ABSTRACT: Comprehensive oil spill liability and compensation legislation has eluded the United States for about 12 years, despite the fact that well-crafted legislation would benefit all interested parties. The public would be better protected from catastrophic effects of oil spills; industry (both oil and shipping) would be provided reasonable limits of liability (or alternative measures); and state governments would become full partners in federally funded oil spill responses. Most of the parties who would be affected by oil spill legislation have made substantial contributions and shown increased flexibility since 1984. Still, one major hurdle must be crossed before legislation can become a reality: state liability law preemption.

The problem

Oil spills are dirty and emotional events: they contaminate and disrupt our beaches, kill our wildlife, and cause losses to a variety of commercial activities. Natural resources can be severely damaged, sometimes beyond repair. But as long as we are an oil-consuming nation, and in particular, import such vast quantities of oil by tanker, it is inevitable that large, damaging, and costly oil spills will continue to occur.

It is vital, then, that we plan for and properly respond to these accidents when they happen. Quickly and effectively removing oil from the environment is essential, but equally important are providing compensation to those who suffer damage and restoring our natural resources.

There are now a number of oil spill regimes under U.S. law. These are the Outer Continental Shelf Lands Act Amendments (OCSLAA), the Deep Water Ports Act (DWPA), the Trans-Alaska Pipeline Authorization Act (TAPAA), and the Clean Water Act (CWA). A regime for seagoing tankers, consisting of the 1969 Civil Liability and 1971 FUND Conventions (CLC and FUND) is in force internationally, but the United States is not a party. These regimes vary considerably in size, purpose, and administration.

CWA, the application of which includes most tank ships (foreign and domestic), is especially deficient. Not only is the liability for owners and operators of tankers unduly low, at $150 per gross ton with a $250,000 minimum, but the coverage does not extend to damaged parties. The publicly financed backup fund, with a current balance of about $6 million, applies to cleanup costs only. In illustration of this shortfall, a 50,000 ton tanker would only be liable for $7.5 million. At least two U.S. spills have required publicly financed cleanup approaching $10 million. Recent bills introduced before the Congress have proposed liability for tanker owners up to $78 million for a broad class of damages, backed up by a compensation fund for up to $260 million per incident.

State liability laws vary widely, with most not requiring financial responsibility, and are often “unlimited,” with the attendant insurance coverage problems. Actual damage recovery is extremely problematic.

The solution

Comprehensive legislation is needed to replace the existing four domestic regimes, eliminating the serious gaps and inadequacies in the coverage they provide, and to adopt the 1984 amendments to the CLC and FUND (the 1984 Protocols). Simply stated, comprehensive legislation would provide adequate cleanup, natural resource restoration, and third-party damage recovery through a regime whose costs are shared by the shipping and oil industries. This result would be accomplished by placing high levels of liability on potential dischargers, backed up by domestic and international oil spill funds (the latter in the case of seagoing tankers) supported by oil interests. Comprehensive legislation would provide compulsory insurance, clear jurisdiction, enforceability of judgments, and, perhaps most importantly, sure and speedy relief for damaged parties.

State preemption—a divergence of views

The 100th Congress had before it three oil spill liability and compensation bills, H.R. 1632, S. 1802, and S. 2643. These bills varied in a number of ways (although H.R. 1632 and S. 1802 were nearly identical). One difference, which probably spelled the failure of all three, was that S. 2643 would not have preempted state oil spill liability law and would not have implemented the 1984 Protocols, while the other two bills would have done so. Thus the issue of state liability law preemption is the compelling question that will face the 101st Congress during 1989 and 1990.

It is important to understand the rationale behind the divergent views on state liability law preemption. In this respect, the positions of the Senate, the House of Representatives, and the states are vitally important.

The House has traditionally passed oil spill legislation that preempted state law to “establish a clear and predictable legal and regulatory framework within which actual or potential claimants, spillers, and insurers will be able to make decisions relevant to oil pollution matters.” The Senate, on the other hand, has taken the position that “Any state wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so.”
The collective position of state governments is clear. The states have put forth a strong case on several points:

- In general they oppose state liability law preemption.
- However, they strongly support the 1984 International Protocols and accept the limited preemption necessary to adopt the Protocols.
- They are gratified that recent proposed legislation would not impinge on states' oil spill funds or enforcement sanctions.

Compromise is required

The Protocols aside, there are two solutions to the issue of state law preemption. One, of course, is to enact legislation that would flatly preempt state liability law, an unlikely event unless the Senate environmental leadership and state governments have an unexpected change of heart.

A compromise with potential is to ensure, by law, that state statutes constitute a remedy of last resort—behind the liabilities of the discharger and a domestic fund established in federal law. The acceptance of this compromise would require sufficiently high liability limits for both the discharger and the fund to make it extremely unlikely that state law would ever come in to play. But the potential benefits of preserving state law would be maintained.

The preemption required under international law to adopt the Protocols is not subject to compromise. To obtain the advantages the Protocols afford, claims against the owner of a seagoing tanker, as well as other persons such as crew members and charterers, would be barred for losses, damages, and costs covered by the Protocols. Claims against persons not named in the Protocols are not barred for any class of damage, nor are state oil spill funds or sanctions that a state might wish to impose. Yet the advantages are substantial and the costs minimal.

The 1984 Protocols

The 1984 Protocols deserve a closer examination since their adoption depends more on their advantages and costs rather than the potential for compromise.

Overview. The Protocols offer a coherent, speedy, and certain remedy for persons and governments damaged by oil spills from seagoing tankers. The costs for the regime are borne, in the first instance, by the tanker owner through a system of strict liability backed by compulsory insurance up to $78 million, and second, if the liability of the tanker owner is exceeded, by an international fund financed by oil receivers. The total compensation at current exchange rates is $260 million, which can be further backed up by a domestic fund in the unlikely event that were necessary.

The Protocols would be a vital companion to domestic oil spill law solving problems connected to the international character of seagoing tanker trade. Financial responsibility would be virtually ensured and judgments of U.S. courts against the tanker owner and his insurance company would be enforced in the country of the owner or insurer. If the owner’s limits of liability were reached or if, for whatever reason, the owner was not properly insured, the international fund would be liable. The regime covers cleanup, natural resource damage, and a broad range of economic damages.

The Protocols solve a particularly vexing problem for oil spill claimants. Financial responsibility imposed unilaterally is of little practical value if the ship does not call at a U.S. port, or is otherwise not subject to U.S. jurisdiction. Spills from ships passing by our coasts in innocent passage, cases in which a legitimate defense is established, and incidents involving a one-ship company that loses its only asset by wreck would all be covered by the Protocols (and the costs borne by an international rather than domestic fund).

The effect of the Protocols is a simple and sure remedy for damages and cleanup resulting from oil spills. The straightforward approach quickly identifies the liable person and greatly reduces the likelihood of litigation.

The need. Tanker accidents continue to occur. Since March 1984 eight large tanker spills have accounted for about four and a half million gallons of oil (ranging from crude to carbon black feed stock) spilled into U.S. waters. The threat was even greater. The spills affected a wide range of geographic locations. Spills occurred in the Columbia and Delaware rivers, and near Savannah, Georgia; the Texas-Louisiana amenity beaches were fouled; the logging industry in Washington was disrupted and the salmon catches in Alaska seriously threatened. Wildlife and natural resources were damaged and threatened, livelihoods were placed in jeopardy, and personal and real property was damaged.

Adequacy of coverage. U.S. adoption of the Protocols would provide full coverage for any major tanker oil spill, according to the worldwide experience of the past 18 years. A recent judgment in the case of the 1978 Amoco Cadiz incident, the most devastating tanker spill on record, confirms that the Protocols are fully adequate. The Protocols would provide compensation up to three times the level of the judgments rendered in this case ($85 million, of which nearly half is interest accrued during the lengthy legal proceedings).

Negligible cost. The net cost to U.S. oil receivers would be negligible on full implementation of the Protocols, about four one-hundredths of a cent per barrel of oil. This highly economic insurance cost would change from a small net loss to a small net gain if the United States were to experience only one catastrophic spill (costing $150 million) over an 18-year period.

Support of state governments. In testimony before both the Senate and House, state governors and organizations representing state governments have clearly stated that speed, certainty, and guaranteed jurisdiction with respect to foreign ships are of real concern, and recognized that the practical advantages of the Protocols in solving these problems outweigh the mythical rewards of unlimited liability.

At the 1988 meetings of the National Governors Association, the governors recommended that "Congress should approve legislation establishing a comprehensive oil spill liability and compensation system and Senate consent to ratification of the 1984 International Protocols."

Summary

Comprehensive oil spill liability and compensation legislation can and should become a reality during the 101st Congress. Compromise is required to remove the principal impediment, preemption of state oil spill liability law. The most realistic compromise at this date is to ensure that state oil spill funds and their taxing authorities will not be preempted, and that state oil spill liability law will not be preempted, except to adopt the 1984 Protocols—an advantage the states themselves recognize and a course they support.

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