisement twice, with at least one week's interval, in *The Norwegian Gazette (Norsk Lysingsblad)* and in newspapers and other publications generally read in the places where the damage is caused or presumed to occur (art. 7-7, para. 2). The PAA also provides for the summoning by preclusive notice of possible claimants, subject to the Ministry's consent and its issuance of relevant rules (art. 7-7, para. 3).

The legal venue for compensation for pollution damage is the court in the court district where the petroleum effluence or discharge has occurred or where the damage has been caused. However, the Ministry will determine where the legal action will be brought if: (a) the effluence or discharge occurred or the damage has been caused outside the area of any court district; (b) it cannot be demonstrated within which court district the effluence or discharge took place or the damage has been caused; (c) the effluence or discharge took place in one court district and the damage has been caused in another; or (d) the damage has been caused in more than one court district (art. 7-8, paras. 1 & 2).

2. Compensation for Norwegian Fishermen Under the PAA

Chapter 8 of the PAA is devoted to compensation for Norwegian fishermen (persons registered in the registration list of fishermen and owners of vessels listed in the registry of Norwegian fishing vessels subject to registration licenses (art. 8, para. 3)) for pollution damage. Chapter 8 provisions apply to compensation for financial losses incurred by Norwegian fishermen as a result of petroleum activities occurring in fishing fields or resulting in pollution and waste, or as a result of damage caused by a facility or actions in connection with the placement of a facility. They do not apply to pollution damage set forth under Article 7-1 (*see above*) (art. 8-1, para. 1). "Pollution and waste" in Chapter 8 (art. 8-1, para. 2) have the same definition as in Articles 6 and 27 of the PCA.

If petroleum activities completely or partially occupy a fishing field, the State must, "to the extent that fishing becomes impossible or is substantially impeded," award compensation, in the form of payment entirely or in part as a lump sum or as a fixed annual payment, for any resultant financial losses. Compensation claims may normally not be made for losses that have occurred more than seven years after the occupation occurred. If the licensee should have averted the losses, the State may claim recovery from him (art. 8-2, paras. 1-3).

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[9] The Norwegian Maritime Code of 24 June, 1994, No. 39 (amended through Jan. 26, 2007; Peter Bilton et al. trans.), University of Oslo website, http://www.ub.uio.no/ujur/ulovdata/lov-19940624-039-eng.pdf (last visited June 18, 2010).

In general, the PAA imposes strict liability for financial losses incurred as a result of pollution and waste from the petroleum activities as well as for the cost of "reasonable measures to avert or limit such damage or such loss, including damage or loss as a result of such measures" (art. 8-3, para. 1). The liability also includes damage and inconvenience caused by pollution and waste from supply vessel and support vessel traffic, and by relocation of the facility to or from the field concerned. However, the licensee has the right of recourse against the actual perpetrator of the loss or the ship owner if the other prevailing conditions of liability have been fulfilled (art. 8-3, para. 2).

Compensation may also be claimed for fishing time lost to locating, marking, retrieving, or bringing ashore objects, provided the objects are "properly marked or brought ashore and presented to the police or port authority or other equivalent public authority, unless absolute obstacles exist"; the objects' location, at least, must be reported to the police or port authority (art. 8-3, para. 3). This provision also applies to compensation for other losses "reasonably" requiring marking, indication of location, or bringing ashore of objects (art. 8-3, para. 4). Joint and several liability will be imposed on licensees for damage incurred when the perpetrator cannot be determined, to the extent that it is believed to have been caused by petroleum activities connected to the license in question (art. 8-4).

Strict liability of licensees also applies to financial losses suffered by fishermen as a result of damage caused by the placement of a facility or actions in connection with it, and the injured party does not have a right to compensation under the provisions of Article 8-2 (art. 8-5.)

Compensation claims made in connection with Norwegian fishermen will be handled by a commission, the composition and procedures of which will be determined by regulations issued by the King, who will also issue provisions on the handling of administrative appeals (art. 8-6, para. 1). Decisions of the administrative appeal body may be brought directly before the district court within two months of the party concerned having been notified by a summons of the given decision (art. 8-6, para. 2).

3. Penal Provisions Under the PAA

The PAA stipulates a punishment of a fine or up to three months' imprisonment for willful or negligent violation of provisions or decisions issued in or pursuant to the Act; in particularly aggravated circumstances, a sentence of up to two years' imprisonment may be imposed. The same penalties apply to complicit acts. These provisions will not apply, however, if the violation is subject to a more severe penalty under any other statutory provision (art. 10-17).

4. Proof of Insurance Under the Regulations to the PAA and JV Contracts

Proof of insurance is required by Norway for offshore drilling. There is no set amount for the insurance, but the Regulations to the Petroleum Activities Act stipulate that "the license shall provide reasonable insurance cover" (art. 73, para. 3).[10] Article 73 states in full:

> The activities conducted by the licensee pursuant to the Act Chapters 3 and 4 [on production licenses and production of petroleum, respectively] shall be insured at all times. The insurance must at least cover:
>
> a) damage to facilities,
>
> b) pollution damage and other liability towards third parties,
>
> c) wreck removal and cleanup as a result of accidents,
>
> d) insurance of the licensee's own employees who are engaged in the activities.
>
> The licensee shall ensure that contractors and subcontractors engaged in the activities take out insurance for their employees to the same extent as the operator insures his own employees.
>
> When taking out insurance as mentioned in the first paragraph literas a) to c), the licensee shall provide reasonable insurance cover, taking into consideration risk exposure and premium costs. Insurance as mentioned under litera d) shall be taken out as further agreed with the organisations of the employees.
>
> The Ministry may consent to the licensee using another form of security arrangement.
>
> At the end of each calendar year, the licensee shall inform the Ministry about existing insurance agreements, with an indication of the main terms. The Ministry may require further insurance to be taken out.

However, it is rare in Norway for there only to be one company in a lease, and leases are not award based on an auction system like that of the United States. Companies must apply for the leases and the Norwegian authorities will evaluate the applications based on such factors as the candidate's geological expertise, the candidate's technical expertise (including safety), and the authorities' prior experience with the company. Therefore, most leases for petroleum activities are in the form of a joint venture. Article 14 of the standard joint venture agreement in Norway is on insurance.[11] It provides that the operator will take out and maintain any insurance required by laws, regulations, and other official rulings, as well as other insurance as determined by the management committee. Copies of the policies will be submitted to the joint venture parties (art. 14.1, para. 1). The operator must file all claims covered by the insurance and collect indemnities that are to be credited to the joint account (art. 14.1, para. 2, in part). A party to a joint venture is also entitled to take

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[10] Regulations to Act Relating to Petroleum Activities (by Royal Decree of June 27, 1997, *as amended by* Royal Decree of Dec. 22, 2006, No. 1536), NPD website, http://www.npd.no/en/Regulations/Regulations/Petroleum-activities/ (last visited June 18, 2010) (unofficial source).

[11] Agreement Concerning Petroleum Activities, MPE website, http://www.regjeringen.no/Upload/OED/Vedlegg/Konsesjonsverk/k-verk-vedlegg-1-2-eng.pdf (last visited June 18, 2010) (unofficial source).

out his own insurance or an equivalent form of coverage, but must notify the operator well in advance of the operator's taking out insurance on behalf of the joint venture, provide the operator and the other parties with the necessary information on that insurance coverage, and ensure waiver of recourse against the other parties (art. 14.2, para. 1). The operator must establish that the insurer of the parties covered by joint insurance or equivalent coverage taken out by the operator has waived recourse claims against a party that takes out his own insurance (art. 14.3). The operator must also ensure that suppliers of goods and services to the joint venture activities take out and maintain the requisite insurance (art. 14.4, in part).[12]

D. Other Potentially Relevant Regulations

Regulations Relating to Health, Environment and Safety in the Petroleum Activities (The Framework Regulations) contain provisions on, among other subjects, prudent petroleum activities, principles on risk reduction, coordination of and cooperation in emergency preparedness, establishment of safety zones, and sanctions.[13] An Appendix to the Regulations is on the "Application of the Working Environment Act in Petroleum Activities Outside the Norwegian Part of the Continental Shelf and During Relocation."

There are four supplementary regulations to the Framework Regulations: Regulations on Management in Petroleum Activities (the Management Regulations),[14] Regulations on Material and Information in Petroleum Activities (Information Duty Regulations),[15] Regulations on the Design and Outfitting of Facilities, etc., in Petroleum Activities (Facilities Regulations),[16] and Regulations on the Conduct of Activities in Petroleum Activities (Activities Regulations).[17] The Management Regulations contain "all overarching requirements" for management in the field of health, safety, and the environment, including, inter alia, risk reduction, analysis and

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[13] Regulations Relating to Health, Environment and Safety in the Petroleum Activities (The Framework Regulations) (issued on Aug. 31, 2001, in force on Jan. 1, 2001), PSA website, http://www.ptil.no/framework-hse/category403.html (last visited June 18, 2010). However, new Framework Regulations (No. 158 of Feb. 12, 2010) have been adopted and are scheduled to enter into force on January 1, 2011. *New Framework Regulations for the Petroleum Activity*, PSA website (Feb. 19, 2010), http://www.ptil.no/news/new-framework-regulations-for-the-petroleum-activity-article6677-79.html.

[14] Regulations Relating Management in the Petroleum Activities (The Management Regulations) (issued on Sept. 3, 2001, in force on Jan. 1, 2002), PSA website, http://www.ptil.no/management/category401.html (last visited June 21, 2010).

[15] Regulations Relating to Material and Information in the Petroleum Activities (The Information Duty Regulations) (issued on Sept. 3, 2001, in force on Jan. 1, 2002), PSA website, http://www.ptil.no/information-duty/category402.html (last visited June 21, 2010).

[16] Regulations Relating to the Design and Outfitting of Facilities etc. in the Petroleum Activities (The Facilities Regulations) (issued on Sept. 3, 2001, in force on Jan. 1, 2002), PSA website, http://www.ptil.no/facilities/category400.html (last visited June 21, 2010).

[17] Regulations Relating to the Conduct of Activities in the Petroleum Activities (The Activities Regulations) (issued on Sept. 3, 2001, in force on Jan. 1, 2002), PSA website, http://www.ptil.no/activities/category399.html (last visited June 21, 2010).

measurement, follow-up, and improvement.[18] The Information Duty Regulations set requirements for the relevant material and information to be submitted or made available to the authorities, such as applications for consent, alerts, notifications, and reporting. The Facilities Regulations govern the design and outfitting of facilities, "such as safety functions and loads, materials, work areas and accommodation areas, physical barriers and emergency preparedness."[19] The Activities Regulations regulate various activities and set requirements for such matters as "planning, prerequisites for use, the working environment, work arrangements, health-related aspects, the external environment, maintenance and emergency preparedness. Requirements to environmental monitoring are listed in an appendix, which forms part of the regulations."[20]

III. Key Regulatory Agencies

Norway's Ministry of Petroleum and Energy (MPE) has as its principal aim the attainment of "a coordinated and integrated energy policy."[21] The MPE is responsible for the state's direct financial interest (SDFI), by means of which the state takes part in Norway's petroleum sector as a direct investor. It is also in charge of state shareholding in StatoilHydro ASA (an oil and gas company in which the Norwegian state is the majority shareholder), Petoro AS (a state-owned limited company that manages SDFI and that serves as the licensee for SDFI shares on Norway's continental shelf), and Gassco AS (a gas transport company). The MPE is responsible as well for the Government Petroleum Insurance Fund.[22]

The Norwegian Petroleum Directorate (NPD), which reports to the Ministry of Petroleum and Energy, "sets frameworks, stipulates regulations and makes decisions in areas where it has been delegated authority."[23] It is also "responsible for conducting metering audits and collecting fees from the petroleum industry" and, "[t]ogether with the MPE, … is responsible for the security of supplies. In addition, the NPD contributes administrative competence, mapping of resources and petroleum data administration for the development aid programme 'Oil for Development.' "[24] The NPD is the coordinating regulatory body; the Norwegian Pollution

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[18] *The Continental Shelf*, PSA website, http://www.ptil.no/regulations/the-continental-shelf-article4246-87.html (last visited June 21, 2010).

[19] *Id*.

[20] *Id*.

[21] MPE website, http://www.regjeringen.no/en/dep/oed.html (last visited June 18, 2010). An organizational chart of the MPE is available at http://www.regjeringen.no/upload/OED/Bilder%20-%20store/Org%20kart/Org_kart_ENG_Mai10_m_politisk.jpg.

[22] *State Participation in the Petroleum Sector*, MPE website, http://www.regjeringen.no/en/dep/oed/Subject/State-participation-in-the-petroleum-sec.html?id=1009 (last visited June 18, 2010).

[23] *The Norwegian Petroleum Directorate*, NPD website, http://www.npd.no/en/About-us/ (last visited June 18, 2010). An internal organizational chart is available at the NPD website, http://www.npd.no/en/About-us/Organisation/Organization-chart/ (last visited June 18, 2010)

[24] *Id*.

Control Authority (SFT) and the Norwegian Board of Health are independent regulatory authorities.[25]

The Petroleum Safety Authority Norway (PSA) was established as an independent government regulatory agency in 2004, supplanting the safety department of the NPD.[26] According to its website, the PSA is "the regulatory authority for technical and operational safety, including emergency preparedness, and for the working environment," whose "regulatory role covers all phases of the industry, from planning and design through construction and operation to possible ultimate removal."[27] Its definition of "safety" is broad-ranging "and embraces three categories of loss—human life, health and welfare, the natural environment, and financial investment and operational regularity."

The Norwegian Climate and Pollution Agency (CPA, established on January 18, 2010; formerly the Norwegian Pollution Control Authority, established in 1974) is a directorate under the Ministry of Environment tasked with implementing government policy on pollution. One of its functions is to exercise regulatory authority and carry out inspections, e.g., by managing and enforcing the Pollution Control Act, the Product Control Act, and the Greenhouse Gas Emission Trading Act. The CPA grants permits, establishes requirements and sets emission limits, and carries out inspections to ensure compliance.[28]

IV. Regulations on Svalbard Islands

Norway also has a set of regulations relating to safe practices in petroleum exploration activities on the Svalbard Islands, entitled Regulations Relating to Safe Practice in Exploration and Exploration Drilling for Petroleum Deposits on Svalbard[29] (hereinafter, Svalbard Safety Regulations). As noted above, the PAA does not apply to the internal waters and territorial sea of the Islands. The Svalbard Islands are an archipelago, constituting the northernmost part of

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[25] *Environmental Regulations for NORWEGIAN Offshore Oil & Gas Industry*, Offshore Oil and Gas Environment Forum, http://www.oilandgasforum.net/management/regula/norwayprof.htm (last visited June 18, 2010).

[26] U.S. Department of the Interior, *Increased Safety Measures for Energy Development on the Outer Continental Shelf* (May 27, 2010), http://www.doi.gov/deepwaterhorizon/loader.cfm?csModule=security/getfile&PageID=33598.

[27] *About Us*, PSA website, http://www.ptil.no/about-us/category89.html (last visited June 18, 2010). For its organizational chart, *see* PSA website, http://www.ptil.no/getfile.php/Div%20artikkelbilder/ptilorganisasjon_engelsk_0070110.pdf (last visited June 18, 2010).

[28] *About Us*, CPA website, http://www.klif.no/no/english/english/About-Us/ (last visited June 18, 2010); its organizational chart is available at CPA website, http://www.klif.no/no/english/english/Organisation/ (last visited June 18, 2010).

[29] Regulations Relating to Safe Practice in Exploration and Exploration Drilling for Petroleum Deposits on Svalbard, stipulated by Royal Decree of Mar. 25, 1988, by virtue of Section 4 of Act of July 17, 1925, No. 11, relating to Svalbard (Spitzbergen), *last amended* Dec. 19, 2003, No. 1596, *available at* the PSA website, http://www.ptil.no/getfile.php/Regelverket/Svalbardforskriften_e.pdf.

Norway, located about halfway between Norway's mainland and the North Pole, in between the Norwegian Sea, Greenland Sea, Barents Sea, and Arctic Ocean.[30]

The Svalbard Safety Regulations "are applicable to safety in connection with exploration, exploration drilling for petroleum deposits or other exploration activities in accordance with The Mining Ordinance for Svalbard (Spitzbergen)" (art. 2, para. 1). The Petroleum Safety Authority of Norway is the main regulatory body referred to in the Svalbard Regulations (art. 2, para. 2). It has the authority to impose coercive fines on licensees who fail to comply with orders within the time limit imposed. Such fines must either be stipulated at the time the order is imposed, or in connection with the stipulation of a new time limit for compliance with the order (art. 4, para. 1). The amount of the fine will be based on the importance of complying with the order and the estimated costs involved. Coercive fines may be collected by distraint (art. 4, para. 2). When "considered reasonable," the PSA may waive an imposed coercive fine (art. 4, para. 3).

Willful or negligent violation of the Svalbard Safety Regulations, or of regulations imposed by virtue of them, is punishable by fines, with reference to Article 339, subsection 2, of the Penal Code, except when more severe penal provisions apply to the case. The same penalty applies to attempt and complicity (art. 5). Article 339, subsection 2 of the Penal Code imposes liability to fines for failure to give to a public authority any report or information required by law or for contravening any regulation issued by a public authority according to law and implying liability to a penalty.[31]

Before the commencement of petroleum activities as well as afterwards, the Petroleum Safety Authority may require the licensee to "provide financial security for fulfillment of the obligations he has undertaken, as well as for possible liability in connection with the activities" (art. 15).

V. Recent Developments

The Norwegian Oil Industry Association (OLF) has reportedly commissioned a report on the differences and similarities between Norwegian and U.S. regulations and procedures for petroleum activities, as a result of the Deepwater Horizon accident.[32] OLF is "a professional body and employer's association for oil and supplier companies engaged in the field of exploration and production of oil and gas on the Norwegian Continental Shelf."[33] The report is

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[30] CIA, THE WORLD FACTBOOK: SVALBARD, https://www.cia.gov/library/publications/the-world-factbook/geos/sv.html (last visited May 5, 2010).

[31] Norwegian Ministry of Justice and Police, The General Civil Penal Code (Act. No. 10 of May 22, 1902, as amended by Act No. 131 of Dec. 21, 2005, by Act No. 131) (in English), LOVDATA, http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf (last visited June 18, 2010) (unofficial source).

[32] *DNV to Prepare Summary Report*, OLF (June 11, 2010), http://www.olf.no/news/dnv-to-prepare-summary-report-article19624-291.html.

[33] *OLF The Norwegian Oil Industry Association*, http://www.olf.no/en/ (last visited June 21, 2010).

to be prepared by Det Norske Veritas (DNV), an international provider of services to manage risk, headquartered in Oslo.[34]

Another result of the Deepwater Horizon spill is that Norway has declared a moratorium on deepwater drilling. Minister of Petroleum and Energy Terje Riis-Johansen, stated that, in connection with its twenty-first licensing round currently underway, Norway "will not allow any deepwater oil and gas drilling in new areas until the investigation into the explosion and spill in the U.S. Gulf of Mexico is complete."[35] He further stated that it would not be appropriate for him to allow new licenses for deepwater drilling "until we have good knowledge of what has happened with the Deepwater Horizon [the Gulf of Mexico rig that exploded on April 20] and what this means for our regulations."[36]

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[34] OLF, *supra* note 32; *About DNV North America*, http://www.dnv.us/moreondnv/profile/about_us/ (last visited June 21, 2010).

[35] Carola Hoyos, *Norway Bans Deepwater Oil Drilling*, THE FINANCIAL TIMES, June 8, 2010, http://www.ft.com/cms/s/0/986a577e-72fb-11df-9161-00144feabdc0,dwp_uuid=f2b40164-cfea-11dc-9309-0000779fd2ac.html (registration required for access).

[36] *Id*.

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UNITED KINGDOM

OIL SPILL LIABILITY AND REGULATORY REGIME

Executive Summary

The main oil producing areas in the UK are located in the North Sea. Liability for oil spills rests with the operator on the "polluter pays" basis, with unlimited liability for costs associated with pollution and clean up. There is a substantial regulatory regime for offshore installations that involve many government bodies. For oil pollution, primary responsibility rests with the Maritime and Coastguard Agency.

I. Introduction

The main offshore oil and gas producing area in the UK is in the North Sea. The oil fields in the North Sea were discovered in the 1970s, and during the last decade production appears to have reached its peak although recent surveys indicate that it is continuing to increase.

II. Oil Spill Liability and Liability Caps

Liability for oil spills in the UK is on a strict liability basis, under the "polluter pays" principle. There are a number of means of redress for liability, including tort claims, and the operator of the offshore installation has unlimited legal liability for the full costs associated with any incidents of pollution.[1]

Special rules have been imposed for pollution that is caused by an offshore installation by the Offshore Pollution Liability Agreement of 1975. The OPOL Agreement was introduced as an interim measure during the negotiation phase of the Convention of Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources. Negotiations with this Convention were ultimately unsuccessful and it was never ratified. However, the UK considered the OPOL Agreement to be a satisfactory means of providing for a strict liability regime in case an operator should default on providing the clean up costs associated with an incident.[2] The OPOL agreement thus goes into effect if any operator defaults on paying clean up costs, with a current cap of US$120 million.

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[1] Email to author from Craig Bunyan, Senior Manager, Offshore Environmental Inspectorate, Department of Energy and Climate Change, June 17, 2010 (on file with author). Additional information and links provided by Mr. Bunyan on oil spill liability and the UK's regulatory regime is attached as Appendix 1.

[2] Offshore Pollution Liability Association Limited, *Home*, http://www.opol.org.uk/ (last visited June 17, 2010); Email from Craig Bunyan, *supra* note 1.

The OPOL Agreement is a voluntary oil pollution compensation scheme that provides guarantees of payment for claims up to US$120 million for all members of OPOL to "provide an orderly means for compensating and reimbursing any Person who sustains Pollution Damage and any Public Authority which incurs costs for taking Remedial Measures as a result of a Discharge of Oil from any Offshore Facility."[3] As noted, membership in this organization is voluntary, however, it is a license requirement to either be a member [4] or have the same liability coverage provided for by OPOL.[5] Currently all operators in the UK are members of OPOL.[6]

Under the OPOL Agreement, member operators accept strict liability for pollution damage and remedial measures, up to US$120 million per incident and US $240 million in the annual aggregate.[7] This money is apportioned equally in the sums of $60 million for pollution damage and $60 million for remedial measures, however, if one fund is exhausted, any surplus money can be taken from the other.[8] The operators must show evidence of financial responsibility for this amount, either through insurance, self insurance or other means.[9] The liability amount of this agreement is currently under review by the Department of Energy and Climate Control (DECC) in light of the 2010 BP oil spill.[10]

The agreement, while limiting liability to $120 million, does not prevent additional claims from being sought in court. The OPOL agreement merely guarantees payments of claims up to the maximum amount of US$120 million in case of default by the operator.[11] This amount also does not extend to any costs that are incurred for measures taken to protect, repair or replace facilities damaged by pollution.[12]

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[3] Offshore Pollution Liability Association Limited, Offshore Pollution Liability Agreement, May 1, 1975, Preamble, http://www.opol.org.uk/agreement.htm (last visited June 17, 2010).

[4] DECC, *Licensing: License Assignments*, https://www.og.decc.gov.uk/upstream/licensing/licassign.htm (last visited June 17, 2010).

[5] Petroleum Act 1998, c.17; *see also* Maritime and Coastguard Agency, *National Contingency Plan for Marine Pollution From Shipping and Offshore Installations*, app. M, http://www.mcga.gov.uk/c4mca/mcga-contin.pdf (last visited June 15, 2010).

[6] Offshore Pollution Liability Association Limited, *Home, supra* note 2.

[7] Offshore Pollution Liability Association Limited, Offshore Pollution Liability Agreement, May 1, 1975, clause IV, http://www.opol.org.uk/agreement.htm (last visited June 17, 2010); *see also* Maritime and Coastguard Agency, *National Contingency Plan for Marine Pollution From Shipping and Offshore Installations*) (hereinafter *National Contingency Plan*), app. M, http://www.mcga.gov.uk/c4mca/mcga-contin.pdf (last visited June 15, 2010).

[8] Offshore Pollution Liability Association Limited, *Liability Under OPOL*, http://www.opol.org.uk/about-2.htm (last visited June 17, 2010).

[9] Offshore Pollution Liability Association Limited, About OPOL, http://www.opol.org.uk/about.htm (last visited June 17, 2010).

[10] Email from Craig Bunyan, *supra* note 1.

[11] *National Contingency Plan*, *supra* note 7, at app. M, ¶ M.34.

[12] Offshore Pollution Liability Association Limited, *The Offshore Pollution Liability Agreement (OPOL)*, http://www.opol.org.uk/about-1.htm (last visited June 17, 2010).

The aims of OPOL are:

1. To provide an orderly means for the expeditious settlement of claims arising out of an escape or discharge of oil from offshore exploration and production operations.

2. To encourage immediate remedial action by the parties.

3. To ensure the financial responsibility of the parties to meet their obligations;

4. To provide a mechanism for ensuring that claims are met up to the maximum liability under OPOL.

5. To avoid complicated jurisdictional problems.[13]

Claimants under OPOL include Public Authorities who can make a claim for any remedial measures taken to "prevent, mitigate or eliminate pollution damage, or to remove or neutralize the oil following an escape or discharge."[14] Anyone damaged by pollution from the oil spill may also file a claim for compensation if they have suffered: "direct loss or damage caused by contamination."[15]

There are exceptions to the operation of strict liability, which include if the incident of pollution is a result of war, hostilities, an exceptional natural phenomenon, an act or omission of a claimant, or a third party that intended to cause the damage; negligence or a wrongful act from the state or authority; if it resulted from compliance with instructions or conditions from the licensing state.[16]

III. Offshore Petroleum Regulatory Regime

A. Regulatory Distinctions Between Shallow and Deep Water

There is no distinction in regulations between shallow and deep water in the UK. However, the depth of the water is taken into account during the approval process for any license to explore for or obtain oil, which takes into account the "area, conditions, sensitivities and operations being conducted."[17]

B. Roles of Regulatory Agencies

In the UK there is a distinction in between those responsible for regulating offshore exploration and production activities and those that become involved in the instance of an offshore oil disaster. The Department of Energy and Climate Change (DECC) has responsibility for licensing exploration and regulating the development of the UK's oil and gas resources and

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[13] Offshore Pollution Liability Association Limited, *About OPOL*, http://www.opol.org.uk/about.htm (last visited June 17, 2010).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Email from Craig Bunyan, *supra* note 1.

the Health and Safety Executive has responsibility for enforcing health and safety legislation.[18] However, both of these authorities have "no remit with regard to the implementation of any counter pollution measures."[19] In oil pollution incidents, the lead government authority is the Maritime and Coastguard Agency (MCA) and their Counter Pollution and Response Branch,[20] who respond in accordance with the National Contingency Plan,[21] when necessary.

The current policy is that the operator accountable for the spill is responsible for all associated clean up costs and counter measures to minimize the impact any oil spill may have in accordance with the "polluter pays" principle. The operators are responsible for implementing their oil spill contingency plans, which are a detailed set of responses to an offshore pollution incident that has been approved in advance by the DECC and MCA.[22]

The Offshore Installations (Emergency Pollution Control) Regulations 2002 also provide the Secretary of State for Energy and Climate Change with the power to intervene in cases where there may be or is a significant risk or pollution. In these cases, the power is undertaken by the Secretary of State's Representative (SOSREP), who is a single representative that acts on behalf of the Secretaries of State for the Department of Transport (for ships) and the Department of Energy and Climate Change (for offshore installations). As noted above, the MCA leads the government response for any oil spills and the SOSREP monitors this and the operators' response to any pollution, and may make high level decisions without consulting higher authorities if the UK's public interest is at stake.[23]

The SOSREP becomes involved and may intervene when:

- there has been any occurrence causing material damage or a threat of material damage to an offshore installation; **and**
- in the opinion of the SOSREP the occurrence may or will cause significant pollution; **and**
- in the opinion of the SOSREP use of the powers is urgently needed.[24]

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[18] The Offshore Division of the Health and Safety Executive was created as direct result of the tragic Piper Alpha disaster in 1987, where 167 people lost their lives. A government report, commonly referred to as the Cullen Report, made a number of recommendations, one of which was transferring responsibility for offshore health and safety to the HSE.

[19] Email from Craig Bunyan, *supra* note 1.

[20] The MCA was formed in 1998 when HM Coastguard (HMCG) and the Marine Safety Agency (MSA) merged .

[21] *National Contingency Plan*, *supra* note 7.

[22] Email from Craig Bunyan, *supra* note 1; Offshore Installations (Emergency Pollution Control) Regulations 2002, S.I. 2002/1861 ¶ 2. *See also* Department of Energy and Climate Change, *Guidance Notes to Operators of UK Offshore Oil and Gas Installations on the Offshore Installations (Emergency Pollution Control) Regulations 2002* (hereinafter, *Guidance Notes*), 2009, ¶ 6.1, https://www.og.decc.gov.uk/environment/EPC_Guidance.doc.

[23] Email from Craig Bunyan, *supra* note 1.

[24] *Guidance notes*, *supra* note 22, at 5.1.1; *see also* Offshore Installations (Emergency Pollution Control) Regulations 2002, SI 2002/1861 ¶ 3.

The SOSREP achieves this intervention through Directions that are issued to the operators, either verbally or in writing. They can be wide-ranging and vary from remedial measures that should be taken to prevent an incident, to closing down a specific pipeline.[25] If the Directions are not successful in preventing or reducing pollution, the SOSREP can take further action as he feels is necessary, which include:

- sinking or destroying all, or any part of, an offshore installation; or
- taking control of the offshore installation (which includes either boarding the installation or taking control at the response centre); or
- any other action necessary.[26]

Local Authorities (the local government) do not have a specific statutory duty to plan or clean up shores in cases of oil pollution, however, they do have a general duty provided for in section 2 of the Civil Contingencies Act 2004 to assess, plan and advise the public on the risk of an emergency occurring.[27]

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[25] *Guidance Notes, supra* note 22, at 5.1.1; Offshore Installations (Emergency Pollution Control) Regulations 2002, SI 2002/1861 ¶ 3.

[26] *Guidance Notes, supra* note 22, at 5.1.6; Offshore Installations (Emergency Pollution Control) Regulations 2002, SI 2002/1861 ¶ 3.

[27] Civil Contingencies Act, 2004, c. 36 § 2.