
NATURAL RESOURCES JOURNAL

Volume 19
Issue 3 *Summer 1979*

Summer 1979

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LIABILITY WITHOUT FAULT UNDER THE FEDERAL WATER POLLUTION CONTROL ACT

The Seventh Circuit Court of Appeals enforced civil penalties, assessed by the United States Coast Guard under Section 1321(b)(6) of the FWPCA, against two discharging facilities for oil spills caused by third parties. *United States v. Marathon Pipe Line Company*, 589 F.2d 1305 (7th Cir. 1978); *United States v. Tex-Tow*, 589 F.2d 1310 (7th Cir. 1978).

INTRODUCTION

It is well known that oil and gasoline do not mix with water. Oil and gasoline, however, whether accidentally or negligently, continue to be discharged into rivers and other waterways where oil and gasoline-related activities occur. In 1974 1600 gallons of gasoline joined the waters of the Mississippi River when a tank barge operated by Tex-Tow, Inc. was punctured causing the gasoline it carried to discharge.[1] The following year 19,992 gallons of crude oil were discharged into the Kaskaskia River in Southern Illinois from a ruptured pipeline owned by the Marathon Pipe Line Company.[2] Only 10,920 gallons of the oil were recovered or burned; the remainder escaped downriver.

The two discharging facilities, Tex-Tow, Inc. and Marathon Pipe Line Company, were penalized. Both appealed the enforcement of the civil penalty, assessed by the United States Coast Guard and upheld by way of summary judgment by the United States District Court for the Eastern District of Illinois. The Seventh Circuit Court of Appeals affirmed and held each defendant subject to the civil penalty[3] based on its ownership or operation of a discharging facility even though it was not at fault and the spill had been caused by a third party's act or omission. The defendants questioned whether Section 1321(b)(6) of the Federal Water Pollution Control Act[4] permitted the Coast Guard to assess such a penalty against the owner or operator of a discharging facility where that owner or operator was without fault or did not directly cause the spill.

1. United States v. Tex-Tow, 589 F.2d 1310 (7th Cir. 1978).
2. United States v. Marathon Pipe Line Company, 589 F.2d 1305 (7th Cir. 1978).
3. Marathon was assessed a civil penalty of $2000 and Tex-Tow $350.
4. 33 U.S.C. §1321(b)(6) (1973).

THE STATUTORY SCHEME

The Federal Water Pollution Control Act[5] was designed to "restore and maintain the chemical, physical and biological integrity of the nation's waters."[6] To achieve this objective Congress set national goals of eliminating the discharge of all pollutants into the navigable waters by 1985.[7] Section 1321, however, sets a "no discharge" policy of immediate effect and prohibits any discharges "into or upon navigable waters of the United States, adjoining shorelines or into or upon the waters of the contiguous zones in harmful quantities . . . ."[8]

In general, Section 1321 provides the government with a wide range of enforcement options in controlling spills of oil and hazardous materials into navigable waters. It also sets out various complex provisions concerning liabilities and defenses of parties relative to the clean-up of such spills. More specifically, Section 1321(b)(5) requires that any person in charge of a vessel or an onshore or offshore facility from which a discharge of oil or hazardous substance occurs shall, as soon as he knows of such discharge, give immediate notification to the appropriate agency of the federal government.[9] The Environmental Protection Agency has been designated as this agency[10] for purposes of receiving notice for discharges in violation of Section 1321(b)(6).

Finally, Section 1321(b)(6),[11] upon which the Seventh Circuit focused, makes owners and operators liable for a civil penalty of up

5. 33 U.S.C. §1251 (1973). All references were to the 1972 and 1973 amended version. The 1977 Amendment did not apply to these cases because the spills occurred in 1974 and 1975.

6. 33 U.S.C. §1251(a) (1973).

7. 33 U.S.C. §1251(a)(1) (1973).

8. 33 U.S.C. §1321(b)(1) & (3) (1973). The 1977 Amendment also includes discharges "in connection with activities under the Outer Continental Shelf Lands Act or belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Fishery Conservation and Management Act of 1976)." Clean Water Act, Pub. L. No. 95-217, 91 Stat. 1593 & 1594 (1977).

9. 33 U.S.C. §1321(b)(5) (1973).

10. Pursuant to Executive Order 11735, 38 Fed. Reg. 21243 (1973).

11. 33 U.S.C. §1321(b)(6) (1973) states: "Any owner or operator of any vessel, onshore facility or offshore facility from which oil or a hazardous substance is discharged in violation of §1321(b)(3) shall be assessed a civil penalty by the Secretary of the department in which the Coast Guard is operating of not more than $5000 for each offense. No penalty shall be assessed unless the owner or operator charged shall have been given notice and opportunity for a hearing on such charge. Each violation is a separate offense. Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business and the gravity of the violation, shall be considered by the Secretary."

to $5,000 and provides no opportunity for raising any defenses.[12] The agency cannot use its own discretion as to whether a civil penalty should be assessed, but it may exercise discretion in determining the size of the penalty.[13] Further, the civil penalty procedure imposes a minimal burden of proof on the enforcing agency: it need only prove that the spill occurred in navigable waters and that the defendant was the enterprise involved. The agency need not prove any degree of fault on the part of the defendant, and, defendants are not rendered immune from penalty assessment merely by their compliance with the notification requirement of Section 1321(b)(5).

Persons charged with violating the regulations are entitled to an agency hearing prior to the assessment of a civil penalty.[14] There is no provision, however, requiring that this be a full-scale adjudicatory hearing.

LIABILITY WITHOUT CAUSATION

Tex-Tow, Inc. operated a tank barge which was being loaded with gasoline at a dock on the Mississippi River. The load of gasoline caused the barge to sink deeper into the water until it settled on an underwater steel piling that was part of the dock, owned and operated by Mobil Oil Company. The piling punctured the hull of the barge causing 1600 gallons of gasoline to discharge into the river. Tex-Tow had no way of knowing about the piling nor had it been warned of it by Mobile. Admittedly, Tex-Tow was not at fault.

Tex-Tow argued that the Coast Guard should not assess any penalty against it because it did not "cause" the spill, and suggested that the third-party causation defense provided in Section 1321(f)[15] should also be read into the civil penalty provision. The court, rejecting this, found the language of the statute to be unambiguous and stated that such a literal interpretation furthered the "overall statutory scheme of shifting the cost of pollution onto the polluting

12. The 1977 Amendment extended the liability of Section 1321(b)(6) to include persons "in charge" of discharging facilities.

13. 33 U.S.C. §1321(b)(6) (1973).

14. *Id.*

15. 33 U.S.C. §1321(f) (1973) provides the following defenses to liability: (1) an act of God, (2) an act of war, (3) negligence on the part of the United States government, and (4) an act or omission of a third party without regard to whether any such act or omission was or was not negligent. The court in United States v. General Motors Corp., 403 F. Supp. 1151, 1157 (D. Conn. 1975) also declined to read a third party causation defense in Section 1321(b)(6), after an extended analysis of the history and purpose of the penalty. In this case, vandals had opened the valves of several of defendant's oil storage tanks causing oil to flow into a nearby river.

enterprise."[16] The court concluded that Congress, in including Section 1321(b)(6) in the Act, had clearly intended to impose strict liability on operators or owners of discharging facilities who violated Section 1321(b)(3).

Tex-Tow also asserted that a causation requirement must be implied in the civil penalty provision because liability may not exist in the absence of causation. The court agreed. It noted, however, that Tex-Tow had conceded that its presence at the site of the spill was a cause in fact, to which Tex-Tow responded that mere presence was not sufficient to constitute legal cause. The court, however, found that more was involved. Tex-Tow was engaged in the type of enterprise which inevitably causes pollution and to which Congress has determined to shift the cost of pollution when an actual discharge occurs.[17] Consequently these two elements, actual pollution and the statistically-foreseeable pollution derived from the type of enterprise involved, constituted cause in fact and legal cause.[18]

The court further elaborated that, although a third party may be responsible for the act or omission which directly resulted in a spill, Congress had exercised its power so as to make certain oil-related activities the cause of the spill rather than a third party's conduct. Conduct becomes irrelevant in the application of absolute liability and foreseeability may be used to establish legal responsibility without fault.[19]

The Seventh Circuit noted that Tex-Tow might still have an indemnity cause of action against the third party under Section 1321(h).[20] The only court to consider the question, however, has construed the indemnity cause of action as not applying to recovery of a civil penalty assessed under Section 1321(b)(6).[21]

In *United States v. Marathon Pipe Line Company,* Marathon was notified by the local police that one of its pipelines had ruptured and

16. United States v. Tex-Tow, 589 F.2d 1310, 1313 (7th Cir. 1978).

17. *Id.* at 1314.

18. *Id.*

19. Mickle v. Blackman, 252 S.C. 202, 166 S.E.2d 173 (1969); Davis v. Wyeth Laboratories, Inc. 393 F.2d 121 (9th Cir. 1968).

20. 33 U.S.C. §1321(h) (1973) states: "The liabilities established by this section shall in no way affect any rights which (1) the owner or operator of a vessel or of an onshore facility or an offshore facility may have against any third party whose acts may in any way have caused or contributed to such discharge, or (2) the Unied States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substances."

21. In Tug Ocean Prince v. United States, 436 F. Supp. 907, 926 (S.D.N.Y. 1977) the court stated that "the absence of a third party defense in this penalty provision, the language of the statutes, and the purposes of the various remedies supplied to the government lead to the conclusion that no indemnity right was contemplated for the penalty imposed by Section 1321(b)(6).

was discharging oil into the Kaskaskia River in Southern Illinois. In compliance with Section 1321(b)(5). Marathon immediately reported the discharge to the Environmental Protection Agency. The damage to the pipeline had been caused several months earlier by a bulldozer hired by the owners of the land to dig an irrigation ditch. The landowners had believed the pipeline was no longer in use and consequently, the damage was never reported to Marathon. It was undisputed that the rupture in the pipeline was caused by the bulldozer and that like Tex-Tow, Marathon was not at fault.

Marathon, shying away from the issue of congressional intent, argued that the Coast Guard had misapplied its own administrative guidelines in fixing the amount of the penalty, and that no more than a nominal penalty could be imposed in the absence of fault. The Seventh Circuit responded by referring to that portion of Section 1321(b)(6) which directs the Coast Guard to consider the defendant's ability to pay and the "gravity of the violation." It therefore found that the Coast Guard had not abused its discretion in assessing the civil penalty charged to Marathon[22] and held that the penalty is clearly one of strict liability since fault is not a requisite. It was further noted that every court which has considered the question has so held.[23]

SUBSTANTIVE DUE PROCESS

Marathon also asserted that the assessment of a substantial penalty in the absence of fault did not meet the due process requirement that legislative means bear "a reasonable relation to a proper legislative purpose and be neither arbitrary nor discriminatory."[24] Tex-Tow argued that imposing a penalty when Tex-Tow had not caused the spill was irrational. The Seventh Circuit noted, however, that the Supreme Court has not struck down an economic regulation on substantive due process grounds since 1937. And the court indicated that the penalties were economic because no personal or non-economic interests of the defendants were involved.[25]

The defendants' substantive due process claim was grounded in the

22. The court noted that it is the Coast Guard's stated policy to assess a penalty at or near the maximum of $5000.

23. Tug Ocean Prince v. United States, 436 F. Supp. 907, 926 (S.D.N.Y. 1977); United States v. Atlantic Richfield Co., 429 F. Supp. 1352, 1357 (W.D. Okla. 1976); United States v. General Motors, 402 F. Supp. 1151, 1157 (D. Conn. 1975); United States v. Eureka Pipeline Co., 401 F. Supp. 934, 942 (N.D.W. Va. 1975).

24. Nebbia v. New York, 291 U.S. 502, 534 (1934).

25. *Id.* The Supreme Court stated that "price control is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecesary and unwarranted interference with individual liberty."

assumption that the purpose of the penalties is to deter spills. The court disagreed and stated that deterrence is not the sole purpose of the civil penalty or of strict liability in general. Congress made a legislative determination that polluters, rather than the public, should bear the costs of water pollution. Consequently, Section 1321 serves to shift the cost of oil and hazardous substance pollution to the private sector.[26]

This cost-shifting aspect serves to accomplish a remedial purpose of cleaning up spills rather than seeking to prevent spills.[27] It provides for government cleanup of spills where a discharger fails to do so.[28] Proceeds from civil penalty collections go to funding these clean-up activities.[29] The Supreme Court has held that forfeitures may be used to finance a regulatory scheme,[30] and penalties or forfeitures have been sustained against due process arguments even when the charged party was not at fault and a third party caused the spill.[31] The Seventh Circuit concluded that the bases for the Marathon and Tex-Tow holdings were even stronger than the forfeiture cases because the penalized activity was responsible for the pollution.

CONCLUSION

The Seventh Circuit has determined that the cause of a spill is the polluting enterprise rather than the conduct of a third party. In their concurring opinions, Judge Wood and Judge Bauer agreed with the court's analysis of the applicable law, but did so reluctantly. A basic unfairness may exist when an agency can penalize a business engaged in an enterprise essential to the well-being of our society. Punishing defendants who are concededly without fault appears to be a self-defeating exercise of power by the Coast Guard. Judge Wood stated that unjustified penalties such as those imposed on Marathon and Tex-Tow are eventually passed on to the consuming public, and that such a process is generally considered to be contrary to the accepted principles of law and equity. On the other hand, it is important that polluters be made to pay for their pollution. Decisions such as these may make the operators in oil and gasoline-related businesses more careful of their own actions or those of third parties.

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26. United States v. Marathon Pipe Line Company, 589 F.2d 1305 (7th Cir. 1978).
27. 33 U.S.C. §1321(d) (1973).
28. 33 U.S.C. §1321(c)(1) (1973).
29. 33 U.S.C. §1321(k) (1973).
30. One Lot Emerald Cut Stone v. United States, 409 U.S. 232 (1972).
31. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Edelberg v. Illinois Racing Board, 540 F.2d 279 (7th Cir. 1976).