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Comment: Cleanup Cost Liability for Oil Spills: Whether the FWPCA Alternative Remedies for Recovery of Cleanup Expenses

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COMMENT

CLEANUP COST LIABILITY FOR OIL SPILLS: WHETHER THE FWPCA PRECLUDES ALTERNATIVE REMEDIES FOR RECOVERY OF CLEANUP EXPENSES

I. THE FEDERAL WATER POLLUTION CONTROL ACT

The fundamental objective of the Federal Water Pollution Control Act (FWPCA) or (Act)[1] is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[2] To that end, Congress has established a national program for controlling the "spills" of oil and hazardous substances into navigable waters.[3] The policy to be implemented by the Act is codified by explicit declaration in the United States Code and is simple and direct:

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1. 33 U.S.C. §§ 1251-1376 (1982). The Federal Water Pollution Control Act, commonly referred to as the Clean Water Act, is in large measure the bill approved by Congress as the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, and amendments made in the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

2. 33 U.S.C. § 1251(a). In addition to oil spill provisions, the Act includes a permit program establishing national effluent limitations and water quality standards, and a grant program for publicly-owned treatment works (POTWs).

3. 33 U.S.C. § 1321. The first statute specifically dealing with oil discharges was the Oil Pollution Act of 1924, ch. 316, 43 Stat. 604 (formerly codified at 33 U.S.C. §§ 431-437, repealed in 1970). Although the 1924 legislation prohibited discharges into the national coastal waters, it was not until 1966 that the costs of the federal government's removal of the discharge were chargeable to the responsible vessel. Liability was limited to only those acts which were "grossly negligent" or "willful." Act of Nov. 3, 1966, Pub. L. No. 89-753, 80 Stat. 1252. A broad-based federal interest in pollution of the waters was demonstrated with the enactment of the Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155 (formerly codified at 33 U.S.C. § 466). It was amended in 1956, Act of July 9, 1956, ch. 518, 70 Stat. 498, and again in 1961, Act of July 20, 1961, Pub. L. No. 87-88, 75 Stat. 204. Water quality standards and planning were mandated by the Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (formerly codified at 33 U.S.C. § 466), and the 1966 amendments, Act of Nov. 3, 1966, Pub. L. No. 89-753, 80 Stat. 1246. The Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (formerly codified at 33 U.S.C. §§ 1161-1175, amended and codified at 33 U.S.C. §§ 1251-1376) was the first statute to include the prohibition against any discharge of oil. Pub. L. No. 91-224, 84 Stat. 92 (codified at 33 U.S.C. § 1321(b)(1)). The Federal Water Pollution Control Act Amendments of 1972 completely replaces the acts and amendments which pre-dated it. The 1970 Water Quality Improvement Act was, however, retained by transfer to the FWPCA. The Act of 1972 is generally considered to be a comprehensive statutory statement of federal water pollution policy and law. It is a remedial act in that it provides for removal of pollutants unlawfully discharged and establishes a scheme for distribution of liability between the parties responsible in fact and the federal government. 33 U.S.C. § 1321. *See supra* notes 1, 2.

> [t]here should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone . . . or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.[4]

Despite this absolute proscription, oil discharges do occur, and if the responsible party fails to provide for removal of the pollutant, the federal government must do so.

To encourage prevention of harmful discharges, the Act assigns liability for the costs of cleanup to the industry which generated the pollution. The FWPCA provides a specific statutory remedy for recovery of expenses, typically, from the owner or operator of the ship which expelled the oil.[5] Where the spill is attributable to willful negligence or willful misconduct within the privity and knowledge of the owner, the owner is liable for the full amount of actual cleanup costs.[6] This standard imposes an onerous burden of proof which in many cases would insulate the polluter from financial responsibility for the spill. The Act, however, compensates for this inadequacy in part; the owner is held liable for oil spill cleanup costs without regard to fault, but within statutory limits on the dollar amount which may not equal the full costs.[7] Where the facts of a particular incident show that the sole legal cause of the discharge is an act of God, an act of war, an act of negligence by the United States, or an act by a third party, the Act imposes no liability.[8]

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4. 33 U.S.C. § 1321(b)(1).

5. 33 U.S.C. § 1321(c)(1). The term "oil" includes hazardous substances.

6. 33 U.S.C. § 1321(b)(3), (f). The term "owner" includes the operator of a vessel. Willful negligence refers to "reckless disregard for the probable consequences of a voluntary act or omission." Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 614 (4th Cir. 1979).

7. 33 U.S.C. § 1321(f)(1). The government can recover the greater of $125 per gross ton or $125,000 against an inland oil barge, the greater of $150 per gross ton or $250,000 against a vessel carrying oil as cargo, and $150 per gross ton against any other vessel. Section 1321 also encompasses oil spills from on shore and offshore facilities. *See* 33 U.S.C. § 1321(f). Such spills are beyond the scope of this paper.

The limited liability provision is effectuated by 33 U.S.C. § 1321(p) which provides that vessels over 300 gross tons "establish and maintain . . . evidence of financial responsibility" up to the applicable limits. Financial responsibility may be established upon a showing of insurance coverage, surety bonds, or other evidence. 33 U.S.C. § 1321(p)(1).

8. The four exceptions are narrowly drawn. *See* Burgess v. M/V Tamano, 564 F.2d 964, 982 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978); United States v. LeBeouf Bros. Towing Co., 1978 A.M.C. 2195 (E.D. La. 1978); United States v. General Motors Corp., 403 F. Supp. 1151, 1157 (D. Conn. 1975).

The statutory liability might often provide less than the actual costs expended by the government in cleanup operations if the polluter in that instance is not guilty of willful wrongdoing.[9] Ultimately, it is the United States taxpayer, not those who caused the spill, who will pay the uncompensated portion of the federal cleanup bill. When a spill occurs through no legal fault of the polluter, this result appears just. A shipowner who causes an oil spill while acting reasonably under the circumstances should be expected to bear some, but not all, of the loss. This is not so if more than a mere causal connection can be proved between the shipowner and the spill.

The FWPCA's compensatory scheme addresses intent and strict liability, but does not address the negligence category of tort law. The possible grounds for tort liability are intent, negligence, and strict liability; each is a concept distinct from the other with an independent role in the law.[10] The question left open is whether the federal government can fully recover its cleanup costs in a negligence cause of action outside the Act. The courts have couched this as whether the FWPCA is the federal government's exclusive remedy and, in particular, whether the Act has displaced the traditional avenues used for recovery of expenses — maritime tort, nuisance, and the Refuse Act.[11]

II. ALTERNATIVE REMEDIES

A. Maritime Tort

Oil pollution is a tort for which damages may be awarded under general maritime law.[12] In *California v. S.S. Bournemouth*,[13] the

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9. *Steuart*, 596 F.2d 609, 614; *In re* Oswego Barge Corp., 1979 A.M.C. 333, 337-39 (N.D.N.Y. 1978); Note, *Oil Spills and Clean Up Bills: Federal Recovery of Oil Spill Clean Up Costs*, 93 HARV. L. REV. 1761 (1980).

10. W. PROSSER & W. KEETON, THE LAW OF TORTS § 7 (5th ed. 1984).

11. United States v. City of Redwood City, 640 F.2d 963, 970 (9th Cir. 1981); United States v. Dixie Carriers, Inc., 462 F. Supp. 1126 (E.D. La. 1978), *aff'd*, 627 F.2d 736 (5th Cir. 1980); United States v. M/V Big Sam, 454 F. Supp. 1144 (E.D. La. 1978), *rev'd*, 480 F. Supp. 290 (E.D. La. 1979); *In re* Steuart Transp. Co., 435 F. Supp. 798 (E.D. Va. 1977), *aff'd sub nom.*, Steuart Transp. Co. v. Allied Towing Co., 596 F.2d 609 (4th Cir. 1979); *In re* Oswego Barge Corp., 1979 A.M.C. 333; *See generally* Note, *Oil Spills and Clean Up Bills: Federal Recovery of Oil Spill Clean Up Costs*, 93 HARV. L. REV. 1761 (1980); Comment, *Federal Water Pollution Control Act—The Federal Government's Exclusive Remedy for Recoupment of Oil Spill Cleanup Costs*, 53 TUL. L. REV. 1421 (1979); Note, *The Federal Water Pollution Control Act: Is it Really an Exclusive Remedy?*, 21 WILLAMETTE L.J. 107 (1985).

12. *See, e.g., Burgess*, 564 F.2d 964 at 983; Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973); Maryland v. Amerada Hess Corp., 350 F. Supp. 1060, 1064-65 (D. Md. 1972); American Waterways Operators, Inc. v. Askew, 335 F. Supp. 1241 (M.D. Fla. 1971), *rev'd on*

California Department of Fish and Game filed a complaint in rem against a foreign polluting vessel to recover under maritime tort for damages to California's navigable waters. Explaining that the state could recover damages including cleanup costs, the court stated:

> Oil pollution of the nation's navigable waters by seagoing vessels both foreign and domestic is a serious and growing problem. The cost to the public, both directly in terms of damage to the water and indirectly of abatement is considerable. In cases where it can be proven that such damage to property does in fact occur, the governmental agencies charged with protecting the public interest have a right of recourse in rem against the offending vessel for damages to compensate for the loss.[14]

Ordinarily, negligence or intentional conduct must be shown as the actual cause of the pollution to be entitled to recovery under general maritime law.[15] Recovery under maritime tort is made more difficult by the Limitation of Shipowner's Liability Act.[16] This act provides the vessel owner the right to limit liability to the value of the vessel at the time of the loss or damage, provided that loss or damage did not occur due to negligence within his privity or knowledge.[17]

B. Nuisance

Federal and state governments may also recover damages for oil spills under the law of public nuisance.[18] The government must

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other grounds, 411 U.S. 325 (1973); California v. S.S. Bournemouth, 307 F. Supp. 922, 926-27 (S.D. Cal. 1969). *See also In re* New Jersey Barging Corp., 168 F. Supp. 925 (S.D.N.Y. 1958).

13. 307 F. Supp. 922 (S.D. Cal. 1969).

14. *Id.* at 929.

15. Some courts have permitted recovery based on a mere showing of the unseaworthiness of a polluting vessel. *See* The Ocean Eagle, 1974 A.M.C. 1629, 1655 (D.P.R. 1974). *But see Amerada Hess*, 350 F. Supp. at 1070-71 (showing of unseaworthiness is not a basis for recovery under general maritime tort law in oil pollution suit).

16. 46 U.S.C. §§ 181-96 (1982).

17. 46 U.S.C. § 183 (1982). Responsibility for damages that result from the vessel owner's participation, or from a condition which he knew about, will not be avoided through the Limitation of Shipowner's Liability Act. However, under the FWPCA, the vessel owner will be able to avoid responsibility for damages that result from his participation or with his knowledge, so long as the tortious conduct was not wanton or willful. The FWPCA, therefore, provides a stronger shield from liability than the Limitation of Shipowner's Liability Act.

18. *See* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (the application of federal com-

show that the oil spill unreasonably interferes with a right common to the general public. Contrary to negligence, nuisance refers to the interests invaded or the damage done, not to any particular type of action. Recovery in nuisance does not require proof of negligence. Rather, negligence is merely one type of conduct which may give rise to nuisance.[19] In other words, liability for nuisance may rest upon an intentional invasion of the plaintiff's interests or upon conduct which is abnormally hazardous (that is, conduct within the principle of strict liability).[20]

The Limitation of Shipowner's Liability Act applies equally to nuisance and maritime tort actions. However, a nuisance action may suffer from an infirmity not present in maritime tort. Some courts have held that a nuisance must involve a continuing or recurring activity and have found that an oil spill is not such an activity.[21] Dean Prosser, however, instructs that "the duration or recurrence of the interference is merely one—and not necessarily a conclusive—factor in determining whether the damage is so substantial as to amount to nuisance."[22]

C. *Refuse Act*

The Refuse Act[23] prohibits the dumping of refuse into the navigable waters of the United States and the deposit of "material of any kind" on the banks of any navigable waterway where it might be washed into the water. The Refuse Act does not explicitly provide for recovery of cleanup costs, but in *Wyandotte Transportation Co. v. United States*, the Act was held to authorize civil relief for damages in pollution cases.[24] In the oil spill context, the culpability required to constitute a violation of the Refuse Act is the mere discharge of oil into a navigable waterway without the per-

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mon law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act); State *ex rel.* Wear v. Springfield Gas & Elec. Co., 204 S.W. 942 (Mo. App. 1918) (when pollution kills the fish in a body of water used by the public, an interference with a public right occurs, and the action becomes a public nuisance).

19. *See generally* Village of Wilsonville v. SCA Services, Inc., 426 N.E.2d 824 (Ill. 1981); W. PROSSER & W. KEETON, *supra* note 10 §§ 87-91.

20. W. PROSSER & W. KEETON, *supra* note 10, at § 91.

21. *See Amerada Hess*, 350 F. Supp. 1060, 1069; *But see In re Oswego Barge Corp.*, 439 F. Supp. 312, 322 (oil spill is by its very nature continuous and recurring).

22. W. PROSSER, LAW OF TORTS § 87 (4th ed. 1971).

23. 33 U.S.C. § 407 (1982). The Act provides that it is unlawful to discharge refuse other than sewage into United States navigable waters without a permit. *See* United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655 (1973).

24. 389 U.S. 191 (1967).

mission of the Secretary of the Army.[25] Liability under the Refuse Act is absolute; there are no exonerating circumstances and there is no limit on the amount recoverable.

III. THE FWPCA AS THE "EXCLUSIVE" FEDERAL REMEDY

The two earliest court decisions regarding the "exclusivity" of the FWPCA found that while "the statute is not a model of clarity,"[26] it is the federal government's exclusive remedy for oil pollution cleanup costs.[27] Both have been almost unanimously embraced by subsequent "exclusivity" decisions.

United States v. Dixie Carriers, Inc.[28] was the initial case to consider whether the FWPCA precluded the federal government from recovering its cleanup costs under the three alternative theories discussed above. In mid-1974, approximately 1,265,000 gallons of oil spilled into the Mississippi River. The tugboat that caused the spill ceased its cleanup operations at the point where it had incurred financial expenses equivalent to the limited liability provided under the FWPCA as in effect at the time.[29] The Coast Guard finished the cleanup operations at an expense to the United States of approximately $954,000. In its claim against the tug for the $954,000 outlay, the United States asserted that the Act's limit on liability did not interfere with the traditional common law and statutory rights of recovery including maritime tort, nuisance, and liability under the Refuse Act. The Fifth Circuit looked to the language of the Act, in particular, to the section which provides that the discharger of oil "in violation of subsection (b)(3) of this section shall, *notwithstanding any other provision of law*, be liable to the United States government for the actual costs" of removal up to the FWPCA limits.[30] It concluded that the language was so ambiguous that the court could not glean the plain meaning of the statute. Hence, the court reviewed legislative history in search of the Act's congressional intent. The court noted that the Senate and the House had been embroiled in a debate concerning the degree of fault and the amount of liability which the Act would address. The House proposed limited liability in the event of a willful

25. *See* United States v. Standard Oil Co., 384 U.S. 224 (1966).

26. Tug Ocean Prince v. United States, 584 F.2d 1151, 1162 (2d Cir. 1978).

27. United States v. Dixie Carriers, 462 F. Supp. 1126 (E.D. La. 1978), *aff'd*, 627 F.2d 736 (5th Cir. 1980).

28. *Id.*

29. *Id.* at 737.

30. *Id.* at 739; 33 U.S.C. § 1321(f)(i) (emphasis supplied).

or negligent discharge; the Senate proposed full liability in the event of ordinary negligence. The compromise provision created a strict limited liability scheme and approved unlimited liability when willful negligence is proven.[31]

The court concluded the legislative balancing of interests resulted in unlimited liability in a narrow range of circumstances, with limited liability in almost *all* other circumstances. The court apparently believed that full liability for willful misbehavior was traded for limited liability in all other instances.[32] But, in fact, the limited liability provision merely relieved the government of its burden of proving negligence. In other words, the legislative compromise was a trade-off between proof of negligence and unlimited liability.[33]

One year later, the Fourth Circuit in *Steuart Transportation Co. v. Allied Towing Corp.*,[34] followed the suspect logic of *Dixie* by holding the FWPCA to be the exclusive federal cleanup cost remedy. In early 1976, the federal government spent $480,000 to remove an oil spill caused by the negligence of a barge owner, Steuart, in the Chesapeake Bay. At the direction of the Coast Guard, Steuart spent $40,000 in preliminary containment operations, and the State of Virginia spent $41,000 in cleanup costs.[35] The district court found that Steuart was not willfully negligent within the meaning of the Act and therefore limited Steuart's liability to about $123,000, leaving approximately $360,000 to be paid by the United States.[36]

The Fourth Circuit affirmed the district court's denial of traditional maritime tort, nuisance, and Refuse Act claims, holding that the FWPCA afforded the government its exclusive remedy for recovery of costs incurred by the federal government in removing oil pollution.[37] In reaching its decision, the court grappled with the meaning of the "notwithstanding any other provision of law"

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31. 627 F.2d 739-42.

32. *Id.*

33. Testimony by representatives of the shipping and maritime insurance communities apparently convinced Congress that unlimited liability was not insurable. Whether that premise was sound is debatable. Protection and Indemnity Clubs offer marine insurance in amounts of $300 million and the extra cost of this increased coverage is nominal. Smets, *The Oil Ship Risk: Economic Assessment and Compensation Limit*, 14 J. MAR. L. & COM. 23, 33 (1983).

34. 596 F.2d 609 (4th Cir. 1979).

35. *Id.* at 612.

36. *Id.* at 614.

37. *Id.* at 618.

phrase and, like the Fifth Circuit in *Dixie*, found its meaning insusceptible of definitive interpretation.[38] The *Steuart* court embraced the theory of legislative compromise set forth in *Dixie* and added to that the underlying policy for exclusivity: "[a]llowing federal removal cost recoveries beyond the Pollution Act's limitation would have economic consequences for oil carriers significantly different from those envisioned by Congress."[39] For a variety of reasons, it is unsettling that judicial rationale for denying traditional federal government remedies is a concern for the economic consequences to oil carriers.

The FWPCA is a remedial statute. Its fundamental objective is to eradicate water pollution.[40] This does not mean that economic consideration to the oil industry cannot be taken into account. However, those interests should not be balanced or weighed equally against the benefits of pollution removal. Subsidizing oil carriers by limiting their liability removes the economic incentive to improve safety procedures, thereby increasing the probability that more oil will be spilled. Limited liability also makes it less likely that the shipowner will remove the oil, especially in light of the *Steuart* court's holding that containment expenditures beyond the statutory limit of liability are not subject to reimbursement.[41]

The problem with basing the "exclusivity" decision on economic concerns is revealed in the very opinion that articulates this rationale. The *Steuart* opinion considers state recovery and holds that the FWPCA is not the *state's* exclusive remedy: "[C]ongress did not hobble the states by subjecting their claims for removal costs to the limitation in the Pollution Act."[42] In *Steuart*, Virginia was entitled to sue Steuart under a state statute that imposed unlim-

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38. *Id.* at 615.

39. *Id.* at 618. The Senate Report revealed that the factors which were considered in determining the type of liability in the act included:

> (1) the effect of too rigid a liability test on maritime commerce; (2) the availability of insurance for any specific amount or type of liability; (3) the economic impact of any specific amount of liability on the owner of the vessel, the shipper of the oil and the consumer; and (4) the impact of a burdensome liability test on the U.S. Government and the people of the United States.

Id. at 617.

40. 33 U.S.C. § 1251(a).

41. 596 F.2d at 619. An exclusive FWPCA limits a vessel owner's or operator's liability to just a fraction of the actual cleanup costs that owners or operators may incur in assisting in the cleanup of an oil spill. These costs cannot be offset or reduced against the owner's or operator's liability to the federal government for costs under the FWPCA. Therefore, the vessel owner would make an unwise economic decision to clean up the vessel's spill.

42. *Id.* at 620.

ited liability without fault on shipowners responsible for oil pollution. In other words, a state can recover one hundred percent of its costs without proving negligence, while the federal government can recover only a small portion of its costs even if it were able to prove negligence.[43] Obviously, whether an oil carrier's payment of the entire costs of cleanup is made to the federal government or to the state, the economic consequences to the carrier are the same. In light of the *Steuart* holding that the states are not limited to the Act's compensatory scheme,[44] two observations may be made: limiting the federal government's remedies will not insulate the oil carrier from unlimited liability; and the federal government should hand the responsibility for all oil spill removal to the states.

Concern for the economic survival of oil carriers as a premise for the "exclusivity" decision is weak. Oil carriers are business enterprises capable of both insuring against risk[45] and spreading the risk of loss. Defendants in oil spill cases are usually commercial enterprises which by means of insurance or price adjustment are best able to distribute to the public at large the risks and losses which occasion oil transport.[46]

Legal commentators, unhappy with *Dixie*, *Steuart* and their progeny, find fault with the courts' adherence to the notion that "notwithstanding any other provision of law" is a phrase too ambiguous to be applied.[47] Arguably, the most persuasive interpretation of this clause it that its language precludes other provisions of law from limiting liability for cleanup costs incurred *under* the FWPCA. Congress did not intend to exclude remedies outside the Act; rather, it intended that regardless of other remedies or limitations, a shipowner would be liable up to the Act's cap on financial

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43. *See* Askew v. American Waterways Operators, 411 U.S. 325 (1973) (states may impose strict no fault liability on a discharging vessel).

44. 596 F.2d at 620.

45. *See supra* note 33 and accompanying text.

46. This premise for shifting the burden of loss to the defendant in an oil spill may not satisfy those who logically argue that the federal government can also spread the loss to the public at large through the taxing mechanism. Although plausible, this argument fails to respond to the public policy concerns for efficiency which is of primary concern in the allocation of loss. *See* W. Prosser, *supra* note 22, § 4.

47. Some of the various judicial interpretations of the "notwithstanding any other provision of law" clause are that: (1) the Act acknowledges that other laws exist upon which the government can base a claim for reimbursement for cleanup expenses; (2) the remedial scheme provided in § 1321(f)(1) is exclusive; (3) the liability provision in the statute should not be further limited by other laws, such as the Limitation of Liability Act of 1951; and (4) the laws which create liability outside of the Act are replaced by the FWPCA. The first three of these can be found in *Dixie*, the fourth is propounded in *Steuart*.

responsibility. In other words, remedies outside the Act are not eliminated, but are merely precluded from interfering with the operation of the FWPCA.[48] Although this is an intelligent and plausible interpretation of the "notwithstanding" phrase, the unfaltering position of the judiciary indicates a federal district and circuit court system unlikely to revisit this issue.

A more convincing argument for overturning the *Steuart* line of cases is found in the interpretation of the general saving provision of the Act, which provides that the Act "shall not be construed as . . . limiting the authority or functions of any officer or agency of the United States under any other law . . . not inconsistent with this chapter."[49] Accordingly, federal recovery of cleanup costs under the Refuse Act and theories of maritime tort and the federal common law of nuisance cannot survive if inconsistent with the provisions of the FWPCA. The FWPCA and the Refuse Act both allow recovery on a strict liability basis. The FWPCA, however, places a limit on the amount recoverable, while the Refuse Act does not. Liability under the Refuse Act is absolute; there are not exonerating circumstances such as those provided by the FWPCA.[50] The Refuse Act therefore, is inconsistent with the FWPCA and, in accordance with *Steuart* and its progeny, should be precluded by the Act.

However, the court in *Steuart*, also found the remedies of maritime tort and common law nuisance were inconsistent with the liability and limitation standards prescribed in the Act: "[I]f the government could secure unlimited cost recoveries against a shipowner guilty of neither willful negligence nor willful misconduct, the limitation found in § 1321(f)(1) would be nullified."[51] This conclusion is in error because it is contrary to the basic three-tier tort liability division explained by Prosser.[52] The limitation found in section 1321(f)(1) applies to strict liability torts only. Willful negligence applies to intentional torts. Thus, it is clear that torts in negligence are not addressed by the Act and, therefore, a remedy which has negligence as its gravamen cannot be inconsistent with the Act.

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48. *See* Note, *Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs*, 93 HARV. L. REV. 1761, 1772-73 (1980); Note, *The Federal Water Pollution Control Act: Is it Really an Exclusive Remedy?*, 21 WILLAMETTE L.J. 107, 112-13 (1985).

49. 33 U.S.C. § 1371(a)(1) (1982).

50. *See supra* notes 25, 26.

51. *See Steuart*, 596 F.2d at 618.

52. *See supra* note 10.

Maritime tort is such a remedy.[53]

Nuisance, however, may or may not be inconsistent with the FWPCA. Because an action in nuisance can be proved without showing a defendant's negligence, there is a potential for conflict with the Act. If the government brings a nuisance action based on a theory of abnormal activity or another strict liability theory, it could conceivably recover unlimited damages without proving fault. This result runs afoul of the Act's trade-off between strict and unlimited liability. An action brought in nuisance which avers negligence on the part of the defendant, like maritime tort, would not offend the Act.

Although the Limitation of Shipowner's Liability Act in certain instances may render meaningless an action in maritime tort or nuisance,[54] this is not necessarily the case. It is entirely possible that the value of the vessel and the pending freight will exceed the amount recoverable under the FWPCA. The maritime tort and nuisance suits in this instance would provide greater recovery to the federal government than the FWPCA. Moreover, the Limitation of Shipowner's Liability Act is inapplicable when the negligent acts are within the privity and knowledge of the shipowner.[55] It is very possible that under a maritime tort or nuisance suit the federal government would recover its entire cleanup expense.

The Ninth Circuit, recently addressed the exclusionary issue in the FWPCA cleanup provision and ostensibly rejected the holdings of *Dixie* and *Steuart*. In *United States v. City of Redwood City*,[56] the defendants were third-party nondischargers. The court, therefore, relied on the express provision in the Act permitting recovery against third parties outside the Act[57] and stated that the statute undermined the holding in *Dixie* and *Steuart*.[58] Because *Dixie* and *Steuart* both held that the FWPCA is the government's exclusive remedy against a *first-party discharging vessel*, the impact of the

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53. *See supra* notes 12-14 and accompanying text.

54. *See In re* Baracuda Tanker Corp., 409 F.2d 1013 (2d Cir. 1969) (Under the Limitation of Shipowner's Liability Act § 3, 46 U.S.C. § 183, the owner of the Torrey Canyon argued that his liability for the $15 million in claims and damages were limited to $50 for the value of his vessel after the accident).

55. 46 U.S.C. §§ 181-196 (1982).

56. 640 F.2d 963 (9th Cir. 1981).

57. 33 U.S.C. § 1321(h) provides that "the liabilities established by this section shall in no way affect any rights which . . . (2) the United 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 substance."

58. 640 F.2d at 970.

court's deviation is questionable. The court failed to draw a distinction between cleanup costs and damages, broadly stating that the "United States possessed the right to seek *damages* under a maritime tort or nuisance theory."[59]

The court also stated that "the damages sought here are not in excess of the limitation provided in the FWPCA,"[60] leaving the result uncertain if the damages sought were in excess of the limitation. Thus, *Redwood City* is only a small step toward squelching the *Dixie-Steuart* line of cases. However, the conflict this decision creates among the circuits makes this issue appropriate for consideration by the Supreme Court.

IV. CONCLUSION

The Federal Water Pollution Control Act sets forth a scheme for recovery of oil spill removal costs by providing for limited liability when the polluter is without fault and unlimited liability when the government establishes that the polluter is willfully at fault. The Act is silent when the spill results from ordinary negligence. Frequently, the amount recoverable under the strict liability provision falls short of compensating the federal government for cleanup costs. The federal government has attempted to recover the balance of its costs through claims under the Refuse Act, maritime tort, and nuisance. The courts have usually denied these remedies, holding that the Act is an exclusive federal remedy.

Theories of recovery that are based upon proof of the degree of culpability prescribed in the Act, but permit different forms of recovery, are inconsistent with the FWPCA and should be disallowed. But theories which require a degree of culpability not provided for by the Act are not in conflict with it and should be allowed. Recovery under the Refuse Act is inconsistent with the FWPCA. While recovery under nuisance may be inconsistent, this is not the case using maritime tort as a theory for recovery. Recovery by the federal government under maritime tort for cleanup expenses caused by negligent shipowners will further the fundamental objective of the Act. Moreover, the potential for assessment of full costs against a polluting carrier is at the very least an incentive

59. *Id.* (emphasis supplied). The government sought recovery for both the cleanup expense caused by the spilled oil and the expense for removal of the sunken vessel.

60. *Id.*

to use reasonable care, which in turn means fewer oil spills and cleaner water.

Jaimie Ross