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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. EXXON CORPORATION AND EXXON SHIPPING COMPANY, Defendants.	No. A90-015-2CR GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION OF DEFENDANT EXXON SHIPPING COMPANY TO DISMISS COUNT ONE FOR FAILURE TO CHARGE AN OFFENSE

The United States, by its attorneys, opposes defendant Exxon Shipping Company's Motion To Dismiss Count One For Failure To Charge An Offense. For the reasons set forth in the attached memorandum, the defendant's motion is without merit and should be denied.

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UNITED STATES OF AMERICA, Plaintiff, v. EXXON CORPORATION AND EXXON SHIPPING COMPANY, Defendants.	No. A90-015-2CR UNITED STATES' MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION OF EXXON SHIPPING COMPANY TO DISMISS COUNT ONE FOR FAILURE TO CHARGE AN OFFENSE

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INTRODUCTION

Defendant Exxon Shipping Company has moved to dismiss Count One of the Indictment on the ground that it fails to charge an offense. Count One is based on section 301 of the Clean Water Act (the "Act"), 33 U.S.C. § 1311, which makes unlawful the discharge of any pollutant from any "point source," into waters of the United States unless authorized pursuant to the provisions of the Act. This broad prohibition of unauthorized discharges is enforced through section 309 of the Act. In addition to civil remedies, section 309 provides for criminal liability for both negligent and knowing violations of the section 301(a) prohibition.1/

The defendants caused a massive oil spill from the Exxon Valdez in Prince William Sound. This spill was not authorized under the Act. Accordingly, defendants are properly charged with the negligent violation of section 301's prohibition against the unauthorized discharge of pollutants into waters of the United States. This violation is punishable criminally under section 309. Exxon Shipping

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1/ Section 309(c) provides, in pertinent part, that any person who

> negligently violates section 1311, 1312, 1316, 1317, 1318, or 1345 of this title, or any permit conditions or limitations implementing any of such sections in a permit issued under section 1345 of this title ...

shall be liable for criminal penalties. Criminal penalties are also available under § 309(c) for knowing violations of the same provisions.

nevertheless advances the following arguments to avoid liability:

First, Exxon Shipping argues that the oil that killed tens of thousands of seabirds and marine mammals and fouled thousands of miles of beaches is not a pollutant. As we will show, both the language of the Clean Water Act and the case law interpreting it indicate that oil is unquestionably a pollutant under the Act.

Second, Exxon Shipping asserts that the Exxon Valdez is not a "point source". This argument flies in the face of the statutory definition of point source which explicitly includes vessels.

Third, Exxon Shipping argues that supplementary civil provisions in §311 of the Act pertaining to oil spills should be interpreted to negate the criminal liability imposed by §309. This argument disregards the language and structure of the Act. Section 311 was added to the Act to provide additional remedies for violations of § 301 beyond those already provided by § 309. Section 311 itself includes language indicating that civil and criminal penalties are available under §309 for oil spills. Congressional creation of a civil liability scheme for oil spills did not imply an exemption from preexisting criminal liability provisions that clearly apply to oil spills. There is no basis for finding that § 311 implicitly repealed the criminal provisions of § 309.

In addition, section 311 requires that persons who spill oil report the spill to the government, and provides that such spill reports cannot be used in criminal prosecutions. There would be no reason for such a provision if oil spills could not result in criminal charges.

Section 301 unequivocally prohibits all discharge of pollutants into navigable waters. Only certain limited and specific exceptions to this blanket prohibition are available. The Exxon Valdez oil spill does not fall within any of those exceptions; Exxon Shipping does not even attempt to show that it does. Consequently, this oil spill was prohibited by § 301 and those responsible for it are plainly subject to the § 309 sanctions which enforce that prohibition.

Essentially, Exxon Shipping argues that the same Congress that imposed criminal liability on businesses and individuals for any negligent or knowing violation of permits issued by the U.S. Environmental Protection Agency to protect water quality, exempted oil transporters from any criminal liability for oil spills whatsoever, no matter how immense the spill, no matter how negligent or knowing the conduct that led to the spill. While Exxon Shipping artfully frames its motion in terms of objecting to imposition of criminal liability for "negligent" spills, in fact its arguments would lead to exemption of oil transporters from any criminal liability under the Act whatsoever. These remarkable

propositions, which ignore the language and structure of the statute, are based instead on a confused reading of ambiguous and largely irrelevant legislative history, most of which does not even relate to the statute that forms the basis of the indictment.

Exxon Shipping's tortuous use of an irrelevant legislative history cannot obscure the plain language and structure of the statute. This oil spill falls within the explicit prohibitions of the statute. That Congress chose to supplement the basic prohibitions of § 301 and the sanctions in § 309 with more detailed treatment of civil liability for oil spills in § 311 in no way suggests that it intended to exempt oil transporters responsible for catastrophic oil spills from the same law that governs other polluters.

Statutory Background

Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act is based on the principle that no one has the right to use the nation's waters to dispose of pollutants. S. Rep. No. 414, 92d Cong., 1st Sess. 42, reprinted in 1972 U.S. Code and Admin. News 3668, 3709; H. Rep. No. 911, 92d Cong., 2d Sess. 74 (Attachment A).

In order to carry out the Congressional intent that water pollution be progressively eliminated, section 301(a) of the Act provides that, subject to specific statutory

exceptions, none of which is relevant to this case, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source . . . ." 33 U.S.C. § 1362(12)(A). The term "pollutant" is broadly defined as

> dredged spoil, solid waste, incinerator residue, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of Section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. § 1362(6). Thus, the Act makes unlawful the unauthorized discharge of practically any pollutant into waters of the United States. The very narrow exception for

sewage from vessels is noteworthy because it makes clear that Congress was aware that vessels were potential pollution sources and because it is narrowly framed to exempt only those discharges that were arguably physically necessary to ship operation.

The prohibition of unauthorized discharges is enforced through section 309 of the Act, 33 U.S.C. § 1319. In addition to civil remedies, section 309 provides for criminal liability for both negligent and knowing violations of section 301(a). 33 U.S.C. § 1319(c).

Section 311 of the Act, 33 U.S.C. § 1321, provides for cleanup authority and civil liability for oil and hazardous substance spills into waters of the United States. Section 311 establishes a comprehensive scheme for response to spills by private and governmental organizations to ensure prompt and effective action to clean up and mitigate the environmental damage caused by such spills. In keeping with the emphasis on prompt response, section 311 requires that the person in charge of a vessel or facility from which there is a spill must notify the government of the spill. However, such notification may not be used against the reporting party in any criminal case which might arise from the spill. 33 U.S.C. § 1321(b)(5). Aside from providing criminal liability for failure to make such a report, section 311 does not otherwise provide criminal penalties in addition to those provided in section 309, which contains the substantive

criminal penalties applicable to all conduct prohibited by the Act.

The language of § 311 provides that an election of civil and administrative remedies may be made under either §311 or 309, clearly indicating that §309 is applicable to oil spills if the United States so chooses. Section 311(b)(6)(E) states that "[c]ivil penalties shall not be assessed under both this section and §309 for the same discharge." Similar language appears in §309(g)(6)(A)(i) of the Act, which provides that any administrative action taken under subsection (g) "shall not be the subject of a civil penalty action under subsection(d) of this section or §1321(b)[311(b)] of this title or §1365 of this title."

ARGUMENT

I. THE CLEAN WATER ACT AUTHORIZES CRIMINAL PROSECUTION FOR NEGLIGENT DISCHARGE OF OIL FROM VESSELS

As noted above, section 309(c) of the Act, 33 U.S.C. § 1319(c), provides criminal penalties for knowing or negligent violations of section 301(a) of the Act, 33 U.S.C. § 1311(a). Section 301(a) mandates a "total prohibition" of unauthorized discharges of pollutants. Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977); see also Sierra Club v. Union Oil Co. of California, 813 F.2d 1480, 1483 (9th Cir. 1987), vacated, 485 U.S. 931 (1988), judgment reinstated and amended, 853 F.2d 667 (9th Cir. 1988) ("the Act prohibits the discharge of all pollutants except as authorized by the Environmental Protection Agency"). The

elements of the offense with which Exxon Shipping is charged are: (1) a person; (2) negligently discharges; (3) a pollutant; (4) from a point source; (5) into waters of the United States; (6) without a permit. 33 U.S.C. §§ 1311, 1319(c)(1)(a). Exxon Shipping does not contest that it is a "person," that Prince William Sound and the Gulf of Alaska are navigable waters of the United States, and that it did not have a permit for the Exxon Valdez oil spill. It argues that the oil that it discharged is not a pollutant and that the Exxon Valdez was not a point source.[2/] These arguments are completely without merit; the Exxon Valdez oil spill clearly comes within the explicit terms of the statutory offense.

A. Oil is a Pollutant For Purposes of the Clean Water Act

Exxon Shipping makes the novel assertion that the oil it spilled, which caused the deaths of tens of thousands of

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2/ Exxon also asserts that the United States has not utilized the Clean Water Act to prosecute oil and hazardous substance spills in the past. In fact, the United States has repeatedly prosecuted oil and hazardous substance spills under section 309, both before and after the Exxon Valdez spill. On March 9, 1989, the defendant in United States v. Ashland Oil, Inc., No. 88-146 (W.D. Pa.), was sentenced to a fine of $2,250,000 in a prosecution under the Clean Water Act and the Refuse Act arising out of an oil spill into the Monongahela River caused by the rupture of an oil tank. On August 9, 1989, the defendant in United States v. Pennwalt Corp., Inc., No. 88-55T (W.D. Wash.) was sentenced under the Clean Water Act and CERCLA for a chemical spill resulting from rupture and collapse of a storage tank. On September 29, 1989, the defendant in United States v. Ballard Shipping Co., No. 89-051 (D.R.I.) was sentenced for negligent discharge of oil under the Clean Water Act as a result of the grounding of defendant's oil tanker.

sea birds and marine mammals, is nevertheless not a pollutant of Prince William Sound under the Clean Water Act. It claims that crude oil is not a pollutant under the relevant provisions of the Act, when it is in transit on a vessel and not intentionally discharged. This assertion is ridiculous on its face and is flatly contradicted by both the statutory language and well established case law.

The only courts to consider a defendant's argument that oil is not a pollutant have held, emphatically, that it is. In a case directly on point, the Sixth Circuit in United States v. Hamel, 551 F.2d 107 (6th Cir. 1977), held that gasoline is a "pollutant" under the terms of § 502(6), that unauthorized discharge of gasoline constitutes a violation of section 301(a) and that the violation can be criminally prosecuted under section 309. The court noted that in defining "pollutant" in the Clean Water Act, Congress had explicitly stated that it was incorporating the definition of "refuse" under the Clean Water Act's predecessor, section 13 of the Rivers and Harbors Act of 1899, commonly known as the Refuse Act, 33 U.S.C. § 407. The court examined the Senate Report accompanying the 1972 amendments that added the definition of "pollutant" to the Clean Water Act, and found that the committee extracted the definition of pollutant from the Refuse Act and in so doing, permitted only specific exemptions from the term: sewage from vessels and water, gas or other materials associated with the secondary recovery of

oil. See S. Rep. No. 414, 92d Cong., 1st Sess. 76, reprinted in 1972 U.S. Code Cong. & Admin. News 3668, 3742.

Exxon Shipping has cited no case in which oil has been held not to be a pollutant. Indeed, the Hamel case has been cited with approval by numerous other courts, including the Ninth Circuit. See Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 490-491 n.9 (9th Cir. 1984); United States v. Frezzo Bros., Inc., 602 F.2d 1123, 1127 (3rd cir. 1979); See also, Guilford Industries, Inc. v. Liberty Mutual Insurance Co., 688 F. Supp. 792 (D. Me. 1988). Even prior to the 1972 amendments to the Clean Water Act, the Supreme Court had interpreted § 407 of the Refuse Act, which in large part was a predecessor to the Clean Water Act, to prohibit discharges of oil. United States v. Standard Oil Co., 384 U.S. 224 (1966). Thus, at the time that Congress added the definition of "pollutant" into the Clean Water Act, it was clear that the definition included oil.

The definition of "pollutant" in section 502(6) of the Act is intentionally broad. See e.g., Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, 859 F.2d 156, 189 (D.C. Cir. 1988) ("the term 'pollutant' includes industrial, municipal, and agricultural waste. Any discharge to which a toxicity limit could be applied would seem to fall within this broad definition"). The courts have consistently interpreted the definition of "pollutant" broadly to further the purpose of the Act to

eliminate pollution. United States v. Hamel, 551 F.2d at 110 ("broad" definition of pollutant). Exceptions to the definition are construed narrowly. U.S. Steel v. Train, 556 F.2d 822, 852 (7th Cir. 1977). This is consistent with the principle that the Act should be interpreted to further its goals and underlying policies, as set forth in the legislative history. See, e.g., Natural Resources Defense Council v. Costle, 564 F.2d 573, 579 (D.C. Cir. 1977) ("We think the statute must be given a reasonable interpretation, not parsed and dissected with the meticulous technicality applied in testing a common law indictment or deed creating an estate in fee-tail.") Indeed, the Ninth Circuit has declared that the courts "must consider the statutory scheme as a whole, including the object and policies contained within." United States v. City of Redwood City, 640 F.2d 963, 969 (9th Cir. 1981).3/

The legislative history of the Act confirms that Congress considered oil to be a pollutant for purposes of section 301(a). Congress noted that section 311, which deals with oil spills, could be interpreted to prohibit discharges permitted under the National Pollutant Discharge Elimination

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3/ The fact that this is a criminal case does not affect the broad construction afforded remedial statutes designed to protect public rights. See United States' Memorandum in Support of Opposition to Motion of Exxon Corporation to Dismiss All Counts Insofar as They Attempt to Charge Offenses Based on Vicarious Liability, Section III. F. Rule of Lenity Does Not Bar Imposition of Agency Liability on Exxon.

System ("NPDES") program. Accordingly, it stated that the provisions of section 311

> are not intended to apply to the discharge of oil from any onshore or offshore facility, which discharge is not in harmful quantities and is pursuant to, and not in violation of, a permit issued to such facility under section 402 of this Act.

S. Conf. Rep. 1236, 92d Cong., 2d Sess. 134, reprinted in 1972 U.S. Code Cong. & Admin. News 3776, 3811 (emphasis added). NPDES permits are issued under section 402 to authorize discharges of pollutants that would otherwise be prohibited by section 301(a). Thus, by providing that section 402 permits could be issued for discharges of oil, Congress implicitly recognized that oil is a pollutant under section 301(a). See United States v. Hamel, 551 F.2d at 112.

Given the clear legislative intent to incorporate the prohibitions of the Refuse Act into the Clean Water Act, the Supreme Court's interpretation of "refuse" to include oil, and the legislative history cited above, the Hamel court concluded that gasoline is a pollutant under § 502, although as the court noted, neither oil nor gasoline is specifically enumerated as such in the definition.4/

4/ With regard to the absence of such specific enumeration, the court said

> We do not, however, read the failure to do so as an intent to exclude these materials from the Act. On the contrary, we conceive the employment of the broad

(continued...)

Exxon Shipping attempts to create a distinction between oil that is intentionally discharged as a waste, which it apparently concedes is a pollutant, and oil that is carried by a vessel in transit. Motion of Defendant Exxon Shipping Company to Dismiss Count One for Failure to Charge an Offense, pp. 27-28 (hereinafter "Def. Memo"). There is no support in the statute or in the case law for this distinction. The definition of "pollutant" gives no indication that oil discharged from vessels is to be exempted from its broad reach. See 33 U.S.C. § 1362(6). On the contrary, the statute provides for only two exemptions from the definition of "pollutant": (1) sewage discharged from a vessel and (2) water or gas associated with the production of oil or gas which is injected into or disposed of in a well. The very explicitness of these narrowly drawn exemptions indicates that Congress chose to carefully circumscribe the materials which would not be considered a pollutant. Obviously, if the definition did not include material discharged from vessels, the explicit exemption for sewage

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4/ (...continued)
generic terms as an expression of Congressional intent to encompass at the minimum what was covered under the Refuse Act of 1899.

United States v. Hamel, supra, at 110.

The conclusion that oil is a pollutant for purposes of the Clean Water Act is further supported by a recent EPA administrative decision, Matter of Chevron U.S.A., Inc., No. IX-FY88-54, slip op. (Environmental Protection Agency, May 3, 1990) (Attachment B), holding that an oil pipeline rupture constituted discharge of a pollutant under § 301(a).

discharged from a vessel would have been unnecessary. Furthermore, there is no distinction in the statute between oil spilled in transit and intentional discharges of waste oil. In United States v. Standard Oil Co., supra, the Supreme Court upheld an indictment under the Refuse Act for a spill of commercially valuable aviation gasoline that was discharged when a shutoff valve was accidentally left open. 384 U.S. at 229-230. The Court rejected the argument that the Refuse Act distinguished between discharges of waste oil and spills of commercially valuable product, observing that "[o]il is oil and whether usable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence is both a menace to navigation and a pollutant." 384 U.S. at 226. A similar distinction under the Clean Water Act, which as shown above incorporates the Refuse Act definition, should clearly be rejected here as well. Exxon Shipping's effort to insert this distinction into the statute ignores the fact that Congress has already established the necessary mens rea for liability under the Clean Water Act. The question is not whether the Valdez spill was accidental, but rather whether it was caused by negligent and unlawful conduct on Exxon Shipping's part.

These principles underscore the true meaning of National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), which is misinterpreted in Exxon Shipping's Memorandum. Exxon Shipping cites the case for the

proposition that the definition of "pollutant" must be interpreted narrowly, and limited to the specific items listed in the definition. See Def. Memo at 31. In reality, NWF stands for the proposition that Congress entrusted EPA with reasonable discretion over the definition of "pollutant." 693 F.2d at 173-174, 175. "Given this focused legislative intent concerning deference to EPA's interpretation of these definitional provisions, we must accept that interpretation unless it is manifestly unreasonable." 693 F.2d at 174. In NWF, EPA took the position that certain water quality problems caused by dams did not constitute "addition" of pollutants from point sources within the meaning of the Act. The court did not, in fact, decide whether the list of items in the definition of "pollutant" was exclusive, but only whether EPA had made a reasonable interpretation of the definition in its policy on dams. See 693 F.2d at 174 n.56.

Thus, NWF supports the United States' position here. As the D.C. Circuit observed, Congress intended that EPA have at least some discretion over the definition of pollutant. EPA has decided that accidental oil spills constitute a violation of section 301(a). This interpretation is controlling because it is not only reasonable, but indeed essential to discourage negligence in the handling and transportation of oil, which causes severe contamination of our waters when spilled.

Thus, both case law and agency interpretation uniformly support the conclusion that oil is a pollutant for purposes of section 301(a) of the Act. Exxon Shipping has not cited a single case to the contrary. Accordingly, there can be no legitimate dispute that the oil discharged from the Exxon Valdez is a pollutant for purposes of the Act. It would defy the terms of the statute, all case law interpreting those terms, and common sense to conclude otherwise.

B. The Exxon Valdez is a Point Source

The definition of "point source" in section 502(14) of the Act, 33 U.S.C. § 1362(14), includes "any discernable, confined and discrete conveyance, including but not limited to any . . . discrete fissure, container, . . . or vessel." Thus, the statute explicitly includes as point sources the Exxon Valdez, its oil storage tanks and the fissures in its hull through which the oil was discharged.

Nevertheless, Exxon Shipping argues that the Exxon Valdez is not a "point source" within the meaning of the Act and that therefore, the discharge of oil from it was not a violation of § 301(a). Exxon Shipping makes three basic arguments. First, Exxon Shipping argues that vessels can be point sources only when "designed to function" as waste disposal facilities. See Def. Memo at 21-22. Second, Exxon Shipping argues that only those vessels that are subject to the NPDES permitting requirements of § 402(a) of the Act can be considered point sources. Def. Memo at 23. It contends

that sections 301(a) and 309 of the Act are designed only "to prescribe and enforce technology-based effluent limitations, continuous or intermittent waste streams from facilities . . ." Def. Memo at 14; see also Def. Memo at 15-16. Therefore, it concludes that section 301(a) cannot be used to prosecute for a discharge that does not involve an NPDES permit. Third, Exxon Shipping interprets EPA's decision not to regulate discharges "incidental to the normal operation of a vessel," 40 C.F.R. § 122.3(a), as evidence that vessels are not point sources when transporting oil. Def. Memo at 23-25. Each of these contentions is completely erroneous.

Exxon Shipping's argument that the definition of point source requires that a vessel be designed to intentionally discharge waste is without merit. See Def. Memo at 21-22. In the leading case, United States v. Earth Sciences, 599 F.2d 368 (10th Cir. 1979), the court held that a gold leaching process, which utilized a system of sumps, ditches, hoses and pumps, constituted a point source and was therefore subject to the Clean Water Act enforcement regulations. This was true even though the discharge of the pollutants in question was due to an unanticipated snow melt which carried the pollutants into navigable waters. The court interpreted the statute broadly in refusing to exempt from regulation any activity that emits pollution from an identifiable point. 559 F.2d at 373-374. The court rejected the argument that

only intentional discharges of pollutants are subject to the Act and that accidental discharges are exempt. Id.

Similarly, in Sierra Club v. Abston Construction Co., Inc., 620 F.2d 41, 45 (5th Cir. 1980), the court held that a point source of pollution was present where miners had merely collected rocks and designed spoils piles which resulted in discharges from ditches and gullies when it rained. 5/

Exxon Shipping's second argument, that section 301(a) applies only to enforcement of NPDES permits, is similarly flawed. The fundamental purpose of the Act is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). The Act's "ultimate objective" is "to eliminate the discharge of pollutants into navigable waters . . . ." Natural Resources Defense Council v. Costle, 568 F.2d 1369, 1373 (D.C. Cir. 1977). Section 301(a) is the centerpiece of this program. Section 301(a) is a "total prohibition" of pollutant discharges. 568 F.2d at 1374. Congress recognized, however, that it would be impossible for some sources to immediately

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5/ See also, United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1505-06 (11th Cir. 1985), vac'd on other grounds, 481 U.S. 1034 (1987) (tugs that resuspended sediment with propellers were point sources "since the Act specifically includes vessels within the meaning of that term"); United States v. Tom-Kat Development, Inc., 614 F. Supp. 613, 614 (D. Alaska 1988) ("Every identifiable point that emits pollution is a point source ..."); O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 655 (E.D. Pa. 1981) (definition of "point source" has "nothing to do with intent of the operators").

eliminate pollutant discharges without shutting down and causing massive economic dislocation. Therefore, Congress provided specific exemptions in section 301(a) for discharges authorized by EPA under the NPDES program, which is designed to progressively eliminate pollutant discharges into the nation's waters from facilities regularly discharging pollutants in the regular course of operations. In this regard, it is useful to remember what the initials "NPDES" represent: "National Pollutant Discharge Elimination System." 33 U.S.C. § 1342. The NPDES system is designed to gradually eliminate pollution by making it unlawful to discharge a pollutant unless a prior permit is obtained under specified terms. The touchstone of the NPDES program is that

> those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.

United States v. Earth Sciences, 599 F.2d at 373.

Thus, discharges that are not necessary to the continuance of a facility's operation, like oil spills, are not given permits under the NPDES program, and therefore are completely prohibited by section 301(a). Where it is

impossible to immediately eliminate discharges, NPDES permits subject the discharger to increasingly stringent effluent limitations. EPA "has discretion either to issue a permit or to leave the discharger subject to the total proscription of § 301." Natural Resources Defense Council, Inc. v. Costle, 568 F.2d at 1375. Oil spills from vessels are eminently preventable. Therefore, they do not fall into the category of "needing to use the waters for waste distribution" such that a permit could be issued for the regulated "discharge" of oil from the vessel. Accordingly, EPA does not issue NPDES permits for oil spills from vessels, and they are subject to the "total proscription" of section 301(a). The fact that an NPDES permit is not available for a given discharge is irrelevant to the issue of whether the facility from which the discharge occurs is a point source. As the Supreme Court stated in Weinberger v. Romero-Barcelo, 456 U.S. 305, 309 (1982),

> [T]he release of ordnance from aircraft or from ships into navigable waters is a discharge of pollutants, even though the EPA had not promulgated any regulations setting effluent levels or providing for the issuance of an NPDES permit for this category of pollutants.

456 U.S. at 309.

An argument similar to Exxon Shipping's was rejected by the Third Circuit in the case of United States v. Frezzo

Bros., Inc., 602 F.2d 1123, 1128 (3rd Cir. 1979). Relying on Hamel, the Court held that the promulgation of effluent standards under the Act is not a prerequisite to the maintenance of a criminal action under §309, based on a violation of §301. The defendants in Frezzo Bros. argued that since EPA had not promulgated effluent standards for the compost manufacturing business in which they were engaged, they could not have violated §301 for an unlawful discharge. Id. at 1127. The Court disagreed. In interpreting the statute "in a fashion that best effectuates the policies of the Act," the Court stated:

> We see nothing impermissible with allowing the Government to enforce the Act by invoking §1311(a), even if no effluent limitations have been promulgated for the particular business charged with polluting. Without this flexibility, numerous industries not yet considered as serious threats to the environment may escape administrative, civil, or criminal sanctions merely because the EPA has not established effluent limitations. Thus, dangerous pollutants could be continually injected into the water solely because the administrative process has not yet had the opportunity to fix specific effluent limitations. Such a result would be inconsistent with the policy of the Act.

Id. at 1128.[6/]

The Exxon Valdez's status as a point source is further demonstrated by the impossibility of classifying it as a "nonpoint source" within the meaning of the Act. Nonpoint sources of pollution are those which are "virtually impossible to isolate to one polluter" and therefore, incapable of permitting. Earth Sciences, 599 F.2d at 371. Congress considered nonpoint source pollution to include such phenomena as "disparate runoff caused primarily by rainfall around activities that employ or cause pollutants." 599 F.2d at 373.

Thus, nonpoint sources of pollution are cumulative activities which are not easily traceable and for which a permitting system is not practical. In contrast, identifiable, "discernable, confined and discrete conveyances, including . . . vessels" are point sources. 33 U.S.C. § 1362(14). Where point source discharges can be eliminated, they are subject to "total proscription" under section 301(a). Where they cannot be eliminated, they are controlled under the NPDES program.

6/ The courts have repeatedly found violations of section 301(a) at facilities that were not required to have NPDES permits. See United States v. Earth Sciences, Inc., supra; O'Leary v. Moyer's Landfill, Inc., supra; Fishel v.Westinghouse Electric Corp., 640 F. Supp. 442 (M.D. Pa.). In Matter of Chevron U.S.A., Inc., No. IX-FY88-54, slip. op., (EPA May 3, 1990) (Attachment B), the Presiding Officer rejected the very argument raised by Exxon Shipping here, concluding that section 301(a) reaches unanticipated, accidental discharges of oil from facilities that would not have needed NPDES permits. Slip op. at 18.

Exxon Shipping appears to believe that it qualifies for exclusion from the NPDES program based on regulations exempting discharges from vessels "incidental to the normal operation of a vessel." 40 C.F.R. § 122.3(a); see Def. Memo at 23. Surely Exxon Shipping itself does not consider an oil spill of close to 11 million gallons "normal operation" of a vessel.

Therefore, Exxon Shipping's argument that the Exxon Valdez is not a point source because it was designed for transportation and that an "accidental" release does not constitute a discharge within the meaning of §301(a) must fail. The focus for the definition of point source does not depend on the design purposes of the discharging conveyance or on whether the discharge was accidental, but rather on whether the pollutant was discharged from an identifiable point, a criterion clearly met by the leaking Exxon Valdez.

II. THE CIVIL LIABILITY PROVISIONS OF SECTION 311 OF THE ACT DO NOT PREEMPT CRIMINAL LIABILITY FOR OIL SPILLS UNDER SECTION 309 OF THE ACT

As demonstrated above, the Exxon Valdez oil spill comes within the statutory definition of the offense of unauthorized discharge of pollutants. Exxon Shipping asks this Court to ignore the language of the statute, and to exempt it from criminal liability for oil spills, on the ground that Congress intended civil liability under section 311 of the Act to be the government's exclusive remedy for oil spills.

For obvious tactical reasons, Exxon Shipping frames its arguments as a challenge to imposition of criminal liability for negligent discharge of oil. But there should be no misunderstanding regarding the implications of these arguments. Criminal liability under § 309 for either negligent or knowing discharges of oil or hazardous substances is premised on violation of § 301(a)'s prohibition of unauthorized discharges of pollutants. 33 U.S.C. § 1319(c). Thus, if oil or hazardous substance spills are subject only to civil liability under § 311, and do not come within the terms of §301(a), there is no criminal liability under the Act for discharges of oil or hazardous substances whatsoever. Exxon Shipping is in effect arguing that while Congress provided criminal liability for failure to report an oil or hazardous substance spill, see 33 U.S.C. §1321(b), it decided not to impose any criminal liability for the discharge itself, no matter how large and devastating to the environment, no matter how negligent or knowing.7/

7/ In response to this obvious flaw in its analysis, Exxon offers the non sequitur that "criminal liability for negligent failure to comply with effluent limitations was the only effective way to ensure compliance with the elaborate permitting requirements associated with the NPDES," "[b]ut negligent operation of vessels leading to accidental spills does not involve the permitting process." Def. Memo at 19. Exxon does not explain why it is necessary to subject the smallest mom-and-pop discharger to potential criminal liability for violating an effluent limitation in its NPDES permit, but it is unnecessary to thus burden the operator of an oil tanker carrying millions of gallons of oil that can kill tens of thousands of sea birds and marine mammals and foul thousands of miles of shoreline.

This absurd result is belied by the language of the statute, its purpose and the relevant legislative history. First of all, as demonstrated above, section 301(a) of the Act flatly prohibits unauthorized discharges such as the Exxon Valdez oil spill, and section 309 of the Act explicitly subjects violations of section 301(a) to criminal sanctions. Nowhere does the Act exempt oil spills from these provisions. If, as Exxon Shipping asserts, Congress intended §311 to preempt § 301(a), why did it not say so in either section?

Further, the applicability of §301 and §309 to oil spills is clearly indicated by the language of §311. The treatment of civil penalties under the Act further demonstrates that sections 301(a), 309 and 311 all apply to oil spills. Exxon Shipping argues that Congress intended § 311 to be the "exclusive source of regulation under the CWA for oil spills." Def. Memo at 17. But the plain language of the statute refutes this argument: §311(b)(6)(E) provides that "[c]ivil penalties shall not be assessed under both this section and § 309 for the same discharge." This language is mirrored at §309(g)(6)(A)(i) of the Act, which provides that any administrative action taken under subsection (g) "shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) [311(b)] of this title or section 1365 of this title." 33 U.S.C. §1319(g)(6)(A)(i).

Thus, in prohibiting EPA from pursuing civil penalties under both sections 309(g) and 311(b), the statute clearly

contemplates that an election of administrative remedies under § 311 or § 309 is available. Similarly, § 311(b)(6)(c) proscribes civil penalty assessments under both § 311 and § 309 -- requiring, again, an election of remedies for oil spills. If, as Exxon Shipping argues, § 311 is the exclusive remedy available for unauthorized discharges of oil, the cross references in §§ 309 and 311 would be superfluous. Obviously, statutory construction that renders certain provisions of a statute superfluous or insignificant is disfavored. See, e.g., United States v. Handy, 761 F.2d 1279, 1280 (9th Cir. 1985).[8/] These provisions demonstrate that, even in the field of civil liability, Congress did not intend that §311 preempt remedies under other sections of the statute, specifically section 301(a).

Exxon Shipping attempts to turn this statutory analysis on its head by arguing that if Congress had intended to make a discharge of oil a crime, it would have provided criminal

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[8/] A number of courts have held that section 311 preempts maritime tort theories for government recovery of costs incurred in cleaning up oil spills. United States v. Dixie Carriers, 627 F.2d 736, 742 (5th Cir. 1980); United States v. M/V Big Sam, 681 F.2d 432, 441-442 (5th Cir. 1982); Matter of Oswego Barge, 664 F.2d 327, 344 (2d Cir. 1981) etc. The Ninth Circuit, however, has suggested that maritime tort theories survive section 311. See City of Redwood City, 640 F.2d 963, 970 (9th Cir. 1980). In any event, these cases are irrelevant to the issues in this case. They deal with preemption of maritime torts by comprehensive statutory regulation inconsistent with the maritime tort regime. Here, in contrast, complementary sections of the same statute are involved. Section 311 does not substantively address criminal liability for oil spills, but leaves criminal sanctions to section 309.

penalties in section 311. Def. Memo at 13. This ignores the fact that section 311 is, with one exception, which clearly supports the United States' position here, exclusively devoted to cleanup and civil liability issues. Congress had already prohibited unauthorized discharges in section 301(a), and provided criminal penalties in section 309. Providing criminal penalties in section 311 would be redundant and simply create confusion.

Next, Exxon Shipping argues that because section 301(a)'s prohibition of unauthorized discharges does not refer to section 311 as an exemption, that section 301(a) was not intended to apply to oil spills at all. Def. Memo at 14. Again, Exxon Shipping turns statutory interpretation on its head. Section 301(a) broadly prohibits discharges of pollutants, except where otherwise authorized by the Act. Section 301(a) does not list section 311 as a section authorizing pollutant discharge, because §311 does not authorize oil spills. On the contrary, it prohibits all unauthorized discharges. The fact that section 301(a) does not exempt oil spills from its broad reach is simply more evidence that in fact Congress did not intend to exempt oil spills from liability under that section. As noted above, if Congress had not intended oil spills to be subject to section 301(a), it surely would have made provision for authorization of oil spills in section 311, and provided an exemption in section 301(a) cross-referencing those provisions, as it did

in every other case in which the Act authorizes the discharge of pollutants.9/ Moreover, Exxon Shipping's arguments ignore the Supreme Court's warning that "[i]t is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." National Labor Relations Board v. Plasterers' Local Union No. 79, 404 U.S. 116, 129-130 (1971) (quoting Girouard v. United States, 328 U.S. 61, 69 (1946)).

Exxon Shipping argues that the provision of criminal penalties in section 311 for failure to notify the government of oil spills, unlike the other sections of the Act referred to in section 309, indicates that Congress intended section 311's criminal penalties to be exclusive, and that section 309 should not be viewed as a "catch-all enforcement mechanism to override" section 311's criminal provisions. Def. Memo at 17. It is certainly true that criminal liability is addressed specifically in section 311 in connection with spill reporting requirements, which are intertwined with the cleanup regime established in section 311. In order to facilitate rapid cleanup, Congress required that the person in charge of a vessel or facility report a spill to the government, or else face criminal penalties.

9/ Exxon characterizes as "absurd," any interpretation of the statute that would permit imposition of criminal liability for negligent discharges of oil in quantities not prohibited by section 311, which governs civil liability. Def. Memo at 15. But it is certainly reasonable to criminalize negligent or willful discharges of oil or hazardous substances of any quantity, while providing a threshold of harm for invoking government cleanup authority and imposing strict liability for the costs of cleanup.

Failure to make a report does not constitute a discharge of a pollutant, and therefore a separate criminal provision was required. Because it is specific to the reporting requirement, it was placed with the reporting provisions in section 311, not the general criminal liability provisions in section 309. The very existence of a separate provision limited to and concerning criminal liability for failure to report spills shows that Congress intended to address all other criminal liability for proscribed behavior in the other sections of the statute. That Congress chose to provide criminal penalties in section 311 for reporting violations is no indication that it intended to exempt oil spills from the rest of the Act, but in fact shows precisely the opposite. Here section 309 is not being used to "override" section 311, but simply to provide criminal sanctions for matters not addressed by section 311 at all. Moreover, the notification provisions of section 311 recognize the availability of criminal sanctions for oil spills by providing use immunity for persons reporting spills. The section provides use immunity to persons that properly notify the government of an oil spill; notification will not be used in "any criminal case." (emphasis added). 33 U.S.C. § 1321(b)(5). This provision demonstrates Congressional intent to criminalize the act of the discharge itself, in addition to the act of a failure to notify. Obviously, use immunity for reporting of

discharges would be pointless if there were no criminal liability for oil spills.10/

Furthermore, Exxon Shipping's arguments contradict repeated statements by Congress recognizing that the Act imposes criminal liability for oil spills. In amending the Act in 1978, Senator Stafford, the principal sponsor of the amendment, expressed concern that enhanced regulation of oil spills under section 311 might create incentives for spillers to route spills through outfalls subject to the NPDES program. 124 Cong. Rec. S. 37683 (October 14, 1978) (Statement of Senator Stafford) (Attachment C). He noted however, that "the availability of criminal sanctions under both sections 311 and 309 should operate to deter such avoidance schemes." Id. (emphasis added). In the recent Oil Pollution Act of 1990, P.L. No. 101-380, 104 Stat. 484, Congress amended § 309(c) of the CWA to explicitly provide for criminal liability for willful or negligent violations of § 311(b)(3) In connection with this amendment, Congress made clear that it intended to clarify and confirm its original intent that criminal sanctions be available for oil spills.

10/ Exxon Shipping's arguments are also inconsistent with clearly expressed Congressional policy. Exxon Shipping's position would controvert the Congressional declaration that "it is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States . . . ." 33 U.S.C. § 1321(b)(1). Exxon Shipping does not explain how completely exempting massive oil or chemical spills from criminal liability, in contrast to the most minor violations of NPDES permits, would further this clearly stated policy.

> Section 206(b) affirms recent court decisions to explicitly provide that violations of the prohibition on discharge of oil and hazardous substances are subject to the criminal penalties established under §309 of the Act. This amendment is intended to resolve any ambiguity concerning the intent of Congress on this question.

S. Rep. No. 94, 101st Cong., 1st Sess. 23 (Attachment D) (Emphasis supplied).[11]

Exxon Shipping attempts to create a false dichotomy between sections 301(a) and 311 of the Act, arguing that section 311 was intended to completely occupy the field of oil pollution.[12] According to Exxon Shipping, section 301(a) is designed to address violations of EPA's NPDES permit program, while section 311 is the exclusive mechanism for controlling oil spills. See Def. Memo at 14-17. But as the Ninth Circuit has stated, the Act regulates oil pollution

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[11] Subsequent legislative history has persuasive value and should be given significant weight in the construction of previous legislation, particularly where it clarifies legislative intent. See generally, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Bell v. New Jersey, 461 U.S. 773, 784 (1983).

[12] Exxon Shipping also mistakenly asserts that preventive regulations issued by the Coast Guard under section 311 to regulate transport of oil somehow authorized the Exxon Valdez oil spill, and indicate an intent to regulate oil spills exclusively under section 311. First, these regulations do not exclude all other law applicable to oil spills. Second, Exxon Shipping has miscited the regulations. The provisions relating to discharge of oil cited by Exxon Shipping, 33 C.F.R. § 151.11, implement the MARPOL convention and apply to ships in international waters, not waters of the United States.

"under two separate schemes," section 311 and the NPDES program. Chevron U.S.A., Inc. v. Hammond, 726 F.2d 483, 490-91 n.9 (9th Cir. 1984). In Chevron, the Ninth Circuit recognized that both parts of the Act apply to oil discharges. Id.[13/] In Matter of Chevron U.S.A., Inc., No. IX-FY88-54, slip op. (Environmental Protection Agency, May 3, 1990) (Attachment B), the Presiding Officer held that section 311 was not the exclusive remedy for oil spills, but that unauthorized discharge of oil was also a violation of section 301(a). Slip op. at 15-16.

Preemption of section 301(a) by section 311 is completely inconsistent with the structure of the statute. First, an examination of section 311 shows that "the imposition of criminal sanctions outside of the section is explicitly acknowledged." United States v. Hamel, 551 F.2d at 112. As discussed above at p. 30, the provision of use immunity for persons reporting oil spills in section 311 demonstrates that Congress contemplated criminal liability for the spill itself.

Second, Exxon Shipping's arguments ignore the complementary functions of sections 301(a) and 311. Exxon Shipping's first fundamental mistake is to limit the reach of

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13/ The reference to the NPDES program necessarily implies the applicability of section 301(a), since NPDES permits are exceptions to section 301(a)'s prohibition of pollution, and can only be enforced through section 301(a). As discussed above at p. 22, where an NPDES permit is not appropriate, discharges remain subject to the total proscription of section 301(a).

section 301(a) to discharges subject to EPA's NPDES program. See Def. Memo at 3, 14-20. As discussed above at pp. 18 -23, section 301(a) covers both discharges subject to regulation under the NPDES program, and discharges like oil spills that are totally proscribed because they are preventable.14/

Exxon Shipping's second fundamental mistake is to fail to recognize that section 311 supplements section 301(a). It was never intended to replace it. The legislative history of §311 indicates:

14/ Another example of Exxon Shipping's misleading use of irrelevant legislative history is its argument that the 1978 amendments to the Act somehow demonstrate that section 311 is separate and inconsistent with the statutory regime established by section 301(a). Def. Memo at 32-34. The 1978 amendments were enacted in response to the decision in Manufacturing Chemists Association v. Costle, 455 F. Supp. 968 (W.D. La. 1978), which enjoined implementation of EPA's hazardous substances spill control program, promulgated under section 311. The court found that this program impermissibly subjected facilities operating under NPDES permits to additional and potentially inconsistent duties under section 311. Accordingly, the statute was amended to limit the applicability of section 311 to facilities regulated under the NPDES program by creating exceptions to 311, now codified at 33 U.S.C. § 1321(a)(2). Thus, Exxon Shipping's interpretation is exactly backward: The 1978 amendments were not intended to limit the reach of section 301(a) to exclude oil spills, but to limit the applicability of section 311 to facilities regulated under NPDES. Congress did not, however, make any changes in the law relating to unpermitted, unauthorized discharges under section 301(a). Indeed, Senator Stafford, the principal sponsor of the amendments, explicitly recognized that oil spills could be subject to criminal sanctions under both sections 309 and 311. See 124 Cong. Rec. S 37683 (Oct. 14, 1978) (Attachment C). In Matter of Chevron, U.S.A., Inc., supra, the EPA Presiding Officer conducted an exhaustive analysis of the legislative history of the 1978 amendments and concluded that the amendments did not change the pre-existing law that prohibited unauthorized discharges of pollutants, including oil, under section 301(a). Slip Op. at 15-16 (Attachment B).

> that Congress was concerned with large oil spills as evidenced by the break-up of the tanker Torrey Canyon off the coast of England and the ruination of Santa Barbara's beaches by offshore drilling. H.R. Rep. No. 91-127, 1970, U.S. Code Cong. & Admin. News pp. 2691, 2692. Seen in this light, the primary concern [of § 311] is the preservation of the environment, not the imposition of criminal penalties.

United States v. Hamel, 551 F.2d at 112. Thus the court held that the civil liability provisions of § 311 did not preempt criminal liability under sections 301(a) and 309. In United States v. Ward, 448 U.S. 242 (1980), the Supreme Court acknowledged when examining whether the civil penalty imposed by § 311(b)(6) was so punitive as to be criminal in nature, that the conduct for which § 311 imposes civil penalties may be also criminally sanctionable. Courts which have considered the issue have unanimously come to the same conclusion.

CONCLUSION

Thus, Exxon Shipping's arguments that oil is not a pollutant, that the Exxon Valdez is not a point source and that section 311 somehow preempts section 301(a) are inconsistent with the language and structure of the Act and with relevant legislative history. Count One properly alleges unauthorized discharges of pollutants in violation of

section 301(a) of the Act. Exxon Shipping's motion to dismiss Count One of the Indictment should accordingly be denied.

Dated this 20 of September, 1990, at Anchorage Alaska.

CHARLES A. De MONACO
Assistant Chief
Environmental Crimes Section
Department of Justice

ERIC W. NAGLE
Trial Attorney
Environmental Crimes U.S. Section

MARK B. HARMON
Trial Attorney
Environmental Crimes Section

MARK R. DAVIS
Special Assistant U.S. Attorney

EXHIBIT 1

92d Congress, 2d Session - - - - - House Report No. 92-911

FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS

UNITED STATES HOUSE OF REPRESENTATIVES

WITH ADDITIONAL AND SUPPLEMENTAL VIEWS

H.R. 11896

TO AMEND THE FEDERAL WATER POLLUTION CONTROL ACT

MARCH 11, 1972.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

74-610 WASHINGTON : 1972

22. Requires all States to identify and classify their lakes according to eutrophic conditions and to establish procedures and to carry out methods to control and restore polluted lakes. $250,000,000 is authorized for this program.

23. Adds new provisions for thermal discharges. The bill provides for continuing comprehensive studies of the effects and methods of control of thermal discharges which shall consider costs, benefits, environmental impacts, and methods to minimize adverse effects and maximize the beneficial effects of thermal discharges. The results of these studies shall be reported within 1 year. The Administrator is required to issue proposed regulations for control of thermal discharges within 1 year after enactment of the Act. Permits for thermal discharges are required as a part of the national discharge permit program.

24. Declares to be unlawful the discharge of any pollutant by any person except as specifically authorized in the bill. The bill establishes a Federal-State discharge permit program. All permits issued under this program shall be consistent with the specific requirements of the bill, including effluent limitations or other limitations, national standards of performance, toxic and pretreatment standards, and ocean discharge guidelines.

25. Provides that upon enactment of this bill, no new permits will be issued under the 1899 Refuse Act. Permits previously issued under that Act will be considered to be permits under this new program. Pending applications under the Refuse Act program would be transferred from the Corps of Engineers who are administering the 1899 Refuse Act to the Environmental Protetcion Agency who would be initially responsible for the administration of the new program.

26. The Administrator shall promulgate guidelines which spell out the details of a State program which would be capable of managing the permit program. Those States which in the Administrator's judgment have programs which meet these guidelines would assume the responsibility of managing the permit program in those States. In States which fail to meet the guidelines, the Administrator will carry on the program. In the interim, while the guidelines are being promulgated, the Administrator may grant authority to those States that have an adequate program to issue permits, except that in these cases all permits proposed to be issued would be subject to the review and approval of the Administrator.

27. The permit program includes the regulation of discharge into the navigable waters, territorial sea, the waters of the contiguous zones, and the oceans.

28. Establishes provisions for citizen participation in enforcement of control requirements and regulations created by this bill. Anyone who has standing may initiate a civil suit against any person who is alleged to be in violation of a Federal or State effluent standard or limitation or an order with respect to such a standard or limitation and may initiate a civil suit against the Administrator for failure to perform a nondiscretionary act. The bill grants standing to citizens of the area having a direct interest which is or may be affected and to a group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy.

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EXHIBIT 2

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
1235 MISSION STREET
SAN FRANCISCO, CA 94103

IN THE MATTER OF CHEVRON U.S.A. Inc., Barbers Point Refinery, Honolulu, Hawaii Respondent	DOCKET No. IX-FY88-54 Proceeding to Assess Class I Administrative Penalty Under Clean Water Act, Section 309(g)

DECISION AND ORDER ON MOTIONS
FOR SUMMARY DECISION

On October 6, 1988, the United States Environmental Protection Agency Region 9 ("EPA or "Complainant") issued a complaint against Chevron U.S.A., Inc. ("Chevron" or "Respondent") pursuant to section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g). The Complaint alleges that Chevron violated section 301(a) of the Act, 33 U.S.C. § 1311(a), by the unauthorized discharge of approximately 104,000 gallons of Jet-A fuel into Waiawa Stream and Middle Loch, Pearl Harbor, Hawaii from a rupture in a pipeline owned by Chevron U.S.A. Inc. which runs from Chevron's Barbers Point Refinery to Chevron's marketing facility at Pier 30 in Honolulu. EPA proposes to assess a Class I penalty of $10,000.

On November 3, 1988 Chevron filed a "Special Appearance and Request for Hearing" in which it alleged that EPA lacks subject matter jurisdiction to assess a civil penalty under Section 309(g) of the Act for the violation alleged in the administrative complaint. On March 24, 1989 EPA and Chevron each filed Motions for Summary Determination.[1] EPA filed a "Memorandum of Law in Opposition to Respondent's Motion..." on April 28, 1989; Chevron filed a "Reply Brief of Chevron U.S.A..." on May 1, 1989.[2]

Chevron argues that the Adminstrative Complaint should be dismissed with prejudice because an oil spill caused by the unanticipated rupture of a pipeline that is not subject to an NPDES permit may violate Section 311 of the Clean Water Act, 33 U.S.C. §1521, but does not violate Section 301(a) of the Act, and Section 309(g) may not be used to enforce Section 311. EPA argues that the events described in the Administrative Complaint do make out a violation of Section 301(a) and therefore EPA has jurisdiction to bring this action for an adminstrative penalty under Section 309(g) of the Act.

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1. Chevron's motion is captioned "Motion of Chevron U.S.A. Inc. for Summary Dismissal of Administrative Complaint."

2. Procedures for issuance of Class I administrative penalty orders under Section 309(g) of the Act are set forth in Guidance on Class I Clean Water Act Administrative Penalty Procedures, dated July 27, 1987. Under section 126.104(f) of the Procedures a party may move for summary determination as to any issue on the basis that there is no genuine issue of material fact.

Regulatory Background

Following is a brief review of the provisions of the Clean Water Act at issue here:

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person, except in compliance with other terms of the Act:

> Except as in compliance with this section, and sections 302, 306, 307, 318, 402 and 404[3] of this Act, the discharge of any pollutant by any person shall be unlawful.

The terms used in Section 301(a) are defined in Section 502, 33 U.S.C. § 1362. The term "discharge of a pollutant" is defined in Section 502(12), 33 U.S.C. § 1362(12), as[4]

> ... any addition of a pollutant to navigable waters from a point source....

The term "point source" is defined in Section 502(14), 33 U.S.C. § 1362(14) as:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

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3. The only section relevant here is Section 402, 33 U.S.C. § 1342, under which EPA issues National Pollutant Discharge Elimination System (NPDES) permits which authorize the holder to discharge pollutants in compliance with the terms of the permit.

4. "Discharge" is defined in Section 502(16) by reference to the term "discharge of a pollutant."

The term "pollutant" is defined in Section 502(6), 33 U.S.C. § 1362(6) as:

> dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

Although neither "oil" nor "petroleum products" are specifically included in the definition of "pollutant" under Section 502, case law has interpreted the definition to include petroleum. U.S. v. Standard Oil Co., 384 U.S. 224, 86 S.Ct. 1427, 16 L.Ed. 2d 492 (1966); U.S. v. Hamel, 551 F.2d 107 (6th Cir. 1977).

Section 301(a) is enforced using Section 309 of the Act, which provides civil judicial penalties at Section 309(b), criminal penalties under Section 309(c), and Class I and Class II administrative penalties under Section 309(g). Class I adminstrative penalties under Section 309(g)(2)(A) may not exceed $10,000 per violation.

The Clean Water Act regulates oil and hazardous substances specifically in Section 311, 33 U.S.C. § 1321.

Section 311(b)(3) prohibits the discharge of oil as follows:

> The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, ... in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except ... where permitted in quantities and at times and locations or under such circumstances as the President may, by regulation, determine not to be harmful....

Certain terms, including "discharge", are defined differently for the purposes of Section 311 than for the rest of Subchapter 3.

Section 311(a)(2) defines "discharge" for the purposes of Section 311 as follows:

> "[D]ischarge" includes but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping, but excludes (A) discharges in compliance with a permit under section 402 of this Act, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of this Act, and subject to a condition in such a permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit application under section 402 of this Act, which are caused by events occurring within the scope of relevant operating or treatment systems.

The definition of "discharge" applicable to Section 311 thus does not require a discharge to be from a "point source", in contrast to the corresponding definition in Section 502 of "discharge of a pollutant" which applies to Section 301(a).

Section 311 contains its own enforcement provision at Section 311(b)(6)(A), which provides that the U.S. Coast Guard may assess an administrative penalty of not more than $5,000 for each

violation of Section 311.[5]

Chevron's Arguments

Chevron makes three interrelated arguments:

(1) That Section 311 is the exclusive remedy under the Clean Water Act for oil spills of the type at issue here;

(2) That Section 309(g) is not available to remedy violations of Section 311;[6] and

(3) That the oil spill at issue here is not a violation of Section 301(a) because this spill is not a "discharge of a pollutant" from a "point source" as those terms are defined in Sections 502(12) and (14).

Consequently, Chevron concludes, the U.S. Coast Guard could have brought an administrative enforcement action for this oil spill under Section 311(b)(6)(A), but EPA cannot bring an administrative enforcement action under Section 309(g)(1)(A), because Section 309 is not available for a violation of Section 311 and no violation of Section 301(a) has occurred.

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5. The civil judicial enforcement authority in Section 311(b)(6)(B) is applicable only to hazardous substances, not to oil. 44 F.R. 50766, 50774 (August 29, 1979)

6. EPA and Chevron apparently agree that Section 309(g) is not an available enforcement mechanism for violations of Section 311. EPA's complaint charges only a violation of Section 301(a), not Section 311. As explained above, the administrative penalty provisions of Section 311 are enforced by the U.S. Coast Guard, not EPA.

(1) Is Section 311 of the Clean Water Act the exclusive remedy for oil spills of the type at issue in this case?

Chevron argues that for "classic oil spills," which it claims this to be, the 1978 amendments to the Clean Water Act show legislative intent to allow enforcement activities only under Section 311, not under Section 301(a) and Section 309(g).[7]

Chevron asserts that prior to the decision in Manufacturing Chemists Association v. Costle, 455 F.Supp. 968, 980 (W.D.La. 1978) enjoining the implementation of EPA's Section 311 program, it was "at best unclear" whether discharges of oil were subject to Section 301(a) as well as to Section 311, and argues that the 1978 amendments, which were proposed as a direct result of the Court's injunction[8], clarified the law in that respect.[9]

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7. Motion of Chevron U.S.A. at pp.5-8. Chevron does not argue that Section 311 is the exclusive remedy for all oil spills. Reply Brief of Chevron U.S.A. at pp.2 and 15.

8. The 1978 amendments changed the definition of the term "discharge" applicable to Section 311 by excluding certain discharges that were regulated by the NPDES permit system under Section 402. Those exclusions are:

> ...(A) discharges in compliance with a permit under section 402 of this Act, (B) discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 of this Act, and subject to a condition in such a permit, and (C) continuous or anticipated intermittent discharges from a point source, identified in a permit application under section 402 of this Act, which are caused by events occurring with the scope of relevant operating or treatment systems.

33 U.S.C. § 1321(a)(2).

9. Motion of Chevron U.S.A. at pp.4 and 5.

Chevron bases its argument primarily on statements made during the floor debate in Congress by Senator Stafford, the lead Senate sponsor of the legislation. For example, Senator Stafford explained the purpose of the proposed amendments as follows:

> In the amendment adding a new definition of discharge for purposes of section 311, we are attempting to draw a line between the provisions of the act under sections 301, 304, 402 regulating chronic discharges and 311 dealing with spills. At the extremes it is relatively easy to focus on the difference but it can become complicated. The concept can be summarized by stating that those discharges of pollutants that a reasonable man would conclude are associated with permits, permit conditions, the operation of treatment technology, and permit violations would result in 402/309 sanctions; those discharges of pollutants that a reasonable man would conclude are episodic or classical spills not intended or capable of being processed through the permitted treatment system and outfall would result in application of section 311.

124 Cong.Rec. 37683 (October 14, 1978)

Senator Stafford also remarked:

> Basically, the changes make it clear that discharges, from a point source permitted under section 402...are to be regulated under sections 402 and 309.
>
> "Spill" situations will be subject to section 311, however, regardless of whether they occur at a facility with a 402 permit.

124 Cong. Rec. 37683 (October 14, 1978).

From these and similar statements by Senator Stafford, Chevron concludes that the sudden and unanticipated discharge of oil from a pipeline not subject to an NPDES permit (referred to by Chevron as a "classic spill") is now regulated under Section 311

of the Act, but not under Sections 301(a) and 309.

Chevron's argument appears persuasive on first reading. However, a careful review shows that it is based on a misconception of the action taken by Congress in 1978 and on a related misunderstanding of the scope of Section 301(a).

Prior to passage of the 1978 amendments to Section 311, EPA clearly had the authority to enforce against violations of Section 301(a) through the then-available enforcement mechanisms of Section 309[10] even though the same facts might also constitute a violation of Section 311. For example, in United States v. Hamel, 551 F.2d 107 (6th Cir. 1977), which involved the pumping of gasoline into a lake from a gasoline dispenser in a marina, the Court of Appeals held that the negligent or willful violation of Section 301(a) subjects the violator to the criminal sanctions of Section 309(C)(1). U.S. v. Hamel, supra at p. 109. The court held so despite the defendant's argument that he should only have been charged under the civil enforcement provisions of then Section 311 or under the criminal enforcement provisions of the Refuse Act. The court stated "...we do not believe ...that § 1321 [Section 311] was intended to be the sole Congressional expression on oil discharges." U.S. v. Hamel, supra at 111.

Chevron argues that U.S. v. Hamel is no longer applicable because of the effect of the 1978 amendments to Section 311,

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10. In 1977-78 Section 309 contained civil and criminal judicial enforcement mechanisms, but it did not include class I and class II administrative penalty provisions until amended in 1987.

under which Chevron claims "it is clear that Congress intended Section 311 to be the exclusive remedy for non-NPDES related spills of oil." Motion of Chevron U.S.A. Inc. for Summary Dismissal at n.3.

However, a close reading of the 1978 Amendments and their legislative history leads to the conclusion that Congress' action in 1978 was more narrow in scope than Chevron claims. Manufacturing Chemists Assn. v. Costle, the case that necessitated the 1978 amendments, involved several groups of plaintiffs not all of which appear to have had NPDES permits, but the court's discussion regarding what it considered to be EPA's unlawful attempts to enforce under both Section 309 and Section 311 only refers to violations involving NPDES permits. 455 F.Supp. 968 at 979-80. There is no reference to direct violations of Section 301(a), i.e., to discharges of pollutants without a permit.[11] Since the court's decision did not deal with discharges other than those associated with NPDES permits, it did not deal with

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11. Senator Stafford's description of the issues and holding in Manufacturing Chemists is consistent with this. He states that

> [t]he principle challenges to the regulations included allegations...that EPA had unlawfully applied the provisions of section 311 to facilities with NPDES permits....

and that

> the court held that discharges subject to section 402 of the act [relating to NPDES permits] should not be subject to the reporting requirements, civil penalty liabilities, and cleanup costs of section 311.

124 Cong,Rec. 37682 (October 14, 1978).

the fact situation in U.S. v. Hamel or in the present case.

Similarly, to the extent Congress addressed only the issues decided by the court in Manufacturing Chemists Assn. v. Costle, the 1978 amendments to the Clean Water Act have no application to U.S. v. Hamel or to the present case. Consequently, the rule stated in U.S. v. Hamel with respect to criminal enforcement under Section 309 would still be applicable to civil administrative enforcement under Section 309 today.

It is clear from the legislative history[12] of the 1978 amendments that they were intended to address a narrow range of issues. The legislation was requested by Thomas C. Jorling, then EPA Assistant Administator for Water, who advised Senator Muskie, Chairman of the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, that EPA had considered alternative approaches to dealing with the Manufacturing Chemists case and had concluded that the preferable approach was to request legislation which would be "a quick fix addressed to the specific problems raised by the court." 124 Cong.Rec. 37681 (October 14, 1978). Senator Stafford states that his committee considered

> ...two legislative repair possibilities: There could be a lengthy, full-fledged effort to repair section 311 and, perhaps, related authority: or, alternatively, a more focused effort addressed to the specific problems raised by the recent Court decision. After

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12. There are no House or Senate committee reports on this legislation; the legislative history is contained in remarks on the floors of the Senate and the House. 124 Cong.Rec. 37680; 124 Cong.Rec. 38685.

> intense review, the parties[13] concluded that there was no recourse but to seek quick legislative repair if section 311 were to be implemented without further unconscionable delay. The committee agreed.

124 Cong.Rec. 37682 (October 14, 1978).

The rest of Senator Stafford's remarks on the floor of the Senate in support of the 1978 amendments show consistently that the proposed legislation was concerned only with discharges related to NPDES permits. For example, he states:

> The third area of change[14] would clarify jurisdiction over discharges of oil and hazardous substances from point sources with NPDES permits. The issue of which section of the act governs these discharges is a principal source of controversy in the litigation. This proposal only affects the jurisdiction over certain discharges permitted under section 402.

124 Cong.Rec. 37683 (October 14, 1978).

To the extent any of Senator Stafford's remarks about oil spills can be read to include oil spills other than those related to an NPDES permit, there is no indication that he intended to change current law. To the contrary, he was at pains to affirm that then-current law would remain unchanged.

> While most discharges from permitted point sources will, therefore, be regulated solely under the section 402 permit system, the oil spill program under section 311 will remain intact, and other classic spill situations will continue to be subject to section 311.

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13. Sen. Stafford referred earlier to "a large number of interested parties." The litigants from Manufacturing Chemists had been in negotiation with EPA concerning possible legislative proposals that all could agree to. 124 Cong.Rec. 37681-2.

14. The other changes, involving hazardous pollutants, are not relevant to the present case.

124 Cong.Rec. 37683 (October 14, 1978).

Unstated by Senator Spafford, and irrelevant to the precise business then before the Senate, was the fact that under the holding in Hamel, "classic spill situations" that did not involve an NPDES permit were then subject to Section 311 and subject to Section 301(a) as well. Senator Spafford's incomplete statement of then-current law regarding oil spills not involving a permit does not necessarily evidence any intent on his part to change the law relating to such spills. If he had intended to do so, his remarks on the limited scope of his proposed legislation and his many references to NPDES permits would have been erroneous or misleading. The more logically consistent reading of Senator Spafford's remarks is that the 1978 amendments changed the law as to spills related to NPDES permits, but made no other changes in the existing law concerning oil spills.

The floor debate in the House of Representatives also demonstrates the limited scope of the proposed amendments to Section 311:

> H.R. 12140 would amend section 311 in such a way as to meet the court's concerns and to allow the immediate implementation of the program ...
>
> In these last days of the Congress, I recommend this legislation to my colleagues as a means of developing some regulation of hazardous substances while preserving the House's options to consider the entire program in depth in the next Congress.

Remarks of Congressman Breaux, 124 Cong. Rec. 38686 (October 14, 1978).

> ...H.R. 12140 would clarify which provisions of the Federal Water Pollution Control Act govern discharges of oil and hazardous substances from point sources with effluent permits. (emphasis added)

Remarks of Congressman Johnson, 124 Cong. Rec. 38686 and 38687 (October 14, 1978).

> H.R. 12140 would enable the hazardous substances spill program to be implemented by resolving the issues raised by the court.
> ...
> [T]he amendment clarifies which section of the Act, 311 or 402, governs discharges of oil and hazardous substances from point sources with NPDES permits. (emphasis added)

Remarks of Congressman Nowak, 124 Cong. Rec. 38688 and 38689 (October 14, 1978).

The legislative history, both in the Senate and the House, thus shows clearly that the 1978 Amendments were limited in scope and focussed on spills related to NPDES permits. The legislative history contains no unambiguous statement that the amendments also were intended to change existing law with respect to spills not involving a permit and the best interpretation of the floor debates is that Congress never considered the latter type of spill. Consequently, the 1978 amendments had no effect on the rule stated in U.S. v. Hamel.

The actual text of the 1978 amendments requires the same result. While the legislation amends the definition of discharge" applicable to Section 311 to exclude three types of

discharge related to NPDES permits,[15] it makes no corresponding change in the definition in Section 502(12) of "discharge of a pollutant" which is the definition applicable to Section 301. Accordingly, although the 1978 amendments clearly exclude certain discharges from the coverage of Section 311, it is impossible to argue from the text itself that anything has been excluded from the coverage of Section 301.[16] Chevron's claim that Congress excluded "classic oil spills" from the coverage of section 301 is thus not supported in any way by the statutory language actually enacted. To the contrary, the fact that Congress did not change the definition of "pollutant" or "discharge of a pollutant" in Section 502 shows that Congress did not change then-existing law with respect to the scope of Section 301(a) - - oil is still a "pollutant" under Section 502(6) and the "discharge of a

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15. Quoted above at p.7.

16. While Congress could have excluded certain discharges of oil from Section 301 through a variety of means, e.g., by amending the definition of "pollutant" in Section 502(6) to exclude oil, the 1978 amendments contain no such changes. Congress also did not make any changes in 1978 in the "savings" clause for Section 311, which provides

> Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this chapter or any other provision of law, or to affect any State or local law not in conflict with this section.

Section 311(o)(3) of the Clean Water Act, 33 U.S.C. § 1321(o)(3).

pollutant" as defined in Section 502(12) is still a violation of Section 301(a) if unauthorized, notwithstanding the existence of another regulatory structure for dealing with oil spills in Section 311.

Chevron also claims that EPA's explanatory preamble to the regulations implementing the 1978 amendments supports Chevron's position. However, the language of the preamble copies very closely the language of Senator Stafford's remarks to the Senate, and states consistently that the change made by the amendments concerns facilities with NPDES permits. 44 Fed. Reg. 50766-76 (August 29, 1979). Similarly, although the preamble states at several places that "spills" or "classic spills" are subject to Section 311, nowhere does the preamble say that Section 311 is the exclusive remedy for those spills. As with Senator Stafford's remarks to the Senate, a statement that certain spills are "subject to" Section 311 does not necessarily mean "subject only to" that section, and leaves room for the particular spill to be subject to one or more other statutory provisions as well.

In summary, where Congress has stated that it was acting with respect to discharges involving permits and specifically did not undertake a "full-fledged effort to repair Section 311," 124 Cong. Rec. 37682, there is no clear basis in Congressional "intent" on which EPA could read the effect of the 1978 amendments as extending to non-permit-related spill situations. Considering that case law generally interprets pollution control statutes broadly to effectuate their purpose, U.S. v. Standard Oil Co., 384 U.S. 224 at 226, 86 S.Ct. 1427, 16 L.Ed.2d 492

(1966), it would be anomalous to interpret the 1978 amendments so that the scope of Section 301(a)'s prohibition on discharging pollutants is reduced, without an unambiguous statement of Congressional intent to do so and absent any change in the language of Section 301(a) itself or of the definitions in Section 502 applicable to it.

(2) Is this oil spill a "discharge of a pollutant" from a "point source" as those terms are defined in Sections 502(12) and (14)?

Chevron argues that this oil spill was not a "discharge of a pollutant" from a "point source" (and therefore is not a violation of Section 301(a)) because the definitions of those terms in Section 502(12) and (14) show that "discharges" regulated under Section 301(a) must be expected or anticipated discharges, not an unanticipated discharge like the spill into Pearl Harbor from a ruptured pipeline that is the subject of this case. Chevron bases this argument on the definition of "point source" as

> Any discernible, confined and discrete conveyance...from which pollutants are or may be discharged. (emphasis added)

Clean Water Act Section 502(14); 33 U.S.C. § 1362(14), as well as on Chevron's reading of the relationship between Section 311 and Section 301(a). Motion of Chevron U.S.A. at pp. 2-4.

Chevron's arguments regarding the relationship between Section 311 and Section 301(a) are discussed above beginning at page 6. As explained there, Chevron misreads the intent and scope of the 1978 amendments to Section 311 and is incorrect in its claim that those amendments require unanticipated oil spills not involving an NPDES permit to be regulated only by Section 311.

Chevron's argument based on the definitions of "discharge" and "point source" is also incorrect. The phrase "are or may be discharged" quoted above is obviously ambiguous. It can mean "are or are expected to be discharged," but it can also mean "are or are capable of being discharged." Chevron's preference for the former reading is mistaken, since many reported cases hold that unexpected discharges of pollutants can violate Section 301(a). For example, in U.S. v. Earth Sciences, Inc. 599 F.2d 368 (10th Cir. 1978) the operator of a gold leaching process was charged with a violation of Section 301 when a faster-than-expected snow melt caused sumps to overflow into a creek. The sumps were part of a closed system for collecting and recirculating a cyanide solution used to leach gold from piles of ore. U.S. v. Earth Sciences, supra, at p. 370. The court found that no discharge was intended from the facility (and so the facility would not have been required to have an NPDES permit). Nevertheless an accidental release from the collection system was found to be a discharge from a point source in violation of Section 301(a). The cases of O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (E.D. Pa. 1981) and Fishel v. Westinghouse Elect. Corp., 640 F.Supp. 442 (M.D. Pa. 1986) involve similar violations of Section 301(a) at facilities that did not have NPDES permits.[17] See also Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 397 (5th Cir. 1985), a citizen suit under Section

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17. In each case it appears there would have been no discharge if the facilities had been maintained and operated properly and so neither facility would have required an NPDES permit.

505 of the Clean Water Act, 33 U.S.C. § 1365, in which the court stated that a single prior leak from an oil pipeline would not constitute a continuing violation of Section 301(a), as is required in order to maintain a suit under Section 505.

Chevron argues essentially that the "point sources" regulated under Section 301(a) all require NPDES permits. Motion for Summary Dismissal at pp. 3-4; Reply Brief at n.3. Chevron's oil pipeline did not have or require an NPDES permit,[18] and consequently in Chevron's view is only regulated under Section 311 relating to oil spills, and not under section 301(a) relating to unauthorized discharges. As shown in the cases cited above, however, there can be point sources that discharge unexpectedly (and therefore do not require NPDES permits) that nevertheless violate Section 301(a).

Chevron's also argues (Reply Brief at p.5) that the only "discharges" of oil covered by Section 301(a) are the three types of "discharges" excluded from Section 311 by the definition of "discharge" in Section 311(a)(2) and that "[n]o other reading gives meaning to the language of Section 311(a)(2)." However, as discussed above, while the 1978 amendments to Section 311(a)(2) exclude certain types of spills from regulation under Section 311, they do not do the reverse: that is, they do not exclude from regulation under Section 301 all spills that are regulated under Section 311. Thus Section 311(a)(2) has a clear function,

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18. Chevron holds NPDES permit NI0000329 for the refinery, but states that under the permit "no treatment system for the pipeline was ever considered or required." Motion for Summary Dismissal, p.10.

(which is to exclude certain discharges related to permits from coverage under Section 311) eventhough it does have not the double function Chevron claims for it of also defining which "discharges" of oil are covered by Section 301(a).

Chevron does not concede that a pipe can be a "point source" where it was not anticipated that there would be a discharge from the pipe. Reply Brief at n.3. However, it is clear as a matter of law that accidental or otherwise unanticipated discharges of pollutants can be from a "point source." For example, in U.S. v. Earth Sciences, the court said:

> We have no problem finding a point source here. The undisputed facts demonstrate the combination of sumps, ditches, hoses and pumps is a circulating or drainage system to serve this mining operation....
>
> [W]e view this operation as a closed circulating system to serve the gold extraction process with no discharge. When it fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source.

U.S. v. Earth Sciences, supra at p. 374.

Similarly, in O'Leary v. Mover's Landfill the court said:

> The essence of a point source discharge is that it be from a "discernible, confined, and discrete conveyance." 33 U.S.C. § 1362(14). Contrary to defendants' assertions, this has nothing to do with the intent of the operators....
>
> The discharges here from inter alia (1) overflowing ponds, (2) collection-tank bypasses, (3) collection-tank cracks and defects, (4) gullies, trenches, and ditches (5) broken dirt berms, all constitute point source discharges.

O'Leary v. Mover's Landfill, supra, at p.655.

The seven-inch rupture in Chevron's pipeline, apparently caused by operator error when personnel at Chevron's Barbers Point Refinery attempted to pump jet fuel from the refinery to Chevron's marketing facility in Honolulu before the valves were opened at the Honolulu end of the pipeline,[19] is directly analogous to the discharge in U.S. v. Earth Sciences "from a fissure in [a] dirt berm" and to the discharge in O'Leary v. Moyer's Landfill from "collection-tank cracks and defects."

Findings

The events described in the Federal On-Scene Coordinators Report at pages 3-4 and 10-11, if proved at hearing, would constitute the "discharge of a pollutant" from a "point source" in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a).

It is not clear from the administrative record, however, that Chevron has conceded the accuracy and completeness of the Federal On-Scene Coordinator's Report. Chevron appears instead to assert that under its theory of the case the question whether the Barbers Point - Honolulu pipeline is a "point source" should be deferred for resolution at such time as EPA "attempts to regulate the pipeline in a permit proceeding." Reply Brief at n.3. Thus while Chevron's legal arguments against finding the pipeline to be a "point source" have failed, Chevron does not appear to

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19. Federal On-Scene Coordinator's Report at p.10.

have contemplated that an ultimate determination of fact would be made on that issue in this summary determination, and it may be that none can, unless sufficient undisputed facts can be found in the administrative record to allow a finding of fact that the discharge at issue here was from a "point source".[20]

Since Chevron appears not to have agreed generally to the facts in the administrative record, the next obvious source of facts is Chevron's statement of facts in support of its Motion for Summary Dismissal. Although those facts are not presented by affidavit, Section 126.104(e) of the Guidance on Class I Clean Water Act Administrative Penalty Procedures provides that

> "[a]ny party to a hearing to be held under these rules may move, with or without supporting affidavits and brief, for a summary determination upon any of the issues being adjudicated, on the basis that there is no genuine issue of material fact for determination" (emphasis added).

Consequently, necessary facts need not be proved by affidavit, so long as there is no genuine issue as to those facts.

Chevron's Motion for Summary Dismissal does not contain a separate statement of facts, but the following factual statements are made in the body of the Motion:

> On May 13, 1987, a pipeline owned by Chevron U.S.A. Inc. ruptured. That rupture caused the sudden unanticipated spill of approximately 104,000 gallons of Jet-A fuel into Waiawa Stream and Middle Loch, Pearl Harbor, Hawaii.

Motion, p.1.

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20. Whether a certain discharge is from a "point source" is a question of fact. U.S. v. Standard Oil Co., 384 U.S. 224, 226, 86 S.Ct. 1427, 1428, 16 L.Ed. 2d 492 (1966).

> **[T]he sudden and unanticipated rupture of Chevron's pipeline was neither contemplated nor was a treatment system to deal with it available or required. Indeed, under Chevron's permit for the refinery, NPDES permit NI0000329, no treatment system for the pipeline was ever considered or required. And, the Section 311 (a)(2)(C) exclusion is inapplicable here because it was never contemplated that the pipeline would have a "continuous or anticipated intermittent discharge"; in fact, no discharges from the pipeline were ever anticipated. 5/**

Motion, p. 10

> 5 It is undisputed that Chevron's Jet-A fuel spill did not occur at the refinery and did not enter the water through an NPDES-permitted outfall. Chevron's pipeline .... is not regulated by the NPDES permit.

Motion, n.5.

Another source of facts is the Adminstrative Complaint, since Chevron agreed at the prehearing conference held January 25, 1988 that "the events described in paragraph II.C of the Complaint took place."[21]

Paragraph II.C of the Complaint reads as follows:

> On or about May 13, 1987, Respondent violated Section 301(a) of the Act, 33 U.S.C. §1311(a), by the unauthorized discharge of approximately 104,000 gallons of Jet-A fuel from a ruptured Chevron U.S.A. Inc. pipeline into Waiawa Stream and Middle Loch, Pearl Harbor, Hawaii. The subject pipeline runs approximately 22 miles from the Barbers Point Refinery to Chevron's marketing facility at Pier 30 in Honolulu.[22]

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21. Report of Prehearing Conference, p.2.

22. The allegation of a violation of Section 301(a) was, of course, not agreed to by Chevron.

Although these statements contain relatively little detail as to the physical appearance of the pipeline and the causes of the discharge, I find that these statements taken together set out a violation of Section 301(a), that is, an unauthorized "discharge of a pollutant" as that term is defined in Section 502(12) of the Clean Water Act.

Conclusion

Based on the reasons above I find that EPA has jurisdiction of this matter under Section 309(g) of the Clean Water Act and that the May 13, 1987 discharge of Jet-A fuel into Pearl Harbor from a fissure in the Chevron Barbers Point-Honolulu pipeline constitutes a violation of Section 301(a) of the Act.

Accordingly, IT IS ORDERED THAT:

(1) Respondent's Motion for Summary Dismissal is DENIED;

(2) Complainant's Motion for Summary Determination on Liability is GRANTED.

(3) A status conference will be held by telephone at 11:00 a.m. on Tuesday, May 22, 1990 to set the date of hearing on penalty.

Steven W. Anderson

Steven W. Anderson
Presiding Officer

Dated: May 3, 1990

EXHIBIT 3

to grow up in a world which does not set him apart, which looks at him not with scorn or pity or ridicule—but which welcomes him exactly as it welcomes every child, which offers him identical privileges and identical responsibilities.

It has been over 50 years in coming, this right for the mentally ill, and I urge my colleagues to support any amendment to adopt such a national policy and commitment to the children of this Nation, but more particularly to the economically and socially stigmatized low-income mentally ill child.

Mr. BAYH. Mr. President, I am pleased to join many of my colleagues in cosponsoring Senator JAVITS' amendment to the child health assessment program portion of H.R. 9434. This amendment will assure that low income medicaid-eligible children who are diagnosed as mentally ill are not denied treatment for such conditions under the child health assessment program which, if passed, will supplant the EPSDT medicaid program.

Without the Javits amendment, the legislation will single out mental illness for discriminatory, second-class coverage under medicaid. Mental health care for a low-income child diagnosed as mentally ill would remain an option for those States which have not included such under their State medicaid plan. The Javits amendment would assure that all eligible children diagnosed as mentally ill receive the necessary ambulatory and general hospital-based treatment to permit them to grow, learn, and mature without the stigma of mental illness.

Mr. President, I am greatly distressed that CHAP should be adopted with language which would put into medicaid law for the first time, an explicit exclusion from treatment for the child diagnosed as mentally ill. The House Commerce Committee-adopted CHAP program will expand services to 13.5 million low-income children now eligible for EPSDT and bring an additional 2.5 million children into the program. The Javits amendment, costing some $25 million, will assure that among those 16 million children, those in need of treatment for nervous, mental, or emotional disorder, receive the same range of treatment opportunities as provided to those children with physical ailments. The $25 million, which HEW has estimated that the amendment will cost, will eliminate arbitrary limits now imposed on the amount, duration, and scope of services provided by physicians in the care of mental illness.

Further, the amendment will permit full reimbursement to clinics which provide mental health treatment services to CHAP-eligible children diagnosed as mentally ill. Eight States today provide no clinic services at all, and many other States have specifically written exclusions for the treatment of mental disorders in clinics which otherwise provide treatment services under EPSDT for physically ill children.

It has been demonstrated in a number of studies that treatment for mental illness reduces subsequent general health care costs by as much as 50 percent. In a Blue Cross of Western Pennsylvania study, it was shown that overall medical costs were reduced by 31 percent when mental health benefits were included in a health care plan. Such reduction was inclusive of the additional costs associated with mental health care. Further, a national study noted that over 90 percent of all children receiving mental health care were treated on a low-cost outpatient basis, and over 40 percent of such children were terminated from treatment within 12 visits. The cost associated with the amendment, then, is small, when weighed against the savings in other health care costs. The cost of this amendment is further reduced when weighed against the value of a productive adult member of society, which a treated mentally ill child would become.

To diagnose and treat mental and emotional illness among children, thus, are the first lines of prevention. Experience indicates that the failure to do so has already had severe consequences and will continue to have a profound effect in future years. On the other hand, if mental and emotional illnesses are attended to as closely as possible to the time of their inception, the result will be more normal development throughout childhood, and later entry into society as productive adults.

As pointed out by the Joint Commission on Mental Health of Children, the effect of untreated mental illness is felt by many others beyond the child so diagnosed. They stated:

It should be borne in mind that for every child who has a severe mental health problem, many more are affected—those who are in association with him in his neighborhood, in his school, and especially within his family. If only families are considered, one could estimate that at least three or four other people—parents and brothers and sisters—are intimately and deeply affected by a child's mental illness, or serious emotional disorder.

Thus, the amendment which I am proud to cosponsor today, will benefit not only the child diagnosed as mentally ill, but will assure that his or her family, too, is safeguarded from the effects of mental illness—the pressures which can divide families, irreparably scar its members, and destroy perhaps the most vital institution in our society.

I urge my colleagues to support this amendment.

PUBLIC WORKS AND ECONOMIC DEVELOPMENT ACT AMENDMENTS—S. 1493

AMENDMENT NO. 4739

(Ordered to be printed and referred to the Committee on Environment and Public Works and the Committee on Governmental Affairs, jointly.)

Mr. STAFFORD submitted an amendment intended to be proposed by him to S. 1493, a bill to amend the Public Works and Economic Development Act to establish a comprehensive program to provide financial and technical assistance to States, local governments, and Indian tribes to manage impacts caused by energy development, and for other purposes.

DEPARTMENT OF ENERGY CIVILIAN PROGRAMS AUTHORIZATIONS—S. 2692

AMENDMENT 4740

(Ordered to be printed and to lie on the table.)

Mr. McGOVERN (for himself, Mr. RIEGLE, Mr. CRANSTON, Mr. GRAVEL, Mr. HODGES, and Mr. LEAHY) submitted an amendment intended to be proposed by them, jointly, to S. 2692, a bill to authorize appropriations for the civilian programs of the Department of Energy for fiscal year 1979, and for other purposes.

WATER POLLUTION CONTROL ACT—H.R. 12140

AMENDMENT 4741

(Ordered to be printed and referred to the Committee on Environment and Public Works.)

Mr. STAFFORD submitted an amendment intended to be proposed by him to H.R. 12140.

● Mr. STAFFORD. Mr. President, I am submitting an amendment which I hope can receive the Senate's attention at some point during the day. It attempts to correct deficiencies in the hazardous substances program established under section 311 of the Federal Water Pollution Control Act. It is a variation on an amendment characterized by industry, environmental and administration representatives as the "quick fix."

The best explanation of the need for this amendment is contained in a recent letter from the Assistant EPA Administrator in charge of the program, Mr. Thomas Jorling, to Sentor MUSKIE, the chairman of the Subcommittee on Environmental Pollution. If there is no objection, I would like to have that letter inserted in the record at this point.

The PRESIDING OFFICER. Without objection, it is so ordered.

U.S. ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C., September 22, 1978

Hon. EDMUND S. MUSKIE
Chairman, Subcommittee on Environmental Pollution, Committee on Environment and Public Works, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: While I know I must communicate with the Chairman and other members of the Committee, I want to share some thoughts with you first and then meet with you to seek your advice before proceeding on a very serious matter concerning the Clean Water Act.

One of the most acute frustrations I have come to experience in my role as an administrator is the immense difficulty associated with taking statutory mandates into implementation. Complexity, procedures, and shortages of resources all contribute, but there are also larger, more pervasive reasons related to institutional fears of changing or altering the system. The average time for rulemaking in EPA is now approaching four years. In addition, since I have been here all promulgations have been subject to judicial appeal.

My frustrations reached near despair recently when a federal district court enjoined the implementation of the hazardous substances spill portion of sec. 311 of the Clean Water Act. It is important that you know of this situation and I will try to summarize it in this letter, but I think further explanation is essential, especially since, as you will

see, we have a proposal which I believe is the only course of action available to us if the 311 hazardous spill program is to be in operation in the next three to five years.

When the Clean Water Act was enacted in 1972, hazardous substances were included in parallel with oil, and authority was granted to the Administrator to designate hazardous substances to distinguish between substances on their "removal" characteristics, to remove or mitigate spilled substances, to assess liability for costs, and to impose penalties. When I assumed responsibility for the program in 1977, one of my highest priorities was to complete the rulemaking necessary to implement the hazardous spill program. In the absence of a program, EPA has had to grapple with the Hopewell kepone destruction; carbon tetrachloride emergencies on the Ohio River, a four-month closure of the Louisville sewage treatment plant because of a chemical spill, chemical contamination of primary drinking water supplies in Kernersville, North Carolina; chlorine deaths from a freight train derailment in Youngstown, Florida, and many more. Finally, in March of this year, the four key regulations for hazardous substances (designation of 271 substances, classification of removability, rate of penalty and harmful quantities) were promulgated and EPA and the Coast Guard allocated resources for their implementation. This was the culmination of six years of activity.

Following promulgation and before the effective date of the regulations, the Federal District Court in the Western District of Louisiana acting on a complaint filed by the Manufacturing Chemists Association, the American Waterways Operators, the American Association of Railroads, and others enjoined the program. Three issues were brought before the Court—the harmful quantity determination, the question of removability, and the inter-relationships between sec. 311 and existing NPDES permits. The court agreed with the complainants and the specific ruling rendered the hazardous substance program inoperative.

The future of the 311 program is now in the uncertainty beyond the ability of the Agency to singularly control. The courts, the Agency, and a large number of interested parties all are in a position to influence the outcome, especially to cause unending delay by amendment or judicial action if there is not substantial agreement on the basic approach.

In the face of the injunction, the Agency has three basic options to consider. I will summarize each.

First, prosecute an appeal.

The Federal District Court for the Western District of Louisiana is in the 5th Circuit. The Circuit subject to a suit in the penalties Judiciary Bill. In a review of this option in consultation with the Justice Department, we have reached the following conclusions. It would take a minimum of three but more likely five years to have the matter go through the court system and be resolved ultimately by the Supreme Court. On the merits, there is greater than 75 percent chance the lower court decision that stopped the program would be upheld.

Second, attempt a rewrite of the regulations to conform to the court's order.

The threshold issue—the determination of harmful quantities. EPA could not possibly meet this requirement and be in compliance with the 311 mandate. Each would require us to establish actual harmful effects from specific quantities covering a range of circumstances into which spills as might be discharged. This would exceed 1972 burden if there ever was one. Even if we tried this approach, our best estimate indicates we could determine harmful quantities at a rate of 10-15 per year, but at a very high resource cost. It would be decades before we had anything like the 271 chemicals now subject to our rules.

Moreover, since this was the decision of only one federal district court, it is unlikely we could have any certainty that satisfying this court would satisfy all of the other 91 federal district courts.

Third, legislative repair.

Two possibilities are suggested. One, a full fledged effort to repair sec. 311 and perhaps related authority; or alternatively, a quick fix addressed to the specific problems raised by the court.

I have reached the conclusion to proceed with the latter. My reasons include the belief that the basic core of sec. 311 is sound. If the provision was changed—even to make it better—it would require a new rulemaking effort. As I explained above, given our experience, it would be five years or more before we again had promulgated regulations and the capacity to implement them.

Consequently, and with acknowledged risk to all parties, I have met with the litigants over the last two weeks in an attempt to determine if there was a "noncontroversial" legislative proposal that all parties in good faith could accept and allow it to be grafted onto a simple research and development authorization bill which has passed the House and is pending in the Senate Committee (H.R. 12140). This is admittedly a very remote possibility under the best circumstances, but I believe it is worth the try. I do not see the same opportunity for quick action in the next Congress. I believe the parties are participating in this effort in good faith. No one has pressed for all of their preferences. As a consequence, we have reached a position that the Agency and the litigants can support. If it is enacted we can have the 311 hazardous substances program in motion inside of a few months.

In the discussions with the parties I have been guided by the assumption that Congress and the people expect to have the following basic elements of the 311 program put into operation as soon as possible:

1. The designation of substances and quantities the discharge of which creates a duty on the discharging owner or operator to notify the government.

2. Response by the government to mitigate the effects of the substances and to remove the substances where appropriate.

3. Liability imposed on the owner for costs the government incurs in removal and mitigation; and

4. A penalty provision.

I believe that with several amendments to section 311 in this Congress we can build on the rulemaking effort the Agency has conducted for all these years and we can get this basic program to operate almost immediately after enactment.

The Agency and the Coast Guard have expended great resources in training, information dissemination, and related preparations, all premised on the 271 substances and the harmful quantities now designated. Industry similarly, even though it has litigated, has prepared to comply with the program through training of personnel and is ready to distribute materials to employees. There is a program—a very valuable program—ready to go but it is now in suspended animation. The situation is hard for me to understand and the public already suspicious of our ability to govern, it is impossible to understand.

The amendments we propose basically place hazardous substances on a par with oil as they relate to the major components of sec. 311, with one major exception. Rather than the $5,000 penalty limit for oil, the limit for hazardous discharges would be $50,000. This represents a significant reduction from the present law (up to $5 million for vessels and $500,000 for other sources). However, with the 1977 amendments clarifying the liability for mitigation in the case of discharges of hazardous substances, we feel the reduced penalty's effect on achieving a high standard of care is offset. If experience reveals otherwise, amendments to the penalty structure could come later, but in the meantime the duty to give notice, the authority of the government to respond and act, and liability—all presently enjoined—could go into effect.

I know this is a most unusual request, and would hope I could meet with you to explain the circumstances in more detail.

I am motivated by the deepest sense of concern that if the legislation cannot be amended we will be unsuccessful in getting any element of the hazardous substances spill program in effect for years; an inability which, when so much has been invested, does not seem to be in the public interest.

Sincerely yours,

THOMAS C. JORLING,
Assistant Administrator

Mr. STAFFORD. Following the receipt of Mr. Jorling's letter and at the urging of various interested parties, the committee held a hearing on the proposed amendment. Although Mr. Jorling was the only witness, he spoke on behalf of the many groups which participated in the unusual and lengthy negotiations. The date of this hearing was October 5, less than 2 weeks ago.

Normally, a change of such fundamental and important nature would be subjected to more extensive hearings and to formal scrutiny by the membership of the committee. However, because it was so late in the session, we were required to rely on more informal discussions regarding the merits of the proposed amendment.

During the course of these discussions, several flaws in the original proposal were revealed. The amendment was changed to correct these. In addition, certain changes suggested by the Departments of State and Transportation were incorporated into the amendment.

Based on my informal discussions with other members of the committee, I believe I can safely say that my action here reflects the will of its membership. The committee considers it very important to implement one of the most significant provisions of the Clean Water Act, section 311, dealing with the discharge of hazardous substances—particularly, the Government's ability to respond to and mitigate the effects of such discharges. More than in any other environmental area, people expect quick and effective governmental response to protect public health and the environment in the event of spills of such materials. Nothing perplexes a citizen more than discovering that the Government is incapable of acting rapidly and decisively in such situations.

But, despite the fact that section 311 was enacted 6 years ago, the hazardous substances spill program is nonexistent. The concept of Government response to spills was first developed in the context of oil in the late 1960's and was incorporated in the 1970 Water Quality Improvement Act. At that time, uncertainty surrounding the appropriateness of including other hazardous materials in such a scheme led the Congress to authorize the administration to study similar response mechanisms for them.

When the Clean Water Act was enacted in 1972, hazardous substances were included in parallel with oil, and the administrator was granted authority to designate hazardous substances, to distinguish between substances based on their "removal" characteristics, to remove or mitigate the effects of spilled substances, and to assess civil penalties and clean-up costs. The Environmental Protection Agency responded to that mandate inadequately, in part for complicated technical reasons.

Recently, however, implementation of the section 311 program was designated as a high priority. EPA set out to complete the rulemaking necessary to implement the hazardous substances spill program. In this undertaking there were several uncertain elements in section 311 which led the committee to make legislative clarifications, especially regarding the inclusion of mitigation activities in the concept of removal. In December 1977, these clarifications were incorporated in amendments to the Clean Water Act.

In March of this year, the four key regulations for hazardous substances were finally promulgated. The four sets of regulations designated 271 substances, classified their removability, and established harmful quantities, units of measurement, and rates of penalty. The Environmental Protection Agency, along with the Coast Guard, allocated regional resources to the task of implementing the 311 hazardous substances program. This regulatory and programmatic effort was the culmination of 6 years of activity.

Following promulgation, but before the effective date of the regulations, the Federal District Court for the Western District of Louisiana, acting on complaints filed by the Manufacturing Chemists Association, the American Waterways Operators, the Association of American Railroads, and others, enjoined their implementation and enforcement. The principal challenges to the regulations included allegations that EPA had illegally determined the actual removability of the designated substances, that EPA's harmful quantity determinations were arbitrary and capricious, and that EPA had unlawfully applied the provisions of section 311 to facilities with NPDES permits.

The court agreed with the plaintiffs on all three issues and concluded that the regulations were "invalid, void, unenforceable, and of no legal effect." The court concluded that EPA had impermissibly ignored mitigability in determining the actual removability of substances. In addition, it held that EPA's harmful quantity determinations were unlawful because they did not consider "times, locations, circumstances, and conditions" as required by section 311(b)(4), and, therefore, were not predictive of actual harm. Finally, the court held that discharges subject to section 402 of the act should not be subject to the reporting requirements, civil penalty liabilities, and cleanup costs of section 311.

The impact of this decision on EPA's ability to prevent and respond to the discharge of hazardous substances is difficult to overstate. Invalidation of the removability regulation rendered inoperative the entire civil penalty scheme. The rejection of harmful quantity determinations—the cornerstone of the regulatory scheme—eliminated mandatory reporting of spills and relieved dischargers of responsibility for civil penalties and clean-up costs. The future of the 311 program is now in grave doubt. The courts, the EPA, and a large number of interested parties are all in a position to influence the future of the hazardous substances spill program. In the absence of substantial agreement on a basic approach, these parties could endlessly delay any amendment or litigation.

In the face of the situation created by the injunction, the committee considered three basic options:

First, an appeal could be prosecuted. But the Justice Department and EPA concluded that it would take a minimum of 3, but more likely 5, years to have the matter processed through the court system and ultimately resolved by the Supreme Court. Further, the administration believed there would be a substantial chance that the lower court decision halting the program would be upheld.

Next, the regulations could be rewritten to conform to the Court's order. On the threshold issue—the determination of harmful quantities—EPA could not write rules to satisfy the Court order and be in any way responsive to the 311 mandate. To do so would require EPA to establish before the fact actual harmful effects from specific quantities of chemicals covering the infinite range of circumstances in which they might be discharged. This would reestablish the pre-1972 burden of proving water quality impact as a precondition for environmental protection. The best EPA estimate indicated that the agency could determine harmful quantities at a rate of 10 to 15 per year, but only at a very high resource cost. It would be decades before achieving anything like the 271 chemicals designated in the enjoined regulations.

Finally, there were two legislative repair possibilities: There could be a lengthy, full-fledged effort to repair section 311 and, perhaps, related authority, or, alternatively, a more focused effort addressed to the specific problems raised by the recent Court decision. After intense review, the parties concluded that there was no recourse but to seek quick legislative repair, if section 311 were to be implemented without further unconscionable delay. The committee agreed. Our reasons include the belief that the existing section 311 is basically sound. If the provisions were greatly changed, even for the better, it would require an entirely new rulemaking effort. This would be time-consuming. Given past experience, it would take years to achieve promulgated regulations and in the meantime the discharge of these hazardous substances could continue unregulated.

The effort to define a legislative solution has forced judgments as to what elements of the program are most important and to consider altering those which, while important, would prevent a consensus. We concluded that the following basic elements of the 311 program should be put into operation as soon as possible:

First. The designation of substances and the determination of quantities, the discharge of which create a duty on the discharger to notify the Government.

Second. Governmental response to mitigate the effects of discharged substances and to remove them where appropriate.

Third. The imposition of liability on the owner for costs incurred by the Government in removal and mitigation.

Fourth. A penalty provision.

The legislative proposal I am offering retains these key elements of the 311 program.

The recommended changes involve three basic areas. First, the proposal simplifies the determination of which discharge incidents must be reported to the Federal Government. The proposal clarifies the authority of the administrator in designating hazardous pollutants and determining harmful quantities of such pollutants. The amendment makes it clear that the determination of harmful quantities does not require an assessment of actual harm in the variety of circumstances in which such substances might be discharged. Rather, the determination is based on the administrator's judgment of what quantity may be harmful as a result of its chemical properties, not the circumstances of its release. This change would resolve the district court's objections to the previously promulgated regulations and it would allow the basic elements of section 311 to be implemented right away.

Second, the changes place hazardous substances on a par with oil in their relation to the major components of section 311, except that the maximum civil penalty for their discharge would be $50,000, compared with $5,000 for oil. The administrator would enter into a memorandum of understanding with the Secretary of Transportation permitting the administrator to select either of two options available for penalizing dischargers of hazardous substances. One option is an administrative penalty up to $5,000 per violation. The second option would be commencement of a civil action in Federal district court. Penalties in such an action could not exceed $50,000 per violation, unless the discharge was the result of willful negligence or misconduct on the part of the owner, operator, or person in charge, in which case the penalty maximum would be $250,000 per discharge.

The $50,000 maximum involves a significant reduction from the existing $500,000 liability for facilities and $5,000,000 for vessels. However, in view of the 1977 amendments which make it clear that dischargers are liable for mitigation costs resulting from dischargers of a hazardous substance, we concluded that sufficient incentive for a high standard of care exists with the combination of public disclosure of who is discharging, liability for mitigation of hazardous substance discharges provided in 1977, and the penalty provisions. If experience

proves that higher penalties are necessary, the penalty structure can be modified accordingly. In the meantime, however, the key authorities of section 311—mandatory reporting, Government ability to respond and clean-up liability, all of which are now enjoined—could go into effect.

In the proposed changes the criteria for determining the size of the penalty would also be streamlined. In assessing the penalty, the Court would consider the following factors.

First. The size of the business involved;

Second. The effect of the penalty on the discharger's ability to continue in business;

Third. The gravity of the violation, which we would interpret to include the size of the discharge, the degree of danger or harm to the public health, safety, or the environment, including consideration of toxicity, degradability, and dispersal characteristics of the substance, previous spill history, if any, and violation of spill prevention regulations where appropriate, and

Fourth. The extent and degree of success of any effort by the violator to mitigate the effects of the discharge.

Particular emphasis should be placed on the extent of mitigation efforts by the discharger, in order to encourage prompt and effective cleanup. Mr. Jorling has said the agency will include these criteria and other elements governing gravity of the violation in its regulations implementing the penalty provision.

The third area of change would clarify jurisdiction over discharges of oil and hazardous substances from point sources with NPDES permits. The issue of which section of the act governs these discharges is a principal source of controversy in the litigation. This proposal only affects the jurisdiction over certain discharges permitted under section 402.

Basically, the changes make it clear that discharges, from a point source permitted under section 402 permitted source, which are associated with manufacturing and treatment, are to be regulated under sections 402 and 309.

Spill" situations will be subject to section 311, however, regardless of whether they occur at a facility with a 402 permit. For example, on-site industrial spills such as truck or rail accidents or substantial or large-scale failures or ruptures of containers or vessels would be considered subject to section 311, unless such on-site spills were processed through a treatment system capable of eliminating or abating such spills, in which case such discharges would be regulated under sections 309 and 402. On the other hand, situations such as the following would be regulated under sections 309 and 402, not 311: System upsets caused by control problems or operator error, system failures or malfunctions, equipment or system startups or shutdowns, equipment washes, production schedule changes, noncontact cooling water contamination, storm water contamination, or treatment system upsets or failures at facilities with treatment systems capable of eliminating or abating such discharges. While most discharges from permitted point sources will, therefore, be regulated solely under the section 402 permit system, the oil spill program under section 311 will remain intact, and other classic spill situations will continue to be subject to section 311.

In the amendment adding a new definition of discharge for purposes of section 311, we are attempting to draw a line between the provisions of the act under sections 301, 304, 402 regulating chronic discharges and 311 dealing with spills. At the extremes it is relatively easy to focus on the difference but it can become complicated. The concept can be summarized by stating that those discharges of pollutants that a reasonable man would conclude are associated with permits, permit conditions, the operation of treatment technology, and permit violations would result in 402/309 sanctions; those discharges of pollutants that a reasonable man would conclude are episodic or classical spills not intended or capable of being processed through the permitted treatment system and outfall would result in the application of section 311.

While this division might be subject to theoretical abuse, for example, funneling classic spills through an outfall to avoid section 311, the availability of criminal sanctions under both sections 311 and 309 should operate to deter such avoidance schemes.

The amendment also clarifies that the costs of removal of a discharge of a hazardous substance from a point source with a 402 permit are recoverable from the owner or operator of the source under section 309(b) of the act.

I should point out that none of the changes affect the designation of 271 substances as hazardous. If the proposed legislative changes are enacted, the agency will withdraw the regulations, make the necessary adjustments, and promulgate the same 271 designations and quantities without change as soon as possible. The amendments we are proposing would allow us to build on the rulemaking effort conducted for the last few years and enable EPA to get a basic program into operation within a few months after enactment.

The EPA and the Coast Guard have already expended great resources for training, information dissemination, and related preparations premised on the 271 substances and the harmful quantities designated. Industry, notwithstanding its litigation posture, is prepared to comply with the program through personnel training and other implementing actions. In short, a very valuable program is ready to go, but it is now in a state of suspended animation. The situation is hard for the committee to accept. For the public it is impossible to understand.

I do not believe the country can be or should be without a hazardous spill response capability for another 4 or 5 years. We can build on the rulemaking effort that has been conducted; we can get the basic program to operate. Although certain adjustments must be made in the interests of getting the program moving, I believe they are worthwhile.

I am deeply concerned that if the legislation is not amended we will be unsuccessful in getting any element of the hazardous substances spill program in effect for years, a failure which would have incalculable effects on public health and safety. My request is unusual, yet given the complexity, the litigation, and the rulemaking associated with section 311, we feel strongly that it is the only way to put the hazardous spill program into effect without unconscionable further delay. I hope you will agree.●

THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT—H.R. 39

AMENDMENT NO 4742

(Ordered to be printed and to lie on the table.)

Mr. GRAVEL submitted an amendment intended to be proposed by him to H.R. 39, an act to designate certain lands in the State of Alaska as units of the National Park, National Wildlife Refuge, National Wild and Scenic Rivers, and National Wilderness Preservation Systems, and for other purposes.

CALLING INTO QUESTION SALT II

Mr. BARTLETT. Mr. President, after 10 years of the "SALT process" and 6 years of negotiations, the long anticipated SALT II treaty finally seems at hand.

The timetable and style for the presentation of the new strategic arms limitation treaty to the American people and to the Senate is becoming more clear. Immediately prior to the November elections, Secretary of State Vance will be in Moscow conducting secret negotiations designed to conclude SALT II. Undoubtedly, the electorate will read and hear of "progress." Then, with Congress out of session and the elections over, President Carter and Soviet Communist Party Secretary Brezhnev will meet at a SALT II summit designed to enhance the spirit of "peace in our time."

In January, with the next elections nearly 2 years away, the new Congress will finally come face to face with this SALT agreement which will already have become a very old issue. As the new Congress organizes, shuffling its committee memberships and wrestling with the new budget, Senators and Congressmen will attempt, to evaluate this incredibly complex treaty. I assume it will be a treaty and not an "executive agreement," which would be an insult to the treaty powers of the Senate as enumerated in the Constitution.

Next year, there will be little time left to study the SALT II treaty, so I urge my colleagues who will be returning, and also those who will not, to examine the terms of this new strategic arms limitations agreement beginning now. Although the entire package has not yet been made public, most of the major provisions have been revealed. In any case, SALT has a language all its own and learning even to speak it will take some study.

To aid my colleagues, I would like to discuss some of the problems which are

EXHIBIT 4

Calendar No. 181

101ST CONGRESS
1st Session

SENATE

REPORT
101-94

OIL POLLUTION LIABILITY AND COMPENSATION ACT OF 1989

JULY 28, 1989.—Ordered to be printed

Filed under authority of the order of the Senate of July 27 (legislative day, January 3), 1989

Mr. BURDICK, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 686]

[Including cost estimate of the Congressional Budget Office]

The Committee on Environment and Public Works, to which was referred the bill (S. 686) to consolidate and improve Federal laws providing compensation and establishing liability for oilspills, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

GENERAL STATEMENT

The Committee on Environment and Public Works has long been concerned with the potential environmental dangers posed by the transportation, storage, and handling of oil. In 1970, extensive committee activity resulted in enactment of the Water Quality Improvement Act, which amended the Clean Water Act to establish liability for cleanup of spills of oil from facilities and vessels.

The oil pollution liability provision, section 311, was amended in 1977 to expand the geographic coverage of the law, raise the limits of liability for discharges of oil and hazardous substances, and add

29-010

adequacy of the National Contingency Plan and any regulations promulgated pursuant to subsection (j) of the Clean Water Act concerning oil spills.

Oil spill penalties

Section 206 expands and clarifies authority for penalties for discharges of oil and hazardous substances to the navigable waters and other violations of section 311 of the Clean Water Act.

Section 206(a) expands existing authority under section 308 of the Federal Water Pollution Control Act concerning inspection and entry. The authorities of this section are expanded to include vessels and facilities in addition to point source discharges. In addition, specific new authorities for collection of information concerning potential discharges of oil are established. This provision was proposed in the Administration bill (S. 1066). This provision is not intended to in any way limit or constrain related inspection and entry provisions of other Federal laws.

Section 206(b) affirms recent court decisions to explicitly provide that violations of the prohibition on discharge of oil and hazardous substances are subject to the criminal penalties established under section 309 of the Act. These penalties are $2,500–$25,000/1 year for negligent violations, $5,000–$50,000/3 years for knowing violations, and up to $250,000 and 15 years for knowing endangerment. This amendment is intended to resolve any ambiguity concerning the intent of Congress on this question.

Section 206(c) clarifies the Clean Water Act to provide that violations of section 311 are subject to the general administrative penalty authority added to the Act by the 1987 amendments (section 309(g)). This provision effectively increases the administrative civil penalty from a maximum of $5,000 to a maximum of $25,000 in the case of a class I penalty and $125,000 in the case of a class II penalty. This subsection also clarifies that Federal enforcement actions may advance even if there is a State enforcement action.

In hearings on recent major oil spills, the Committee also heard of the large number of smaller spills (i.e. an average of over 10,000 spills per year totalling to an average of over 20 million gallons per year). The use of administrative civil penalty authority is an essential tool in an overall program to reduce to number and volume of spills.

Section 206(d) revises paragraph (6) of subsection 311(c) to establish a judicial civil penalty for discharges of oil and hazardous substances. The amendment provides for penalties of up to $25,000 per day of violation, or $1,000 per barrel, whichever is greater. In any case of willful negligence, willful misconduct, or a violation of applicable safety, construction, or operating regulations, the penalty shall be not less than $250,000. The court may consider several factors in assessing a penalty including the seriousness of the violation, the history of prior violations, and the efforts to mitigate the discharge.

Section 206(e) provides that the determination by the President of amounts of oil which may be harmful to public health or welfare be amended to include quantities which may be harmful to the environment.

Section 206(f) provides for penalties for any person who knowingly fails to provide notice of a discharge of oil or a hazardous substance. The existing penalty of a fine of not more than $10,000 or not more than one year in prison or both is revised to provide for penalties consistent with title 18 of the United States Code or not more than three years in prison or both. The amendment also provides that a person who knowingly fails to provide required notice shall not be entitled to the defenses to liability provided in the Oil Spill Liability and Compensation Act.

Section 206(g) provides that administrative, civil and criminal penalties for violations of section 311 of the Act are to be deposited in the Oil Spill Fund.

Conforming amendments to existing oil spill laws

Title III of the reported bill conforms the provisions of various other laws to the provision of this Act.

Section 201 makes clarifying amendments to the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653). The amendments in this Act make it clear that the removal liability of the permit holder extends only to activities relating directly to the Trans-Alaska Pipeline. Additional language makes the Trans-Alaska Pipeline Act removal liability provisions inapplicable in those situations where this Act applies. In all other instances, those provisions in the Trans-Alaska Pipeline Authorization Act relating to removal costs and liability remain in effect.

The reported bill also repeals that subsection of the Trans-Alaska Pipeline Authorization Act which established a compensation fund for damages caused by oil spills from vessels transporting oil from the pipeline terminus to ports elsewhere in the United States, effective upon the payment of any outstanding claims.

Section 202 amends the Intervention on the High Seas Act, in order to make available to the Secretary, for intervention procedures authorized by that Act, the Fund established by this Act.

Section 311 of the Clean Water Act, is amended in several ways. Subsection (c) of that section is amended by authorizing reimbursement to States from the Fund established by this Act, for reasonable costs in removing discharges of oil pursuant to the National Contingency Plan. Subsections (d), (i) and (l) are amended to delete clauses made unnecessary by this Act.

The revolving fund under subsection (k) is repealed, and the amount remaining in the fund is transferred to the Fund established under this Act. Any amounts received by the United States with respect to claims brought under section 311 after the effective date of the repeal of subsection (k) shall also be deposited in such Fund.

Subsection (p) is repealed because it sets out financial responsibility requirements for vessels that are superseded by this Act.

A new subsection (s) is added to provide that the Oil Spill Compensation Fund established in this Act shall be available to carry out the provisions of subsections (c), (d), (i), and (l) as those subsections apply to discharges of oil.

It is important to note that following enactment of this Act, liability and compensation for petroleum oil pollution damages caused by a discharge from a vessel or facility will be determined