

## Oil Pollution Act: Tips for Spill Response, Compliance, and Enforcement



February 13, 2024

### AUTHORS

Stephen Smith, Allyn Stern

Oil spills commonly occur when least expected and, even in smaller quantities can significantly disrupt business operations and create risks for enforcement and/or litigation. It's important that companies are prepared and know the environmental requirements for when the least expected happens, including understanding what actually is "oil" (hint: it's broader than you might think!), who to

notify, legal authorities at play, and best practices to ensure compliance and minimize exposure to regulators and/or private parties.

### What is "Oil" Anyway?

Section 311 of the Clean Water Act (CWA) and the Oil Pollution Act (OPA) make up the federal statutory framework for oil spills. However, many companies may not realize that both petroleum-based and non-petroleum-based substances are regulated as "oil" under the CWA and OPA. As a result, many companies may not realize that they are subject to these laws and, therefore, fail to adequately prepare for compliance and/or response both pre- and post-spill.

Specifically, Section 311(a)(1) of the CWA defines oil as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil." 40 CFR § 112.2 further defines oil as "oil of any kind or in any form, including, but not limited to: fats, oils, or greases of animal, fish, or marine mammal origin; vegetable oils, including oils from seeds, nuts, fruits, or kernels; and, other oils and greases, including petroleum, fuel oil, sludge, synthetic oils, mineral oils, oil refuse, or oil mixed with wastes other than dredged spoil." This definition is notably broader than what many may consider "oil" (i.e., crude oil and refined petroleum products) and encompasses animal fats, vegetable oils, and non-petroleum oils.

### When to Notify?

The CWA and OPA require companies to notify the [National Response Center \(NRC\)](#) of oil spills as soon as they are discovered (i.e., within 15 minutes). This applies to all discharges that reach navigable waters of the U.S. (WOTUS) or adjoining shorelines and (1) cause a sheen; (2) violate applicable water quality standards; or (3) cause a sludge or emulsion beneath the surface of the water or upon adjoining shorelines. In practice, this typically results from a sheen, which 40 C.F.R. § 110.1 defines as an "iridescent appearance on the surface of water." The Oil Pollution Prevention regulations (discussed further below) also identify discharges from regulated facilities that require reporting, though there are

exceptions—for example, when the discharge is in compliance with a permit under Section 402 of the CWA.

Under state and local laws, notification may be much more stringent. For example, California requires immediate reporting of “any significant release or threatened release” of a hazardous material, which includes oil. This can be subjective and requires a fact- and legal-specific evaluation of whether the release qualifies as “threatened” and/or “significant.” In Georgia, immediate notification is required either when the oil creates a “significant sheen on top of state waters” or when the amount discharged is unknown—further creating different criteria for when reporting is required. Regardless of what triggers notification, it is important that companies understand that different agencies—federal, state, and local—may each have different reporting requirements, and accurate and timely reporting is absolutely crucial. Often, failure to timely report is the first violation sought by agencies and can result in increased penalties and additional scrutiny.

## What Authorities Are at Play?

At the federal level, two agencies primarily exercise authority over oil spills—the U.S. Environmental Protection Agency (EPA) and U.S. Coast Guard (CG). Depending on the location of the spill, the EPA or CG may lead federal oversight with the EPA overseeing inland spills and CG overseeing offshore spills. The Pipeline and Hazardous Materials Safety Administration and Federal Railroad Administration may also exercise authority for pipeline or railroad releases, respectively.

As mentioned above, Section 311 of the CWA and OPA—enacted in 1990 in response to the Exxon Valdez oil spill—make up the federal statutory framework for oil spills. In practice, these authorities are best categorized into two areas: (1) oil spill response; and (2) oil spill prevention and preparedness. It is important for companies to understand the expectations for both (discussed in more detail below), and the National Oil and Hazardous Substances Pollution Contingency Plan (often referred to as the National Contingency Plan or NCP), which outlines the federal government’s cleanup strategy for responding to oil spills, including other cleanups under CERCLA. The goal of the NCP is to ensure that resources are available and responses are consistent. Thus, when the federal government oversees a cleanup, the federal On-Scene Coordinator will expect that all response efforts, including those conducted by the responsible party, are consistent with the NCP.

At the state level, most utilize their respective water laws to address oil spills, though some states, like Louisiana, have laws comparable to OPA. At the local level, municipalities have notification and emergency response authorities that will be applicable. In the end, it’s very important that companies understand that several layers of government may have some form of oversight depending on the size, impact, and location of an oil spill.

## OPA v. CWA

While the CWA and OPA are complimentary, including OPA amending the CWA, companies should understand the goals and implications of both. Generally, the CWA focuses on oil spill enforcement for cleanups and penalties, and the OPA broadens national and regional capability for preventing, responding to, and paying for oil spills.

For the CWA, Section 311(b)(3) expressly prohibits the discharge of oil (or hazardous substances) into or upon WOTUS and adjoining shorelines in quantities that may be harmful.<sup>1</sup> For oil, this generally means discharges to WOTUS that cause sheening or violate applicable water quality standards. Sections 311(c) and (e) of the CWA provide extensive authority to the federal government to respond to these discharges,

including threatened discharges, by issuing orders—either unilaterally or by consent—to owners, operators, or persons in charge of the facility from which the discharge occurs.

Sections 311(b)(6) and (7) of the CWA further empower the federal government to pursue significant penalties—both administrative and civil—for spills that reach WOTUS and/or when responsible parties fail to comply with an order. If gross negligence or willful misconduct is involved, you can expect even greater penalties—commonly more than three-fold—not to mention possible criminal liability. Internally, the EPA utilizes the [Civil Penalty Policy for Sections 311\(b\)\(3\) and \(j\) of the CWA](#) and factors outlined in Section 311(b)(8) of the CWA, including the seriousness of the violation, economic benefit to the responsible party, history of prior violations, and efforts to minimize or mitigate the discharge, to evaluate enforcement and penalty calculations.

Akin to the CWA, Section 2702(a) of OPA also makes responsible parties liable for removal costs and natural resource damages resulting from any discharge of oil, including a substantial threat of discharge, to WOTUS and adjoining shorelines. Notably, this includes not only costs incurred by the federal government, but also costs or damages to private parties, including damages for the loss of personal property, loss of revenues/profits due to injury, and cost of additional services during or after a spill. OPA further aims to strengthen national and regional response strategies, amend the National Oil and Hazardous Substances Pollution Contingency Plan, require facilities to develop prevention and response plans, and establish a fund for damages and cleanup costs—each discussed below.

While it is typically always the priority of the federal government to have responsible parties pay for and conduct their own spill cleanups, when a responsible party is unknown, unable, or refuses to pay, funds from the Oil Spill Liability Trust Fund (OSLTF) can be utilized to pay for the response. The OSLTF is managed by the CG's National Pollution Funds Center (NPFC) and the NPFC thereby manages any oversight or cleanup costs incurred by the federal government. Thus, if an oil spill occurs at your facility and the federal government incurs costs responding or overseeing, the NPFC will be the entity that seeks recovery of those costs—even if the EPA later pursues penalties for the same discharge pursuant to Sections 311(b)(6) and (7) of the CWA. In addition, when a non-liable party performs a cleanup or incurs damages as a result of an oil spill, that party may file a claim for reimbursement directly against the responsible party and/or seek reimbursement from the NPFC.

Lastly, regarding liability, both the CWA and OPA are strict liability and provide limited liability defenses for acts of God, acts of war, or acts/omissions of third parties—comparable to CERCLA. Even so, it's important to note that Section 309(g)(6) of the CWA states that the federal government may not seek enforcement, including penalties, if the state “has commenced and is diligently prosecuting an action” under a comparable state law. This includes issuing a final order or directing a responsible party to pay a penalty. As mentioned above, states typically pursue oil spill violations via their respective water laws, which may be considered comparable. State penalties may often be substantially less than those sought by the federal government—thus, early engagement with the state can be advantageous depending on the circumstances.

## Oil Pollution Prevention Regulations

Section 311(j) of the CWA and OPA, as outlined in 40 C.F.R. Part 112, require facilities that store oil in significant quantities to prepare Spill Prevention, Control, and Countermeasure (SPCC) Plans to prevent accidental releases from reaching WOTUS or adjoining shorelines. Facilities with a greater risk of release and impact to WOTUS may also be required to develop a Facility Response Plan (FRP) to prepare for “worst-case spills.” At the outset, companies should confirm whether these regulations are applicable to their operations and facilities.

SPCC plans are required for facilities that are: (1) non-transportation-related (i.e., they store, process, or consume oil rather than simply move it from one facility to another); and (2) collectively store more than 1,320 gallons of oil above ground or 42,000 gallons below ground that could reasonably be expected to discharge oil to a WOTUS or adjoining shorelines. This can include oil drilling and production facilities, oil refineries, industrial, commercial, and agricultural facilities storing/using oil, facilities that transfer oil via pipelines or tank trucks (including airports), and facilities that sell or distribute oil, like marinas. Practically, these regulations require facilities to have a written plan certified by a professional engineer (apart from qualified facilities), maintain adequate secondary containment for oil storage, maintain updated lists of the federal, state, and local agencies that must be contacted in case of a spill, and follow regular inspection requirements, among other requirements.

In addition to SPCC, FRP plans are required for facilities that could reasonably expect to cause “substantial harm” to the environment by discharging oil into or upon WOTUS. They either have: (1) total oil storage capacity greater than or equal to 42,000 gallons and transfer oil over water to/from vessels; or (2) total oil storage capacity greater than or equal to 1 million gallons and either do not have sufficient secondary containment, are located at a distance such that a discharge could cause “injury” to habitat or shut down a drinking water intake, or within the past five years, have had a reportable discharge greater than or equal to 10,000 gallons. If so, given that FRP is self-identifiable, the facility must prepare and submit its FRP plan to its applicable EPA regional office. Among other things, these plans include evaluating , medium, and worst-case discharge scenarios, descriptions and records of self-inspections, drills, and response training, and diagrams of the facility site plan, drainage, and evacuation plan.

EPA commonly conducts inspections at subject facilities to ensure that SPCC and FRP plans are effectively implemented. Should your facility have an oil spill, plan on an inspection very soon to evaluate compliance and mitigation efforts with your respective requirements.

## Suggested Actions

Beyond being aware of the above implications and requirements, below are several actions to consider to ensure compliance and minimize possible enforcement and/or litigation when the least expected occurs.

- ◆ **Act Fast:** Should an oil spill occur, regardless of size, act fast to respond, mitigate, and determine if notification is required. This includes immediate internal coordination with those responsible for responding, as well as outreach to your environment counsel and/or consultant. If the determination for reporting is close, it is recommended that you report (with a qualified caveat) rather than withhold.
- ◆ **Education and Training:** Ensure your staff is trained to effectively respond to, report, and prevent oil spills. Oil spills happen despite best attempts otherwise. When the inevitable happens, make sure facility staff are prepared to respond and mitigate the potential impacts of the spill, including having spill reporting hotlines and other contact numbers easily accessible and staff trained on where all information is located. Also, learn from past spills and/or near spills by conducting evaluations and identifying lessons learned to be utilized to prevent future spills.
- ◆ **Prepare for Outside Communication:** If the spill is significant or causes public impacts, be prepared for outreach by the public, including local news and community groups. Notifications to the NRC are available online and impacts to public or private property often lead to alerts to local news and organizations. Ensure your public affairs contact(s) are aware and develop necessary communication, including desk statements, should the spill create public attention.

- ◆ **Review Compliance:** Evaluate your current compliance with federal, state, or local requirements, including the development, assessment, and update (if needed) of SPCC and/or FRP response plans. This includes determining if either or both are required at your facility. Should a spill occur, it is important to make sure your response plans are up-to-date and ready for implementation.
- ◆ **Regular Audits and Updates:** Periodically audit your spill response and prevention measures (SPCC and FRP plans), including any changes to facility operations, secondary containment features, or volumes of oil stored, to identify and correct inaccuracies and ensure that your plans are up-to-date. For FRP, this includes submitting updates to the appropriate EPA regional office within 60 days of each change that may materially affect the response to a worst-case discharge.
- ◆ **Insurance:** Though not always necessary, consider appropriate insurance coverage to mitigate potential financial liabilities.
- ◆ **Consultation:** If you have any doubts about your obligations during an oil spill or need assistance with compliance, please do not hesitate to contact your environment counsel or consultants for guidance and support.

*Beveridge & Diamond's [Oil & Gas](#) practice and [Water](#) practice group advise clients on matters arising under Section 311 of the Clean Water Act (CWA) and the Oil Pollution Act (OPA), offering comprehensive experience with preventing, detecting, reporting, and responding to oil and hazardous substance spills and related emergency situations. For more information, please contact the authors.*

<sup>1</sup> While this discussion focuses on the impacts of oil spills, it's important to remember that Section 311 of the CWA (though not OPA) also applies to hazardous substances—discharges to a WOTUS that exceed a reportable quantity pursuant to 40 C.F.R. § 117.3—though the federal government may typically utilize the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), or combination thereof, to pursue such releases.

## AUTHORS



**Stephen Smith**  
Of Counsel,  
Washington, DC  
[spsmith@bdlaw.com](mailto:spsmith@bdlaw.com)  
+1.202.789.6056



**Allyn Stern**  
Office Managing Principal,  
Seattle  
[astern@bdlaw.com](mailto:astern@bdlaw.com)  
+1.206.620.3027

### ABOUT B&D

Beveridge & Diamond's more than 125 lawyers across the U.S. focus on environmental and natural resources law, litigation, and alternative dispute resolution. We help clients around the world resolve critical environmental and sustainability issues relating to their products, facilities, and operations.

Learn more at [bdlaw.com](http://bdlaw.com)

The content of this alert is not intended as, nor is it a substitute for, legal advice. You should consult with legal counsel for advice specific to your circumstances. This communication may be considered advertising under applicable laws regarding electronic communications.