

# LEGAL RESPONSE TO CATASTROPHIC SPILLS: A STEP-BY-STEP GUIDE FOR CORPORATE COUNSEL, SENIOR MANAGEMENT AND ENVIRONMENTAL ENGINEERS

By Kenneth A. Rubin, Ralph N. Albright, Jr.,  
David M. Hibey, and Brian M. Privor

## INTRODUCTION

Until September 11, 2001, the worst case scenarios for an environmental release were the Union Carbide pesticide plant explosion in India, and the *Exxon Valdez* oil spill. The impact of those two releases was so great, and so unexpected, that each event triggered a new law: the Emergency Planning and Community Right to Know Act (EPCRA) (1986), and The Oil Pollution Act (OPA) (1990). Section 112(r) of the Clean Air Act (CAA), added by the Amendments of 1990, is another provision related to the Union Carbide event. Section 112(r), as implemented by EPA at 40 C.F.R. § 68, calls for Risk Management Plans (RMPs). RMPs require identification of potential worst-case risks from a release, planning to prevent such a release, and implementation of a program to immediately contain and respond to any release.

As we go to press with this *Deskbook*, Congress is considering a range of new laws to deal with terrorist threats – especially with respect to chemical plants and drinking water suppliers. A strange twist has been added by September 11. Congress has decided that much of the chemical risk information it wanted industry to identify under the CAA, and to make available to the public under the EPCRA, should not now be available to the general public. The purpose is to deny access to this information by terrorists who

might use it to cause the types of catastrophic releases these laws were intended to prevent.

Morgan Lewis attorneys have first-hand experience in assisting several major corporations in the first hours of responding to a spill, as well as in their representation before many different federal and state agencies and federal and state courts. This article draws on our experience and discusses the matrix of environmental laws and rules and regulatory agencies that industry executives and corporate environmental lawyers must be prepared to deal with immediately following a catastrophic spill. While many of our readers have familiarity with the U.S. EPA and its state counterparts, it is rare for most environmental practitioners to come into contact with the National Transportation Safety Board (NTSB), the Office of Pipeline Safety (OPS), the Coast Guard, the National Oceanic and Atmospheric Administration (NOAA) and the Fish & Wildlife Service. This article will acquaint the reader with each of these agencies, their authorities and roles in responding to spills, and what they can and cannot require a company to do. We offer tips on how to avoid unnecessary problems (e.g., the best way to report the quantity of a spill), and on ways to improve responses to a spill (e.g., by planning ahead).

Class action litigation often accompanies a major spill. Our 2000 *Environmental Deskbook* featured an in-depth article on defending class

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\* Kenneth A. Rubin is a partner in the Washington office of Morgan, Lewis & Bockius LLP and a member of the Tort, Environmental and Construction Practice. Ralph N. Albright, Jr. is a partner in the Washington office and a member of the Complex Litigation Practice with experience in defending class actions arising from catastrophic spills. Brian M. Privor and David M. Hibey are associates in the Litigation Practice. Their biographies appear elsewhere in this *Deskbook*.

actions, and it is available on our web site at <http://www.envinfo.com>. In this article we suggest how to use a mechanism in the OPA to minimize the possibility that a court would certify a class action.

## EMERGENCY PHASE – IMMEDIATE ACTIONS

### *Step One – Report the Spill Immediately, Both to the Government and Your Internal Corporate Emergency Response Leadership Team*

**To Report Oil and Hazardous Chemical Spills, Call the National Response Center at 1-800-424-8802.**

#### **When To Report: Immediately**

Reporting requirements arise under several different environmental laws. While the substances regulated and the quantities that trigger a reporting requirement differ by regulatory program, there is one fundamental and important common theme: The person or organization responsible for a release or spill must notify the federal government immediately upon becoming aware that a release exceeds the designated reportable quantity (RQ). All that is required is a single telephone call to the National Response Center (NRC) using the above toll-free number. States also have reporting requirements. The NRC may be able to identify the state and local agencies that must also be notified.

Do not delay in making the initial call to the NRC. EPA takes the position that the report must be made immediately. The courts have sided with EPA that even a 15-minute delay in reporting might be considered unlawfully late, subjecting the reporter to significant penalties for a late report.

#### **Which Substances Must Be Reported?**

For oil, the reportable quantity is extremely small – just a small spill that causes a sheen upon the surface of a regulated waterway. The courts have determined that just a few drops of oil can trigger this reporting requirement. For releases of hazardous substances, identifying the events that trigger a reporting requirement is far more complex, and varies by statute, rule, agency, and substance.

Because this article focuses on catastrophic releases, it discusses large spill events and assumes a large quantity; therefore it does not discuss reportable quantities in detail.

Under EPCRA, the federal government has designated several hundred substances as “extremely hazardous substances” based on their acute lethal toxicity. Releases of these extremely hazardous substances trigger reporting requirements to state and local authorities. Specifically, EPA requires that the owner or operator of a facility that releases an extremely hazardous substance in an amount greater than its established RQ notify the State Emergency Response Commission (SERC) and the Local Emergency Planning Committee (LEPC) established for the location where the incident occurs.

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), EPA has established RQs for roughly 800 Superfund substances. RQs are adjusted to one of five levels: 1, 10, 100, 1,000, or 5,000 pounds. Additional substances and trigger events are set under the Clean Water Act (CWA) and CAA.

EPA made the entire process much easier in the Fall of 2001 when it published and made available on the web its **Consolidated List of Lists** ([www.epa.gov/ceppo/ap-otgu.htm](http://www.epa.gov/ceppo/ap-otgu.htm)).

#### **What To Report**

The NRC is staffed 24 hours a day by U.S. Coast Guard personnel, who will ask you to provide as much information about the incident as possible, including:

- Your name, location, organization, and telephone number.
- Name and address of the party responsible for the incident
- Date and time of the incident.
- Location of the incident.
- Source and cause of the release or spill.
- Types of material(s) released or spilled.
- Quantity of materials released or spilled. (If you do not know the quantity, provide a range from an estimated low to a potential high, and call back when you have more accurate information. If in doubt, it might be prudent to report the highest amount possible, so that you are not later charged with under-reporting.)
- Media (e.g., land, water) affected by release or spill.
- Danger or threat posed by the release or spill.
- Impacts on the environment and people
- Number and types of injuries or fatalities (if any).
- Weather conditions at the incident location
- Remedial actions taken to control and/or mitigate the effects of the release.
- Where relevant, the name of the carrier or vessel, the railcar/truck number, or other identifying information.
- Whether an evacuation has occurred.
- Other agencies notified or about to be notified.

- Any other information that may help emergency personnel respond to the incident.

A report of a release of an extremely hazardous substance should be made to the SERC or the LEPC established for the location where the incident occurred. To identify the appropriate SERC and LEPC, contact the EPCRA Hotline at 1-800-535-0202. The best time to identify these phone numbers is now – write them down in the blanks here and do not wait until an emergency event.

Each agency will ask you to follow up with a written report with more detailed information. Indeed, in the event of a large spill, there will be numerous subsequent reports. Be prepared to turn over several years' worth of inspection and maintenance records, operating manuals, consultants' reports, and e-mails.

Any spill response plan should identify specific employees tasked with calling in a spill to the NRC. Reporters should be aware that reports to the NRC are tape-recorded, so these

calls provide an excellent historical resource for investigators. Reporters who call NRC should take great care to identify clearly what kind of facility released the spill because NRC uses facility-specific call-lists to inform federal agencies based on whether the product has leaked from a fixed facility or pipeline. For example, the NTSB is notified immediately if a spill is from a pipeline but not if from a fixed facility. Therefore, it is

### Spill Reporting Whom to Call

Regulatory Agency Phone Numbers:

National Response Center  
1.800.424.8802  
State \_\_\_\_\_

Local Emergency Response Center \_\_\_\_\_

Fire Department \_\_\_\_\_

Police Department \_\_\_\_\_

Department of Transportation \_\_\_\_\_

Morgan Lewis Response Team Leader Members:

John Quarles	202.739.5150
Ken Rubin	202.739.5140
Mark Srere	202.739.5049
Charles Swinburn	202.739.5369
Eric B. Rothenberg	212.309.6371
Randy Visser	213.612.2632
Jeff Hurwitz	215.963.5700
John McAleese	215.963.5094

particularly important that reporters clearly identify for the NRC what kind of facility released the spill.

Morgan Lewis attorneys are the authors of the 1,500-page comprehensive *Environmental Spill Reporting Handbook*, published by the West Group, and updated annually. For more details on how to obtain the *Spill Reporting Handbook*, call Ken Rubin.

**TIP:** Now is the time to identify all regulatory agencies, and their phone numbers, to whom you might have to make an immediate phone call in an emergency.

Simultaneously with the reports to the NRC and other governmental agencies, key personnel within the company should be notified, in particular the Emergency Response Coordinator identified in previous filings with the EPA and the Qualified Individual who is responsible for taking the lead to meet Department of Transportation (DOT) requirements.

Depending on the magnitude of the spill, more senior corporate officials should be notified, along with the legal department and the public relations department. The top corporate coordinators should have a good working relationship with government emergency on-scene coordinators (OCSs), to ensure that communications can be established quickly and effectively during the immediate response to a major spill. A corporate **command post** and **incident command structure**, in accordance with previously prepared plans, should be quickly established at or in the vicinity of the spill.

### ***Step Two – Sound the Community Alarm***

As appropriate, and without waiting for all the phone calls in Step One to be completed if immediate notification is essential, alert the surrounding community to a release that might impact it. Facilities handling hazardous substances

that could quickly travel through the air to adjacent communities should have a system in place to alert neighbors and, if needed, to evacuate them. This might include a system of sirens, warning lights, automated phone calls and other techniques for rapid alerts.

Personal visits to impacted residences and businesses may be warranted. If not already done under Step One, notify the local emergency response governmental units, including the police and fire departments.

**TIP:** Now is the time to prepare a complete inventory of all substances at your facility that are subject to reporting requirements, noting the reportable trigger quantity for each substance, so that you can quickly determine if a report is needed when you first become aware of a release.

### ***Step Three – Alert the Cleanup Response Teams***

Pursuant to the various emergency response plans that have been prepared, the following should be called upon to contain the release, mitigate its impact, and commence the long-term cleanup:

- Internal company employees – both from the impacted site, and from other locations;
- Contractors – independent cleanup firms. Ideally, contracts or other arrangements are in place for skilled contractors, familiar with the company's operations, who can quickly bring the needed personnel and equipment to the location.

### ***Step Four – Alert Downstream Users, in Particular Drinking Water Utilities***

For spills to waterways, be certain to alert anyone using the waterway who might be adversely affected by the spill. Procedures should be in place to identify any drinking water intake that might be affected from a spill from your plant, so that the downstream user can be alerted before it draws any contaminated water into its system. Drinking water plants warrant special attention.

### ***Step Five – Alert Medical Authorities***

If needed, alert doctors and hospitals to the particular hazards of the substances released and inform them of recommended treatments.

### ***Step Six – Commence Wildlife Protection Program***

Procedures should be in place to quickly isolate and rescue wildlife from the contamination. Impacted animals should be cleaned under the supervision of appropriate personnel. The U.S. Fish & Wildlife Service and its state equivalents may actively participate in this process and will seek documentation of the numbers of injured wildlife.

### ***Step Seven – Mobilize Non-Emergency Employees for Special Assistance Projects As Permitted by Health and Safety Plans***

Be prepared to comply with the Occupational Safety and Health Administration's (OSHA) Hazardous Waste Operations and Emergency Response Rules (HAZWOPER) (29 CFR § 1910.120). OSHA inspections may follow a major spill event. This is particularly true where an employee fatality or the hospitalization of three or more employees necessitates reporting the incident to OSHA.

The EPA is absolutely rigid in requiring that all personnel involved in a cleanup meet the minimum training requirements in the OSHA rules. This has led to paradoxical results. In one situation where a major corporation responsible for an oil spill had thousands of available employees ready and willing to begin cleanup to contain the spill in the first hours after a leak was detected, when they could have done the most good to prevent the spread of the oil before more highly trained teams of outside contractors could arrive at the scene, EPA would not allow these "initial responders" to participate until they had undergone at least several days of training. Most of OSHA HAZWOPER training is irrelevant to what they would have done in an oil cleanup. Nonetheless, EPA's rigid insistence on full compliance with the OSHA rules should be anticipated.

If you have a large group of employees that could assist with an emergency cleanup who do not have the OSHA training, consider giving them that training now. It is often too late to train and make immediate use of them after a spill occurs.

Dennis Morikawa heads our OSHA group within the firm and can provide you with all the details on satisfying these OSHA rules. In brief, initial responders must be medically fit, use personal protective equipment, and have received an initial 24 hours of training in several subjects relevant to containment activities, including the following:

- proper use of personal protective gear
- understanding the basic hazards of the materials they will be handling
- knowing how to perform basic containment operations

### ***Step Eight – Notify Insurers***

## ***Step Nine – Notify Your Public Relations Department***

An overall spokesman for the company is needed. For a catastrophic spill, the CEO should be prepared to communicate directly with the public. Send out communications to the neighbors and community. Be prepared for television cameras and newspaper reporters to show up at the front door. Remember that the press is not the enemy – important information can be delivered quickly to the community by working in cooperation with local TV, radio and newspaper reporters.

### **EMERGENCY PHASE – LEGAL ISSUES AND CONSIDERATIONS**

#### **The Federal Government**

Numerous federal agencies are alerted by the NRC. How they respond, and their roles, will vary depending on these key factors: The characteristics of the substance and quantity of the release; the location of the release (in particular whether it is on land or impacting only a minor inland waterway, or impacting a major navigable waterway); and whether the release is attributable to an interstate pipeline subject to the jurisdiction of the Office of Pipeline Safety within the DOT.

The federal agencies are required to coordinate their response pursuant to the National Contingency Plan (NCP, 40 C.F.R. part 300), related Regional Contingency Response Plans, and a large number of other interagency agreements, memoranda of understanding, and other documentation not readily available to the regulated community. In general the key agencies, and their roles, are as follows:

#### ***EPA***

The EPA is heavily involved in every spill event. Except for spills out in major water bodies where the Coast Guard takes the initial lead, someone from EPA will be designated the OSC, usually the EPA regional office. The OSC essentially becomes the director of the cleanup, coordinating all the regulatory agencies and ordering the Responsible Party (RP) how to respond. The OSC is authorized to issue Administrative Orders under various statutes, in particular the OPA, the CWA, and CERCLA, directing the RPs to undertake immediate actions to contain, mitigate and clean up the spill. EPA investigators, sometimes including special criminal agents, may arrive at the scene to gather facts about the spill.

The EPA is likely to issue to the RPs an Emergency Removal/Response Administrative order pursuant to section 311( c) of the CWA, 33 U.S.C. § 1321(c). If oil is involved, the caption will add, “ as amended by the Oil Pollution Act of 1990, 33 U.S.C. § 2701, et seq.” These orders will include the first – but not the last – notification of potential penalties. A typical order includes the following language:

Violation of any term of this Order or oral direction from the EPA OSC may subject Respondent to an administrative penalty of up to \$ 27,500 per day of violation or an amount up to three times the costs incurred of the Oil Spill Liability Trust Fund as a result of failure to perform such response action. . . .

It is beyond the scope of this article to address the many reasons why this can be outrageous, but one should consider how many “oral directions” might issue during an emergency and how little justification might exist for such directions in certain circumstances, especially early in the response when some of the key facts are unknown.

The first Emergency Order may be followed a few days or weeks later by a more comprehensive order that will include “Findings of Fact” leading to a conclusion that, under various statutes, EPA has full jurisdiction and authority to compel the RP to conduct the actions ordered by EPA and imposing detailed requirements for the long term cleanup and restoration of the impacted environment. This long-term order is likely to include some or all of the following requirements:

- Notification to EPA of the lead contractor responsible for the cleanup; be prepared to hire someone else if EPA vetoes this person.
- Submission of highly detailed long-term Response Action Plan, which is subject to EPA review and EPA requests for revision and additional work.
- Submission to EPA of every conceivable document relating to the spill, including its cause, all SPCC and Facility Response Plans, maintenance records, employee training records, manifests, etc.
- Consent to giving EPA access to the RP’s property.

However, it is not entirely one-sided. EPA does acknowledge that an RP “may withhold those records and documents covered by any privilege or protection recognized under federal law and applied by federal courts. . . .”

In a large spill impacting a considerable length of shoreline, EPA will organize Shoreline Cleanup Assessment Teams (SCATs). These SCATs consist of several people from a variety of federal, state and local agencies. They divide the coastline into segments and classify them by relative degrees of impact. Throughout the cleanup process the SCATs make the key determinations about whether the cleanup of a particular segment has met EPA’s standards.

## ***The Coast Guard***

A part of the U.S. Department of Transportation, the Coast Guard’s functions have evolved and increased over time from keeping the navigable waters open to navigation to issuing tickets and imposing fines for smaller oil spills and directing the cleanup of major spills impacting major waterways. In an oil spill, pursuant to the Oil Pollution Act, the Coast Guard will notify the RP of its obligation to pay for removal costs and private damages, and work with the RP to prepare an advertisement alerting affected parties how to present their claims to the RP for payment. This claims procedure is discussed in more detail below.

Region by region, the EPA and the Coast Guard have mapped out their respective lead roles for various segments of waterways. Sometimes these plans are forgotten in the urgent response to a major spill, especially one that might cross the imaginary boundaries between an inland water subject to EPA’s exclusive jurisdiction to one where the Coast Guard has the lead.

The FBI, at the invitation of EPA, or sometimes at the direction of the local U.S. Attorney, may arrive at the scene to gather facts about the spill. The special issues relating to such an investigation are addressed in Step Nine, below.

## ***Office of Pipeline Safety and the National Transportation Board***

In the wake of a catastrophic environmental accident involving a natural gas or oil pipeline, federal investigators from the NTSB and the Department of Transportation, OPS will arrive on the scene of the spill and initiate their respective investigations. Although both agencies will be investigating most of the same facts, each agency has its own investigatory mandate. The NTSB’s professed mission is “to prevent future transportation accidents from occurring.” Thus, investigators from the NTSB investigate transportation accidents, determine probable cause,

and set forth recommendations to prevent similar accidents from occurring again. OPS, on the other hand, assumes an enforcement role.

Following a pipeline accident, OPS investigates whether the pipeline operator's practices have conformed with pipeline regulations, laws or rules. If OPS investigators believe a pipeline remains unsafe following a spill, it may issue a corrective action order. OPS investigators may also conclude that the operator has committed a violation of 49 U.S.C. § 60601 et seq. or any other regulation or order issued thereunder, and issue a notice of probable violation (NOPV), which initiates a process that ultimately may result in a civil fine. The following discussion of NTSB and OPS investigations will provide not only the statutory and regulatory bases for each agency's investigations, but also the practical applications of these rules and regulations.

### **Initial Response**

When OPS and NTSB arrive on the scene of a major accident, both agencies begin their investigations almost immediately. Although both investigative bodies will share some work product, each has a different mandate that necessitates independent fact gathering and investigations.

At the outset, DOT's rules, like EPA's, require quick notice about a spill by telephone to the NRC. Specifically, the pipeline operator is required "at the earliest practicable moment following discovery of a release" to contact the NRC, which will in turn notify the OPS and NTSB along with EPA and other agencies. 49 C.F.R. § 195.52(a). Section 195.52(b)(6) requires the pipeline operator to provide six basic areas of information during that notification: (1) name and address of the operator; (2) name and address of the reporter; (3) location of the failure; (4) time of failure; (5) fatalities and injuries, if any; and (6) "all other significant facts known by the operator that are relevant to the cause or failure of the damages." When read in conjunction with section 195.52(a), the open-ended section 195.52(b)(6) presents a dilemma for the spill reporter. The reporter is expected to report a spill almost

immediately – "at the earliest practicable moment" – while at the same time reporting "all other significant facts that are relevant to the cause or failure" of the spill. The reporter is left with a Hobson's choice: he can either attempt to report his best estimate of the spill immediately or he can wait an indeterminate amount of time to acquire all significant facts known to him and then report with much greater accuracy. Neither choice offers an inviolable position safe from the second-guessing of OPS or NTSB. Under this regulatory scheme, an operator runs the risk of incurring a notice of possible violation for either hesitating too long before reporting a spill amount or reporting too quickly before marshaling "all significant facts." The reporting conundrum is also complicated by the difficulty of attempting to estimate accurately the volume of a spill, especially one that occurs on water.

After initial notification is completed, OPS investigators will descend upon the accident scene. OPS, pursuant to 49 U.S.C. § 60117 (a), has the authority to create reports, issue subpoenas, conduct hearings, require production of records, take depositions and conduct research and testing. Even within days of an accident OPS may deem a pipeline facility "hazardous" and issue a corrective action order essentially closing down the pipeline until it is repaired. *See* 49 U.S.C. § 60112(d). A corrective action order can be issued without notice or a hearing if OPS deems it an emergency. *See* 49 U.S.C. § 60112(e).

### **The NTSB Investigation**

Once NTSB is notified of a spill, NTSB "Go Team" members are sent immediately to the accident scene to commence their investigation. Leading the Go Team is the Investigator-in-Charge (IIC). The IIC who reports to a pipeline accident would be a senior investigator specializing in pipeline events. The IIC "organizes, conducts, controls and manages the field phase of the investigation." 49 C.F.R. § 831.8. The IIC's authority and responsibility on the scene even trumps that of a Board member who arrives at the accident scene. *See id.* The IIC is the individual

with whom an interested party will have its most constant contact not only initially, but throughout the entirety of the investigation. *See id.*

The National Transportation Safety Board is an independent federal agency charged with investigating, among other things, pipeline accidents in which there is a fatality or substantial property damage. 49 U.S.C. §§ 1101, 1131(a)(1)(D). Unlike a traditional regulatory or adjudicatory body, the NTSB's principal mission is to determine the probable cause of accidents and make recommendations that will help prevent future accidents. 49 U.S.C. §§ 1116, 1131, 1135. The agency neither promulgates nor enforces safety regulations. Nor does the agency adjudicate the rights or liabilities of interested parties. 49 C.F.R. § 831.4. Rather, its factual findings concerning probable cause are intended primarily to assist in developing ways to improve transportation safety and prevent similar accidents in the future. *See Chiron Corp. & Perseptive Biosystems, Inc. v. NTSB*, 198 F.3d 935, 937 (D.C. Cir. 1999) (discussing general duties of NTSB).

### **The NTSB's Powers in Conducting an Investigation**

Congress has endowed the NTSB with broad powers to accomplish its mission. Once the NTSB authorizes an investigation, Board officers or employees can enter an accident site and do anything necessary to conduct an investigation. 49 U.S.C. § 1134(a). This includes inspecting "any record, process, control, or facility related to the accident." Investigators also may examine or test any pipeline component. *Id.* at 1134(b). Testing must be conducted in such a manner, however, so as (1) not to interfere unnecessarily with transportation services provided by the pipeline owner, and (2) to preserve "to the maximum extent feasible" any evidence related to the accident, "consistent with the needs of the investigation and with the cooperation of that owner or operator." *Id.* at § 1134(c); accord 49 C.F.R. § 831.9(c)(2).

Part of the investigatory process also includes interviewing "any person having knowledge relevant to the an accident/incident."

49 C.F.R. § 831.9(a). The NTSB recognizes the right of the person being "interviewed" by investigators "to be accompanied, represented, or advised by an attorney or non-attorney representative." 49 C.F.R. § 831.7. It bears emphasizing, however, that these regulations cannot fully insulate a party from making disclosures. Indeed, under certain circumstance, even the Fifth Amendment privilege against self-incrimination must give way to the NTSB's investigative mission. *See Jones v. NTSB*, No. 93-2694, 1994 WL 475815, \*1 (8th Cir. Sept. 2, 1994) (discussing "required records" exception to Fifth Amendment).

The IIC and his investigators typically begin interviewing relevant individuals as soon as the exigent circumstances surrounding an accident have abated. It is our experience that fact-gathering interviews will commence within days of a spill and within hours of the containment of the spill. These interviews are often recorded by a stenographer and the transcripts are available to counsel. Typically an NTSB interview will involve not only members of the NTSB team, but also employees of OPS, designated party representatives, and personal attorneys representing counsel. Rules of evidence are not followed and free-flowing and somewhat informal questioning by the interviewers is permissible.<sup>1</sup>

NTSB regulations make clear that participation is intended only to assist the safety mission, not to prepare for litigation. The Board expressly disclaims any purpose of determining the rights or liabilities of any persons. 49 C.F.R. § 831.4. To that end, no party to the investigation "shall be represented in any aspect of the NTSB investigation by any person who also represents claimants or insurers. No party representative may occupy a legal position." *Id.* at § 831.11. The limitations placed upon use of counsel presents a difficult situation for the responsible party. Responsible parties may only be represented by party representatives designated by the IIC. Not well-versed in the law, party representatives are often the only individuals capable of reporting a meeting. It is important that counsel establish a

strong and cooperative relationship with the responsible party's representatives because they are often the sole bridge to the IIC. Participants also must be responsive to Board representatives' direction; failure to comply will result in loss of party status. *Id.*

Access to accident-related wreckage and records is restricted to NTSB personnel and designated participants in the investigation. 49 C.F.R. § 831.12. The NTSB will release seized materials, however, when it has no further need for them in its investigation. *Id.* No information concerning the accident may be released to any person not a party representative to the investigation before approval of and release by the Board and investigator-in-charge. *Id.* at § 831.13(b).

### **Preparation of an NTSB Report and Holding of a Hearing**

While the length of an investigation varies, it normally takes at least several months. *See* 49 C.F.R. § 801.33. Once the investigation is complete, the NTSB investigator sends "a file of the documentation obtained" to the Director of the NTSB Bureau of Administration. 49 C.F.R. § 801.33. When received by the NTSB Bureau of Administration, the file becomes available to the public. *Id.*

At the end of the investigation, interested parties, i.e., any party who could have been designated to participate in the investigation, may submit to the Board a written report detailing their proposed findings, suggesting a probable cause, "and/or proposed safety recommendations designed to prevent future accidents." 49 C.F.R. § 831.14. NTSB investigators also prepare factual reports to be submitted to the Board. 49 C.F.R. § 835.2. The IIC circulates drafts of the technical and factual reports to all parties. The IIC requests that responsible parties comment on the reports. It is our experience that responses to these draft reports should include specific references to documents in the record and if necessary declarations from relevant witnesses. It is also our experience that some IICs prefer that responsible parties present a

rewritten account of a disputed a factual finding, instead of merely arguing that the finding is erroneous.

The responsibility for initially determining the probable cause of an accident lies with the Director of the NTSB Bureau of Accident Investigation or the Director of the NTSB Bureau of Field Operations. 49 C.F.R. §§ 800.25(c) and 800.28(c). In various situations, the director's findings are submitted to the five member NTSB:

for determination of probable cause(s) when (1) any Board Member so requests, (2) it appears to the Bureau Director that, because of significant public interest, or a safety issue of other matter, the determination of probable cause(s) should be made by the Board, or (3) the accident investigation will be used to support findings in a special investigation or study. Provided, that a petition for reconsideration or modification of a determination of probable cause(s) made under § 845.41 of this Chapter shall be acted on by the Board.

49 C.F.R. § 800.25(c).

The Board may conduct a public hearing, 49 U.S.C. § 1113, when "deemed necessary in the public interest," 49 C.F.R. § 845.10, to assist the Board to determine probable cause and to ascertain measures to promote safety and prevent future similar accidents. *Id.* at § 845.2. Such hearings are fact finding proceedings, "with no formal issues and no adverse parties and are not subject to the provisions of the Administrative Procedure Act." *Id.*

The "board of inquiry" is charged with examining witnesses and creating a public record of all known facts surrounding the accident from which probable cause may be determined and recommendations for corrective action may be

formulated. 49 C.F.R. § 845.11. To that end, the Board shall designate as parties to the hearing “those persons, agencies, companies, and associations whose participation in the hearing is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence.” 49 C.F.R. § 845.13(a).

To help make determinations necessary for its report, the Board may obtain, “by subpoena or otherwise,” necessary witnesses and evidence. A witness or evidence may be summoned or required to be produced “from any place in the United States to the designated place of the hearing.” 49 U.S.C. § 1113(a)(2). The Board may seek an order from the local United States District Court to compel compliance with the NTSB subpoena. 49 U.S.C. § 1113(a)(4). The court may punish failure to obey an order to comply as a contempt of court. *Id.*

After all parties have been given notice of the hearing, the NTSB holds a prehearing conference at which “the parties [are] advised of the witnesses to be called at the hearing, the areas in which they will be examined, and the exhibits which will be offered in evidence.” 49 C.F.R. § 845.23(a). In turn, the parties must submit any additional documentary exhibit which they intend to use at the hearing and the names of any additional witnesses. 49 C.F.R. § 845.23(b), (c).

Witnesses have the right to counsel. 49 C.F.R. § 845.24. The witness may be examined by both the board of inquiry and any parties to the hearing. *Id.* at § 845.25(a). While all questions must be material and relevant, evidence is not subject to “objections in the legal sense by a party to the hearing or any other person.” *Id.* at § 845.25(b).

At the conclusion of the hearing before the board of inquiry, “[a]ny party may submit proposed findings to be drawn from the testimony and exhibits, a proposed probable cause, and proposed safety recommendations designed to prevent future accidents.” 49 C.F.R. § 845.27. The proposed findings must be timely filed and served upon all parties, and after filing become “part of the public docket.” *Id.*

Based on the collected reports (and hearings, if any), the Board compiles and publishes a final accident report containing factual findings, a probable cause finding, and safety recommendations. 49 C.F.R. § 801.36. The NTSB also may issue a detailed narrative accident report, if the Board determines such a report is warranted.

*Id.* at § 845.40. The NTSB’s report generally is issued within six months of the accident under investigation and, after notice of issuance in the Federal Register, the report is made available to the public. *Id.* at § 801.36. All resulting transportation safety recommendations, and responses thereto, must be noticed in the Federal Register. *Id.* at § 801.41.

The NTSB will entertain a “petition for reconsideration or modification of [its] findings and determinations of probable cause” only if “a party to an investigation or hearing or other person having a direct interest in the accident investigation” discovers new evidence or shows that the NTSB’s findings are erroneous. 49 C.F.R. § 845.41(a). Other parties to the investigation are then given 90 days to respond. *Id.* at § 845.41(b). Since NTSB investigations never officially close, the time for seeking reconsideration based upon new evidence is virtually unlimited. *Id.* at § 845.51.

### ***Step Nine – Dealing With Government Investigators – Criminal and Civil***

At any moment, the RP’s business may be hosting a variety of federal, state and local investigators – most on the civil side, but some on the criminal side. Some will be there strictly on a fact-finding basis in order to issue a report identifying the cause of the spill along with recommendations on how to prevent a similar event. The NTSB, by statute, is the lead investigatory authority if a spill is from an interstate pipeline. While the NTSB has no enforcement authority (it does not impose penalties), its findings and ultimate reports will have a significant impact on the actions of other federal agencies and private plaintiffs. The NTSB does not allow company counsel to be present

during interviews, but individual counsel may be present.

Others will be assessing the impact on the environment. In particular, teams of federal, state and local scientists and economists will conduct a Natural Resource Damages Assessment (NRDA). The NRDA is typically conducted under the leadership of NOAA and the Fish & Wildlife Service, with substantial input from state agencies. The NRDA process can continue until long after the emergency phase of the spill containment and remediation is over. Pursuant to 15 C.F.R. § 990.14(c), NOAA will invite the RPs to enter into a cooperative agreement to conduct the NRDA.

For most RPs, however, the greatest concern is with the agencies that have the power to impose substantial penalties. Most of the pertinent laws authorize both civil and criminal penalties, and the inspectors may be gathering evidence that could be used in both types of proceedings. It is difficult to know in the first hours after a government team of inspectors arrives what they are planning to do, but there may be significant clues. EPA's Office of Criminal Investigations often teams with the FBI. Their presence at a site is a major indication, but does not necessarily mean, that there will be a criminal prosecution. The ultimate decision to bring a criminal prosecution at the federal level is in the hands of the U.S. Attorney and attorneys within the Environmental Crimes Section at the Department of Justice.

Pipeline spills trigger another layer of operational and penalty considerations. The OPS can shut down operations and prevent resumption of pipeline operations until it is satisfied the problem that caused the spill has been identified and corrected.

OPS's investigation of the pipeline will include an exhaustive study of all aspects of pipeline operations. As noted above, this includes the operator's initial spill reporting procedures; the operator's compliance with pipeline design and pressure requirements; and operations and maintenance. OPS will especially scrutinize pipeline operating and maintenance manuals. At a

minimum, pipeline operators should be extremely conscious of updating and revising their manuals annually. It is our experience that manuals are among the first items requested by OPS investigators so it is important that they be maintained and updated frequently.

It is beyond the scope of this article to examine the investigation/defense process in detail for all the many potential situations that arise after a spill. The immediate action to be taken in the event of a spill is to alert the General Counsel of the company, who can bring in additional legal support as needed for the company and, if warranted, separate counsel for some employees.

In July 2001, William Gardner and Mark Srere conducted a Morgan Lewis Teleseminar, "Environmental Criminal Investigations." This presentation is available on the our web page, <http://www.envinfo.com/webcasts/teleseminars.htm>. Morgan Lewis also published a complete handbook on dealing with government investigations, the *Corporate Investigations and Criminal Defense Handbook*.

### ***Step Ten – Dealing With Private Claims for Damages***

#### **Unique Provisions of the Oil Pollution Act Require the RP to Advertise an Offer to Settle Claims**

Within a few days of the spill, the Coast Guard will send a letter to the RP in effect ordering the RP to advertise the procedures by which persons who have claims for removal costs and damages may submit their claims to the RP, as specified in 33 U.S.C. § 2714. The advertisement, which runs for 30 days, must include a statement that the claimant may present a claim for interim short-term damages representing less than the full amount to which the claimant ultimately may be entitled, and that payment of such claim does not preclude recovery of damages not reflected in the paid or settled claim. If the claim is denied or otherwise not resolved within 90 days of submission, the

claimant may submit the claim to the Coast Guard's National Pollution Funds Center.

The Coast Guard will take over the advertising process when an RP chooses not to cooperate. The Coast Guard will subsequently seek to recover its costs for this process from the RP.

### **Defending Against Private Lawsuits**

The government is not the only concern. Lawsuits for damages are almost a certainty. Landowners might sue for the cost of removing oil or other toxic debris and repairing their property, some might contend they have been damaged by diminished property values, and others will seek to recover for lost use of navigable waterways. Fishermen may sue for lost income due to fishing bans and/or diminished catch.

### ***Class Actions***

Class actions are common. While the OPA imposes strict liability, plaintiffs' lawyers usually seek to avoid making an OPA claim – perhaps to avoid the defense argument that the plaintiffs' claim could have, and should have, been resolved under the OPA administrative process.

### **Common Law Claims**

In mass spill litigation, plaintiffs will file a class action and rely on old common law theories of liability such as negligence, trespass, nuisance<sup>2</sup> and strict liability.<sup>3</sup> Generally, many courts seemingly entertain a predisposition toward allowing litigation involving catastrophic spills to proceed as a class action, at least as to overall liability questions. There is a perception by those courts that allowing a mass tort action to go forward as a class action will save judicial time. This reaction, however, should be resisted by defendants in these types of cases because serious issues about individualized damages often make it impractical to handle actions like these on a mass basis and the cost and time savings can prove to be illusory in many cases. At the end of the day, no significant time is saved by determining liability to the class if each class

member must eventually come forth and prove individual damages.

Recognizing the practical problems of dealing with individualized damages in a class consisting of hundreds or thousands of people, the plaintiffs' class action bar may try to tempt the court with the Lorelei of hedonic regression analysis as a way to establish class-wide general damages and thereby avoid individual proof. Hedonic regression analysis, reduced to its simplest form, is a statistical device that attempts to confirm a preconceived hypothesis that real property must have suffered a determinable loss from a catastrophic spill. Hedonic regression analysis can be effectively attacked by a prepared defendant. This statistical technique is not suitable for determining actual damages that property owners may incur as a result of a large-scale spill. It is a statistical device that attempts to confirm a general hypothesis – not the actual measurable impact on property values from an adverse environmental event.

### **OPA Claims**

The plaintiffs' class action bar is not fond of the federal Oil Pollution Act. It is curious why this is so. After all, the OPA provides that the owner and operator are strictly liable for removal costs as well as any actual damage to real and personal property, along with actual losses of subsistence use of the natural resources. If an oil spill damages property or causes a loss of commercial fishing income and the like, the owner or operator of the pipeline or vessel discharging the oil must respond in damages. Plaintiffs are excused from proving fault and need only prove that the oil causing their damages came from the pipeline or vessel that actually discharged the oil. Whether the owner/operator was negligent or otherwise at fault is not relevant to recovery under this law. Plaintiffs need not retain experts or introduce any proof of the reason for the spill and whether the pipeline or vessel owner/operator did anything wrong. Yet, rarely, if at all, will class action counsel pursue any remedy under this easy federal

scheme crafted to make it relatively easy for those whose property or livelihood has been impacted by an oil spill to be fairly compensated for their losses. Instead, class action claims for oil discharge damages are brought under common law theories such as negligence, trespass, nuisance or state strict liability theories. In this way, the perceived burden of the OPA is avoided and the benefits are sacrificed.

There is one burden of the OPA that is anathema to the plaintiffs' bar. That burden is the OPA's requirement that, before any litigation may be filed, the claimant must first present a claim to the owner/operator and allow 90 days for settlement consideration. (33 U.S.C. § 2713.) After that period has elapsed without any acceptable settlement, the claimant may file suit. Until settlement is given a chance for roughly three months, no litigation may be started.

This is a real impediment to the typical race to the courthouse to file class action litigation stemming from an oil spill. It is not difficult to understand why. Class actions are based on group damage and individual claims are thought to be difficult and expensive to pursue for class action counsel. Indeed, most attorneys in the class action bar do not like the trouble of dealing with individuals or individual claims. It is perceived by many attorneys to be uneconomical. It takes time to put together an individual claim. It takes time to do the paperwork. It takes time to meet with the claimant to understand the claim. It takes time to meet with an owner/operator to discuss the claim and ways to work out any individual settlements. It is thought to be more efficient, and hence profitable, to pursue damage claims on behalf of a group. But that is not what Congress had in mind when it imposed the required attempt at pre-litigation settlement for 90 days. Congress wanted injured parties to have the chance of a prompt and fair settlement of their claims without the necessity for long, drawn-out and expensive litigation. This settlement condition precedent to filing suit was to benefit claimants. It was also to benefit owner/operators as well because settlement of legitimate claims can reduce significantly the

transaction costs of resolving these unfortunate incidents.

Owner/operators should consider insisting that class plaintiffs follow this Congressional scheme of requiring each individual claimant to present a claim and try to have it resolved without expensive and protracted litigation. The OPA requires "all claims" for oil discharge damages to be first presented before a lawsuit can be filed. While the OPA does not preempt state law in most cases, a persuasive argument can be developed that Congress intended this procedure to be followed for "all claims," even where class claims for property or subsistence damages are wrapped in common law labels. Court decisions on this question are mixed. One federal district court rejected the argument, while one state trial court fully agreed with the argument and dismissed a class action until each and every member presented a claim and gave settlement a chance, even though plaintiffs did not sue under the OPA and made only common law claims for recovery.

### *Admiralty Claims*

Some plaintiffs might seek to pursue Admiralty Claims. The navigable waters of the United States are often featured in environmental contamination cases. Releases into navigable waters may occur from leaking underwater pipelines, tanker spills, or even groundwater runoff. Accordingly, defendants should expect that some environmental cases will find their way into the often misunderstood and sometimes arcane reaches of admiralty jurisdiction. Plaintiffs might, for example, assert claims for maritime negligence or other conventional torts. Defendants must be aware that cases founded upon admiralty jurisdiction entertain special rules (Rule 9(h) and the Supplemental Rules for Certain Admiralty and Maritime Claims) and an independent body of judge-made and statutory law that apply uniquely in admiralty. Defendants, however, may raise several effective defenses to admiralty claims.

Defendants must first determine whether the case arises under the court's admiralty

jurisdiction, 28 U.S.C. § 1333. For starters, admiralty claims are not considered to “arise under” federal law for the sake of federal-question jurisdiction. Thus, a plaintiff must properly plead section 1333 as his foundation, not section 1331. Admiralty jurisdiction does not extend to all cases involving water. The Supreme Court has set out a two-part test for determining the reach of the historic admiralty jurisdiction. Plaintiffs must satisfy both “locality” and “nexus” tests. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). The locality test requires either that a tort occur on navigable water or that an injury on land was caused by a vessel on navigable water. Navigable water generally encompasses those waters passable by a “vessel,” or virtually any watercraft. Importantly, injuries to land, such as claims for diminution in property value, by definition are not suffered on navigable waters. Furthermore, pipelines do not qualify as “vessels” for the sake of admiralty jurisdiction, and are generally considered extensions of the land. See 1 U.S.C. § 3 (definition of vessel).

The nexus prong requires both that the incident have a potentially disruptive impact on maritime commerce and that the character of the activity giving rise to the incident has substantial relationship to traditional maritime activity. The focus here is on the tortfeasor’s activity, with relevant factors including the function and role of the parties, the types of vehicles involved, the causation of the injury, and traditional concepts of maritime activity. Thus, mere proximity to water does not transform activity into maritime activity.

In a recent pipeline spill case, our client successfully defeated plaintiffs’ claim to admiralty jurisdiction. There, two classes of plaintiffs sought damages from oil that migrated into a river. One class consisted of property owners complaining of diminished home values; the other class was comprised of commercial fishermen. The court found the issue of locality was too close to call, but ultimately denied admiralty jurisdiction because plaintiffs could not satisfy the nexus test. The court concluded that the case primarily involved a fuel oil spill on land, caused by a ruptured overland

pipeline that only fortuitously touched upon water. *Williams v. Potomac Electric Power Company*, 115 F. Supp. 2d 561 (D. Md. 2000); *see also Johnson v. Colonial Pipeline Co.*, 830 F. Supp. 309 (E.D. Va. 1993).

### ***Punitive Damages***

Finally, RPs may be exposed to claims for punitive damages in common law actions. The OPA seems clear that punitive damages are not allowed. Exxon is still fighting a huge award of punitive damages arising out of the *Exxon Valdez* spill.

## ***Step Eleven – Defending Against Government Lawsuits for Penalties and Natural Resource Damages***

### **The Statutory Matrix**

There are several federal, state, and local laws and regulations that authorize the imposition of substantial civil and criminal fines. At the federal level, the laws summarized below are the greatest concern. (As adjusted for inflation by the Debt Collection Improvement Act of 1996, the following discussion incorporates a 10% increase above the amount listed in the original United States Code.)

### ***Endangered Species Act***

If an endangered species is adversely affected by a spill, it could trigger an enforcement action under the Endangered Species Act of 1973, 16 U.S.C. §§1531-1534 (ESA). Section 9 of the Endangered Species Act, 16 U.S.C. § 1538, makes it unlawful to “take” an endangered species – that is, to harm an endangered species. The penalties and enforcement procedures are set forth in section 11 of the ESA, 16 U.S.C. § 1540. Any person who “knowingly violates” the prohibition on “taking” an endangered species is subject to criminal enforcement. The fine can range up to \$55,000, or imprisonment for not more than one year, or both.

## ***Oil Pollution Act of 1990***

Prompted by the Exxon Valdez oil spill of March 1989, the Oil Pollution Act of 1990 was signed into law on August 18, 1990 (33 U.S.C. §§ 2701-2761).

### **Liability for Costs**

Section 1002 makes a responsible party (by definition, both owners and operators) liable for all removal costs incurred by the United States, and any removal costs incurred by any other person for acts taken by the person which are consistent with the NCP.

“Removal costs” include the actual cleanup, as well as costs incurred to respond to substantial threats of discharge, and costs to prevent, minimize, or mitigate oil pollution from a discharge. Recoverable removal costs for any other person, including individuals, and other governmental entities (local government) are “any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.” Section 1002(b)(1)(B). Section 1002 also imposes liability on a responsible party for “damages.” These damages may be collected by the federal government, and by individuals, state and local governments. Recoverable damages are identified by six classifications, some of which will overlap.

- **Natural Resources** – Damages for injuries to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which is recoverable by the United States Trustee, and a State Trustee.
- **Real or personal property** – Damages for injury to or economic loss resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.
- **Subsistence Use** – Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who

so uses natural resources which have been injured, destroyed or lost without regard to the ownership or management of the resources.

- **Revenues** – Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.
- **Profits and Earning Capacity** – Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.
- **Public Services** – Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

Section 1005 of the OPA provides that claimants may collect interest from the 30th day after their claim is presented until the day it is paid.

The maximum liability ceiling under the OPA for onshore facilities is \$350 million. The liability limits apply if the incident was proximately caused by (1) gross negligence or willful misconduct or (2) violation of an applicable Federal safety, construction, or operating regulation. The liability limits do not apply if the responsible person fails or refuses to (1) report the incident as required by law; (2) cooperate with the responsible official in connection with removal activities; or (3) comply, without sufficient cause, with an administrative order.

In any event, the ceiling on liability does not extend to state actions. The OPA specifically

provides that it does not preempt state law remedies.

### Defenses

Section 1003 is entirely devoted to defenses to liability. A responsible party is not liable for removal costs or damages if it establishes, by a preponderance of the evidence, that the discharge and resulting damage were caused solely by :

- (1) an Act of God;
- (2) an act of war;
- (3) an act or omission of a third party, other than an employee or agent of the responsible party, or third party whose act or omission occurs in connection with any contractual relationship with the responsible party, if the responsible party establishes that it –
  - (a) exercised due care in light of all relevant facts and circumstances; and
  - (b) took precautions against foreseeable acts or omission of any such third party and the foreseeable consequences of those acts or omissions.

### Natural Resource Damage Liability

Section 1006 sets forth in great detail liability for damage to natural resources. The measure of damages include:

- The cost of restoring, replacing, rehabilitating, or acquiring the equivalent of, the damaged natural resources;
- The diminution in value of those natural resources pending restoration; and
- The reasonable cost of assessing those damages.

Both NOAA and the Fish and Wildlife Service have promulgated regulations, and use extensive guidelines, that provide further information on the damage assessment process. State trustees are

specifically entitled by OPA, and routinely take an active part in the process.

Section 1006(d)(3) provides “[t]here shall be no double recovery” for natural resource damages.

### *Clean Water Act*

Section 311 of the Clean Water Act, 33 U.S.C. § 1321, established the penalties for unpermitted discharges of oil and hazardous substances. For oil, the CWA sets up a three-part penalty scheme: (1) administrative penalties administered by the Coast Guard that cannot exceed \$137,500, (2) civil penalties sought in federal court in an action filed by the Justice Department, and (3) criminal penalties.

It is unlikely that administrative penalties under section 311(b)(6) would be pursued after a catastrophic spill, because payment of an administrative penalty bars the government from seeking higher penalties in court. Section 311(b)(7)(F).

### Civil Penalties

Section 311(b)(7)(A) authorizes the Federal government to seek a civil penalty up to \$27,500 per day of violation or an amount up to \$1,100 per barrel of oil discharged.

Under Section 311(b)(7)(B), failure to remove or comply “without sufficient cause” with an EPA cleanup order issued under section 311(c) is subject to a penalty of up to \$27,500 per day or “an amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund as a result of such failure.”

If a spill is caused by “gross negligence or willful misconduct,” a person shall be subject to a civil penalty of not less than \$110,000, and not more than \$3,300 per barrel. Section 311(b)(7)(D).

In determining the amount of a civil penalty the court “shall” consider the “seriousness” of the violation, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability, any history of prior

violations, the nature, extent and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, and the economic impact of the penalty on the discharge.

### **Criminal Penalties**

OPA amended the CWA to make its criminal penalties apply to unpermitted oil spills. Under CWA § 309, for negligent violations, penalties are up to \$27,500 and one year in jail. For knowing violations, the fine is \$55,000 and a sentence up to three years in prison. The crime of “knowing endangerment,” i.e., placing another person in imminent danger of death or serious bodily injury, subjects a corporate entity to a fine of up to \$ 1.1 million, and \$275,000 for an individual, and a prison term up to 15 years. Each day of discharge is a separate offense.

### ***Hazardous Liquids Pipeline Safety Act, 49 U.S.C. §§ 60101 et seq.***

### **Civil Penalties**

Civil penalties can range up to \$500,000 for any series of related violations, and criminal penalties add the possibility of up to five years in prison. As we go to press, Congress is considering legislation that would substantially increase the ceiling on penalties.

The first step in the OPS formal penalty process is the issuance of an NOPV by an OPS investigator. An NOPV is issued when an operator is alleged to have violated 49 U.S.C. § 60101 et seq. or any regulation or order issued thereunder. 49 C.F.R. § 190.207(a). The operator must respond within thirty days of receipt of an NOPV. 49 C.F.R. § 190.209. Although the regulations state that a respondent may respond in writing or request a hearing, it is our practice to respond in writing and within that written explanation request a hearing. Responses to NOPVs and other requests from OPS are in the form of a letter.

It is also our practice to contest NOPVs on all reasonable grounds – fact, legal, and policy. We attach exhibits that include declarations and even evidence generated during the NTSB investigation.

Typically, after an operator has responded to the NOPV, the investigator will set forth additional support for the NOPV. An informal hearing before an attorney from the Office of the Chief Counsel (OCC) of the Research and Special Programs Administration (RSPA) of the DOT will be scheduled. This hearing is not recorded and the rules of evidence are not in effect. Basically the respondent is provided the opportunity to rebut the charges that make up the NOPV and answer any questions that the OCC might have. We recommend that an attorney bring witnesses and exhibits with him to the hearing. Respondent is then given 30 days to supplement the record following the hearing. Although there are certainly informal avenues for communication following this final submission, at this time the OCC begins formally determining whether to make a finding of violation.

## CONCLUSION

### *Final Step & Also the First Step – Avoidance – Integrated Contingency Plans*

Of course the best spill response and argument for minimal penalties is to develop and carefully implement plans that will prevent spills. Several regulations impose the planning requirements which, if fulfilled should

- Identify all potential sources of spills and their worst case impacts.
- Implement procedures to minimize the possibility of a release.

Make sure you are as prepared as possible to quickly and properly respond to a spill.

The most important federal requirements are imposed by EPA, OSHA, and DOT. State and local governments add another level of planning requirements. Recognizing that these numerous rules are often similar and overlap, in several situations a single Integrated Contingency Plan can satisfy the many different agencies ( *see, e.g.*, 61 Fed. Reg. 28,642 (1996)). Consideration should be given to pulling together into one document the following requirements:

**TIP:** Not only does a comprehensive SPCC plan help to minimize the possibility of a release, and the damage that might be caused if a leak should occur, it also eliminates the possibility of significant penalties for failure to prepare an adequate SPCC plan. For example, just as we went to press with this *Deskbook*, we learned that a regional oil company in Virginia paid a \$30,000 penalty in response to an EPA complaint that its SPCC plan was deficient as to the following: failure to predict the direction, rate of flow and total quantity of potential oil discharges, inadequate precautions in a truck loading/unloading area, and inadequate security.

### EPA

Clean Air Act Risk Management Plans, 40 C.F.R. § 68

Resource Conservation and Recovery Act (RCRA) Contingency Plan, 40 C.F.R. parts 264 and 265, subpart D

CWA and OPA – SPCC Plan and Facility Response Plan, 40 C.F.R. §§ 112.7(d) and 112.20-.21

### OSHA

Process Safety Management Plans, 29 C.F.R. § 1910.119

HAZWOPER Rule, 29 C.F.R. § 1910.120

Emergency Action Plan, 29 C.F.R. § 1910.38(a)

### DOT

RSPA's Pipeline Response Plan, 49 C.F.R. § 194

USCG's Facility Response Plan, 33 C.F.R. part 154, subpart F

Hazardous Material Transportation Rule, 49 C.F.R. §§ 171-180

## ENDNOTES

1. While NTSB investigations are conducted by agency staff, outsiders may be designated to participate as well. Only the FAA in aviation cases has the right to participate; however, Board regulations permit the lead investigator to designate private parties to participate if their involvement would assist the investigation. 49 C.F.R. § 831.11(a). These parties are limited to those “persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident.” *Id.*
2. Nuisance claims can be problematic for plaintiffs especially in jurisdictions that presume that the tort of nuisance contemplates a continuing act rather than just a one-time spill.
3. For common law strict liability to attach, the operation must be inherently dangerous. Some jurisdictions have found that petroleum pipelines and facilities are not so inherently dangerous within the meaning of strict liability.