ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
1929 SCOMM 76: HOUSE SPEC.COMM.EXXON VALDEZ OIL SPILL...1991-92 1/6

on the statutory rest provision to insure that crews are not fatigued prior to the vessel getting underway. Flyntz Tr. 1066. There is no evidence in the record concerning the systems or programs Exxon has in place regarding the other statutory crew duty limits. It is difficult for the State to understand how ESC can dispatch its tanker fleet with so little regard for the law or for the alertness and readiness of its crews.

The crew of the EXXON VALDEZ who were interviewed during the field investigation or questioned at the hearing regarding their work schedules provide some insight into the ineffectiveness of Exxon's management of the crew duty time statutes.Appendix D is Alaska's reconstruction of the length of time the critical deck crew were at work or at rest during the 24-hour period prior to the grounding. This analysis reveals that Cousins had only three and a half hours rest in the twelve hours prior to departing Valdez in contravention of 46 U.S.C. § 8104(a). Cousins may also have had less rest than he testified to at the hearing. Accordingly to John Spencer, Cousins was observed by one of the EXXON VALDEZ pumpmen as having "pounded the deck" all afternoon on March 23 thereby contradicting Cousins' claim that he was resting in his quarters from 1330 to 1700. Spencer Tr. 7-10. Of the other crew members, Kagan, the 0000-0400 helmsman, worked ten and a half hours on March 23. Jones, the 0000-0400 lookout, put in an over eleven-hour day of work on March 23 and Chief Mate Kunkel worked nine hours and forty-five minutes on March 23 before turning in at 2200.

Unfortunately, the record does not permit Alaska to determine the work schedule of the crew prior to the arrival in Valdez. However, from the information available to the State, it appears that Exxon paid little, if any, attention to the issue of crew fatigue and alertness, all to the detriment of the citizens of the State of Alaska.

F. ESC Proposed Revisions to Federal Law Regulating Minimum Manning Levels

ESC has been in the forefront of an effort to amend various crew-manning level statutes, which, if adopted, would authorize reduced manning levels and loosen crew scheduling rules. On January 20, 1988, Frank Iarossi co-signed and circulated a paper containing proposed major modifications to the statutes controlling vessel manning requirements.[49] Among the proposals was the repeal of Congressionally imposed rules limiting

(a) crossover between deck and maintenance departments

(b) licensing of dual purpose officers

(c) officer rest periods prior to departure from port.

In addition, Iarossi suggested the repeal of all requirements for a minimum number of licensed officers based on the vessel's gross tonnage.

The justification offered for these changes in manning was the need for improved efficiency and to insure that ESC is

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[49] This document is within the package of documents the State by its letter dated June 9, 1989 requested the NTSB include in the record and permit the parties to refer to in their respective submissions.

competitive with foreign flag vessels. No recognition is given in this paper to safety concerns or to the link between safety and crew size. This ESC cosponsored document is consistent with the Company's several attempts to reduce shipboard manning levels in the name of competition, even though ECS's tankers in the Valdez trade are statutorily protected from foreign flag competition. 46 U.S.C. § 883.[50] ESC's advocacy for these statutory changes is consistent with its apparent disregard for the consequences of a catastrophic event such as the grounding of a heavily laden tanker vessel.

IX. THE UNITED STATES COAST GUARD VESSEL TRAFFIC SERVICE

The Vessel Traffic Service (VTS), operated by the U. S. Coast Guard, is a vessel movement system established by the Ports and Waterways Safety Act of 1972. 33 U.S.C. §§ 1221-1236. The Trans-Alaska Pipeline Authorization Act 43, U.S.C. § 1651-1655, amended the Ports and Waterways Safety Act to require the Coast Guard to establish and operate a vessel traffic service in Prince William Sound. The requirement for such a system was created by the need to move North Slope crude oil from Valdez to the lower 48 states by tank vessels transporting on an average daily basis 2 million barrels (84,000,000 gallons) of crude oil through ecologically sensitive Prince William Sound. The Congress wisely wished to insure that the movement of such large quantities of oil would be safely conducted. VTS Factual Report, Exh 2C, p. 3.

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[50] Pursuant to Jones Act exemptions, a small number of foreign flag vessels, averaging one per week, call on Valdez. McCall Tr. 1291.

April 18, 1991

M E M O R A N D U M

TO: Max Gruenberg, Chairman
House Special Committee on
Exxon Valdez Oil Spill
Settlement Agreement

FROM: Chip Thoma

SUBJECT: Final NTSB Report, June 1990

These excerpts from the NTSB report give credence to the contention that failures on the part of Exxon and Exxon Shipping management contributed directly to grounding of the Exxon Valdez.

The Executive Summary (p. v.) under "Probable Cause" details some of these failings, while the excerpts give specific information on:

1) the background and rating of Joseph Hazelwood (p.28)

2) lack of Exxon monitoring of the Master (p.32)

3) workload of the third mate (p.34)

4) background on Helmsman Kagan (p.35)

5) manning on the Exxon Valdez (p.137)

6) continued increases on crew workloads (p.140)

7) safety conclusions (p.141)

8) Alyeska response to spill (p.144)

9) contingency plans (p.146)

10) dispersants (p.147)

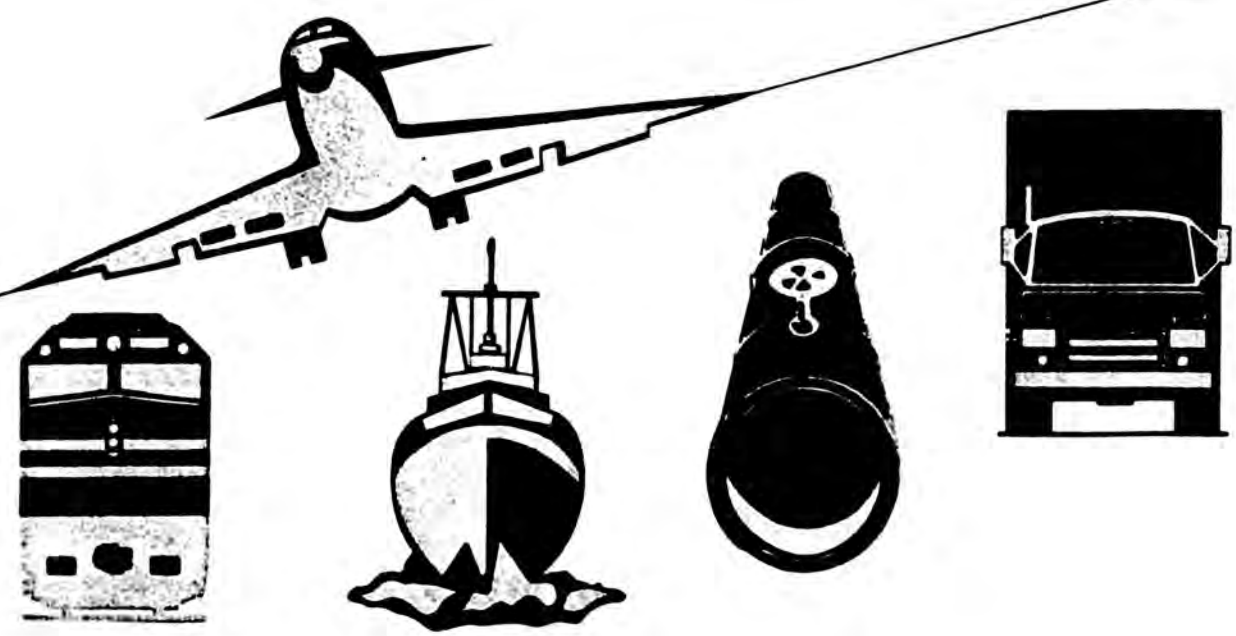
11) conclusions (p.166)

12) probable cause, recommendations (p.170)

NATIONAL TRANSPORTATION SAFETY BOARD

MARINE ACCIDENT REPORT

GROUNDING OF THE U.S. TANKSHIP EXXON VALDEZ ON BLIGH REEF, PRINCE WILLIAM SOUND NEAR VALDEZ, ALASKA MARCH 24, 1989



ANALYSIS

About 0009, on March 24, 1989, the U.S. tankship EXXON VALDEZ, loaded with about 1,263,000 barrels of crude oil, grounded on Bligh Reef in Prince William Sound, near Valdez, Alaska. At the time of the grounding, the vessel was under the navigational control of the third mate. There were no injuries, but about 258,000 barrels of cargo were spilled when eight cargo tanks ruptured, resulting in catastrophic damage to the environment. Damage to the vessel was estimated at $25 million, the cost of the lost cargo was estimated at $3.4 million, and the cost of the cleanup of the spilled oil during 1989 was about $1.85 billion.

The safety issues discussed in the report are:

(1) The adequacy of the navigation watch on the EXXON VALDEZ on the night of the grounding;

(2) The role of human factors, including fatigue and alcohol abuse, in this accident;

(3) Coast Guard and Exxon Shipping Company manning standards and Exxon's procedures for determining manning levels for tankships;

(4) Exxon Shipping Company's drug/alcohol testing and rehabilitation program;

(5) Coast Guard regulations and procedures for drug/alcohol testing aboard commercial vessels;

(6) The role of the Coast Guard Vessel Traffic Service at Valdez; and

(7) Oil spill contingency planning and initial response to this accident.

Recommendations concerning these issues were made to the U.S. Coast Guard, the U.S. Environmental Protection Agency, the U.S. Geological Survey, the Exxon Shipping Company and other tankship companies carrying North Slope crude oil from Port Valdez, the State of Alaska, the Alyeska Pipeline Service Company, and the Alaska Regional Response Team.

Probable Cause

The National Transportation Safety Board determines that the probable cause of the grounding of the EXXON VALDEZ was the failure of the third mate to properly maneuver the vessel because of fatigue and excessive workload; the failure of the master to provide a proper navigation watch because of impairment from alcohol; the failure of Exxon Shipping Company to provide a fit master and a rested and sufficient crew for the EXXON VALDEZ; the lack of an effective Vessel Traffic Service because of inadequate equipment and manning levels, inadequate personnel training, and deficient management oversight; and the lack of effective pilotage services.

$3.4 million. Exxon expended approximately $1.85 billion on cleanup operations in 1989.

Crew Information

<u>Master</u>.--Personnel records provided by Exxon show that the master of the EXXON VALDEZ, age 42, received a Bachelor of Science degree in Marine Transportation from the State University of New York Maritime College in May 1968. At that time he also received a Federal license, which qualified him to serve as a third mate of steam and motor vessels of any tonnage upon oceans.

He was employed by Humble Oil and Refining Co. (the predecessor company of Exxon Shipping Company) as a third mate on June 10, 1968. During his career with Humble/Exxon, he took numerous marine courses sponsored by Exxon. He upgraded his license to second mate in 1971, to chief mate in 1973, and to master in 1977, making him eligible for promotior to the level of the respective licenses. He obtained a Federal pilotage endorsement to his master's license for Prince William Sound between Cape Hinchinbrook and Rocky Point in Alaska in 1987. He was promoted to second mate in 1978, to chief mate in 1979, to relieving master in early 1979, and to master in 1980.

Since his promotion to master, he had served on nine tankships with no breaks in service except for authorized leave periods. He had served as the alternate master on the EXXON VALDEZ since 1987 and had worked in the Alaskan trade for about 10 years (during this period, the master made well over 100 round trips through Prince William Sound).

Submissions by Exxon provided a seriatim ranking of the master in comparison with other Exxon masters from 1981 to 1988. These rankings are as follows:

Year	Rating/group size	Percentile (100 equals the highest possible ranking)
1988	23/38	39
1987	24/29	17
1986	35/37	5
1985	35/37	5
1984	24/34	26
1983	29/33	12
1982	35/39	10
1981	25/36	36

Each year's ranking was for the performance period of the previous year. The EXXON VALDEZ in the West Coast Fleet and the EXXON GALVESTON in the Gulf Coast Fleet were selected as the best performing vessels in 1987. In 1988 the EXXON VALDEZ was the sole winner of this award. The master was one of

In addition to the employment history shown in Exxon and Coast Guard records, the master told Safety Board investigators that he had served as a lightering superintendent in the Gulf of Mexico for about 3 1/2 months and had acquired additional seagoing experience in the Esso foreign flag fleet.

Additional employment information on the master is contained in appendix C.

About 13 hours before the accident, the master, accompanied by the chief engineer and the radio electronics officer, went ashore while the EXXON VALDEZ was loading cargo at the Alyeska Marine Terminal. The Alyeska security logbook shows that they departed the terminal gate at 1059. They were met by the ship's agent, who drove them to the agent's office at Alaska Maritime Agencies, Inc., in Valdez. The agent's supervisor recalled that the three men arrived shortly after 1100 and that the master and chief engineer conducted routine ship's business in a meeting that lasted about 45 minutes. The agent informed investigators that the master seemed "more relaxed" than when she had seen him on previous trips. She explained by saying that she had worked with the master for 8 to 10 years. After the meeting, the pilot who had conducted the inbound transit of the vessel to Valdez picked up the three men at the agent's office in his automobile and drove them to a nearby restaurant, where the four had lunch together. The chief engineer said that they spent about 1 1/2 hours at the restaurant. The chief engineer and the radio electronics officer told investigators that the master and pilot had nonalcoholic beverages with their lunch. However, the master told the Coast Guard investigating officer that he had had a beer at lunch.

After lunch, the pilot drove the three men to a small shopping center, and the three separated to run personal errands. The three men had agreed to meet again at a town bar later in the afternoon. Safety Board investigators located a gift store where the master had ordered flowers sent to his family. The owner of the gift shop recalled having a pleasant conversation with the master and stated that he did not appear to have been drinking. The chief engineer recalled walking to several newsstands, looking unsuccessfully for a newspaper, and then going to the bar, arriving alone about 1600. He said that the master arrived about a half hour after he did. However, the master told the Coast Guard investigator that he arrived at the bar about 1500. The radio electronics officer said that when he arrived at the bar about 1630, the master and chief engineer were already there. According to the radio electronics officer, they played darts with local residents and otherwise enjoyed themselves while each purchased one or more rounds of drinks. The radio electronics officer said that he drank beer while the master was drinking a "clear" beverage and the chief engineer was drinking gin and tonic. The chief engineer told Safety Board investigators that he had three gin and tonics and that he did not recall how much the master had.

The chief engineer said the three men left the bar about 1900 and returned to the restaurant where they had had lunch. They ordered two pizzas to take back to the ship and then went next door to an adjacent bar to await he believed the master had a vodka while they waited. The ch[illegible] said that about 1930 their pizza order was ready and they called a cab to return to the ship.

According to the cab driver who transported them back to the Alyeska terminal, a fourth person from an ARCO tanker joined them in the cab for the trip to the terminal. He said that no one in the group appeared to be "under the influence of alcohol." The security log at the terminal gate showed that the cab arrived there at 2024. Terminal security officers stated that all persons arriving in cabs were required to check in to the office and walk through a metal detector and that they did not believe any of the men arriving at that time were intoxicated. The cab was permitted to proceed to the dock without delay.

The chief engineer said that they had expected the vessel to depart later in the evening and were surprised that it was ready to get under way. He also said that during the afternoon, the master had discussed the presence of ice in the traffic lanes and was considering delaying departure until daylight.

According to the radio electronics officer, the three men boarded the ship together. The ship's agent was aboard the vessel in the wheelhouse when the master arrived. She said that she met with him there to discuss cargo and ship's fuel. She said that he was in a good mood and did not appear to be intoxicated, although his eyes were watery. The agent and the master agreed that they would talk further on the VHF/FM radio to confirm cargo quantities after the vessel got under way.

The pilot conducting the outbound transit from the Alyeska terminal told Safety Board investigators that he smelled alcohol on the master's breath when the master returned to the ship from Valdez. However, it was his impression that the master's behavior and speech were unimpaired. The pilot said that the master left the bridge after they had gotten under way and remained away until the pilot called him shortly before disembarking at Rocky Point. The pilot said that the master returned to the wheelhouse soon after the call, and he estimated that the master had been gone for about 1 1/2 hours. The pilot stated that he again smelled alcohol on the master's breath, but the master's speech and behavior gave no indication of impairment.

Both the XO and the SIO of the MSO who boarded the vessel after the accident about 0335, smelled alcohol on the master's breath when they met with him on the bridge. The investigating officer described the odor as the very strong smell of "stale" alcohol. In response to a question about the smell of alcohol, the master explained to the investigating officer that he drank two Moussy beers (.05 percent alcohol) after returning to the vessel from Valdez. The investigating officer reported finding two empty Moussy beer bottles in a wastebasket in the master's stateroom.

conduct the testing. However, when the trooper arrived about 0630, he had no equipment to conduct any testing or to collect urine specimens for subsequent testing. The XO again called the CO to request someone to conduct the testing. During a later telephone conversation, the CO suggested that the XO check with the master to ascertain if the vessel carried any equipment for collecting toxicological samples. About 1000, the Coast Guard officers learned that kits for obtaining toxicological samples were on board the vessel, and urine specimens were obtained soon thereafter from the third mate and the two ABs on watch when the grounding occurred. The master also was asked to provide a urine specimen at this time, but he said he was unable to urinate.

Meanwhile, ashore, a Coast Guard medical technician from Anchorage, Alaska, who had been conducting an inspection of health records of the MSO, was located at the airport about 0830 and instructed to proceed to the vessel to take blood and urine samples. About 1030, the Coast Guard medical technician boarded the vessel to obtain blood samples for toxicological testing. The master was selected to provide the first blood sample. At this time the master also provided a urine specimen. Blood samples also were taken from the third mate and the two ABs. At this time it was discovered that the urine specimen earlier provided by the AB on lookout was not sealed correctly, and she provided a second specimen.

The results of the toxicological testing by Chem West Laboratories, Inc., of Sacramento, California, of the samples collected on March 24, 1989, are shown in the following table:

Table 3.--Toxicological testing results

	Blood		Urine	
Position	Time	% Ethanol	Time	% Ethanol
Master	1050	0.061	1000[13]	0.094
Third Mate	1100	0	1000	0
Lookout	1140	0	1145	0
Helmsman	1115	0	1000	0

Portions of the blood and urine specimens provided by the master were sent to the Center for Human Toxicology (CHT) for an independent ethanol analysis. The CHT measurement showed the blood contained 0.06 percent ethanol and the urine contained 0.1 percent.

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[13]Although the sample container was marked 1000, the urine specimen probably was taken about 1050.

Individual Disability Report, signed by the attending physician and dated April 16, 1985, showed that the master was admitted to a hospital on April 2, 1985, and "remains in residence at the present time." The report stated: "He is a 38 yo W/M who has been depressed and demoralized; he's been drinking excessively, episodically, which resulted in familial and vocational dysfunction." A treatment program was suggested that included a recommendation that he be given a leave of absence to get involved in Alcoholics Anonymous (AA), psychotherapy, and aftercare. The report indicates his first day of disability was April 1, 1985. Further documents show that the master was on sick leave from April 1, 1985, through May 15, 1985, and that disability was terminated on May 16, 1985, at which time he was placed on leave of absence for 90 days starting on May 16, 1985. Exxon did not provide documentation to indicate when he was granted sick leave or what followup monitoring was provided.

The master had made no claims for medical care or health services with the Exxon health care contractor during the last year of his employment before the accident.

The president of the Exxon Shipping Company testified that a fleet manager and a ship group coordinator were given the responsibility to follow up on the master after he was returned to duty following his hospitalization in 1985. According to this testimony, the followup consisted of visits by the ship group coordinator to the master's vessel in the west coast ports of San Francisco and Long Beach about every 2 weeks. The president testified, "I think he [the master] felt he was the most scrutinized employee in our company. I think he felt a little uncomfortable with it."

Early in the investigation, an Exxon representative said the company could find no documents covering this followup period. Exxon later provided documents that included a memorandum dated June 27, 1988, initialed by the master's shoreside supervisor at the time, regarding the master's performance. In this memorandum, the master was complimented for his professional expertise, leadership, and interdepartmental cooperation. Exxon also provided an unsigned and undated document that discussed the supervision of the master during his rehabilitation from October 1985 to April 1987. This document was developed from memory, after the accident, by a former shoreside supervisor of the master. The frequency of the visits and the outcome of these visits were not detailed in the document, except for a statement that no evidence of alcohol use by the master could be found and that it was concluded that he was "clean."

The Safety Board made a 50-State search of the National Driver Register (NDR) to investigate the master's driving record. This check revealed that the master had one "driving while intoxicated" (DWI) conviction in Huntington, New York, in 1985, and a second DWI conviction in Conway, New Hampshire, in 1988. The police report for the first DWI conviction showed driveway of his residence and reported that the master smelled strongly of alcoholic beverage, was unsteady on his feet, and that his speech was slurred. The master refused to take a Breathalyzer test. The master's second DWI conviction, on September 15, 1988, resulted from his being stopped for driving 44 mph in a 30 mph zone. The reporting officer reported that he smelled strongly of alcoholic beverage, had difficulty getting his driver's license out of his wallet, and was unsteady on his feet. The master submitted to a Breathalyzer test that gave a blood alcohol level of 0.19 percent.

The chief engineer and the radio electronics officer stated that the master was going through divorce proceedings at the time of the accident. The radio electronics officer on the EXXON VALDEZ stated that the master appeared to undergo noticeable changes in mood.

The radio electronics officer said that he witnessed the master drinking alcohol on board the EXXON VALDEZ during the last voyage of the vessel at the end of February 1989. The master had called him about a design for a ship's T-shirt, and in the course of the conversation, the master asked him to come to the lounge to "destroy a bottle." When the radio electronics officer arrived, the third mate was already there and the master removed a bottle or a flask from his jacket. Soon thereafter, the master sent the third mate to the galley for some ice, and the radio electronics officer went to bring some orange juice to the lounge. He said that the chief mate came into the lounge while the drinking was going on but did not participate. According to the radio electronics officer's recollection, the incident took place in the morning or early afternoon. The radio electronics officer said that one or two other persons were in the lounge watching a concert video, but he could not recall who they were. He said that the bottle was placed on the deck while he, the master, and the third mate watched the video. He did not recall tasting alcohol in any beverage he drank during the incident. He said the contents of the bottle were clear. It was his impression that the master had been drinking before he was called to the lounge, but no one appeared to be intoxicated during or after the incident.

Third Mate.--The third mate told Safety Board investigators that he had begun sailing in 1977 on National Oceanic and Atmospheric Administration (NOAA) vessels as an ordinary seaman after having worked several years as a shipfitter and a hull inspector. He said that he had served 3 years on NOAA vessels and in 1980 had begun sailing with Exxon as an AB. Coast Guard records for his sea duty with Exxon show that he worked as an unlicensed seaman from December 1980 to January 1987, principally as an AB. The third mate said he had attended a Page Navigation School course in New Orleans to prepare for the third mate's license examination. He obtained a third mate's license in March 1986. Since January 1987, he had served as third mate on five Exxon vessels with no breaks in service of more than 3 1/2 months. He told investigators that he had made six round trips to the port of Valdez with the current master and had served one previous tour on the EXXON VALDEZ. Company records show that he joined the vessel on February 20, 1989. He

Exxon provided four performance appraisals for the third mate to the Safety Board. The lowest rating given to the third mate was in 1986 while he was serving as an AB on the EXXON JAMESTOWN; it was "above normal" in the rating category of "Steers In Confined Waters." The same rating category was "outstanding" on two earlier appraisals of his service on the EXXON NORTH SLOPE. The third mate's overall performance as an AB was rated as "outstanding" on three of the Exxon performance appraisals.

In one performance appraisal as a third mate, his "overall effectiveness" had been evaluated as "high," one rating below "outstanding." The two lowest ratings he received as a third mate were given to him while he was on the EXXON JAMESTOWN in 1987 and contained the following comments: "performs adequately" in the rating categories of "seeks advice or guidance at the appropriate time and informs supervisor when appropriate" and "demonstrates thorough knowledge of ship and its handling characteristics." In a summary of employee weaknesses, the evaluator wrote, "He [third mate] seems reluctant or uncomfortable in keeping his superior posted on his progress and/or problems in assigned tasks."

During the third mate's initial interview by the Coast Guard investigating officer, he stated that he began work on March 23, 1989, at 0800, had a "cat nap" at 1330, relieved the chief mate for supper and worked thereafter until the grounding. He testified that he had been on watch when the EXXON VALDEZ approached the terminal dock on the day preceding the accident. The third mate said that after his watch ended, he had a brief conversation with the chief mate about how he [the chief mate] "starts up the cargo." He also testified that he had gotten to sleep at 0100 and was called at 0720 for his watch on the morning of March 23.

The crew on the EXXON VALDEZ did not normally break sea watches while they were transferring cargo or ballast. Since the chief mate oversaw cargo handling operations, the second mate and the third mate stood watch extra hours to enable the chief mate to rest. The second mate said that in addition to relieving the chief mate, the two mates tried to "cover one another when needed." The second mate told Safety Board investigators that on this trip to Valdez, the two mates began their extended watches at midnight on March 23. He indicated to Safety Board investigators on board the vessel on March 26, 1989, that he and the third mate essentially stood watches 6 hours on and 6 hours off during cargo operations.

The third mate testified that he went to the engineroom to conduct a "salinity test" after lunch on March 23 and then went to his room for a nap between 1300 and 1350. According to the testimony of an Exxon Seaman's Union officer, it was "common practice for the mates off watch to assist in the cargo operations." The pumpman told Safety Board investigators that he had seen the third mate walking forward on the main deck early during the afternoon watch on the day preceding the accident.

remained on the bridge until he was relieved by the chief mate, probably sometime prior to 1900. The third mate was next reported by an AB as standing by at his usual location at the aft mooring lines during undocking about 2100. The third mate then returned to the pilot house about 2150 to relieve the chief mate. He said that he relieved the chief mate early because the chief mate had been up for a long time and needed rest. The pumpman who met and talked briefly with the third mate immediately before he returned to the bridge stated that the third mate appeared to be fatigued. Another AB also told Safety Board investigators that he had heard on the night of the grounding that the second mate was tired and this explained why the third mate had remained on watch after midnight. The third mate remained on duty until sometime after the Coast Guard boarding officers arrived about 0335.

Helmsman.--Coast Guard records show that the AB serving as helmsman when the grounding occurred had obtained his first seaman's document in 1965. Between 1965 and 1970, he had acquired only 25 days of documented marine work, all of which was in the steward's department for Boatel, Inc., an offshore catering company. The helmsman had no further documented shipping time until he began working for Exxon in April 1975. He initially worked in the steward's department on Exxon vessels for about 1 year and then began working regularly as an ordinary seaman. He obtained a lifeboatman endorsement in April 1980 and an unlimited AB rating in October 1981. Coast Guard records indicated that he had worked each year without remarkable breaks in service except in 1978 and 1987, when he sailed 1 month and 1 1/2 months, respectively. Since joining Exxon, he had served on 19 vessels, including the EXXON VALDEZ.

Since acquiring his AB rating, the helmsman had acquired about 7 1/2 months of documented time as an AB, according to Coast Guard records. Those records show that the helmsman had worked primarily as an ordinary seaman and in other unrated positions. On January 18, 1989, he was assigned to the EXXON VALDEZ as an AB.

Exxon provided seven performance appraisals for the helmsman from February 1986 to August 1988. No performance appraisal for the helmsman referred to an AB-specific job classification, and for the corresponding periods in Coast Guard records he was shown as an ordinary seaman. Five performance appraisals were for the position of maintenance seaman,[14] one was

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[14]Maintenance seaman is a designation for a crewman having cross responsibilities in deck, engine, and steward's departments.

evaluation from the deck, engine, and steward's departments. In May 1986, he received ratings from a chief mate with whom he had worked on two vessels successively. This evaluator indicated a "cannot rate" for the "steers in confined waters" category and commented that the helmsman "needs to practice [helmsmanship] before sailing AB." The chief mate listed the helmsman's strengths as "a hard worker who was thorough in cleanup operations" but stated "[the helmsman] must prove himself capable [of an AB's position] by steering in confined waters ... and other skills required of an AB." A chief mate on the EXXON NEW ORLEANS rated the helmsman as a "normal" overall performer but commented that "[he] must concentrate more on the task at hand." In 1987, the helmsman's performance appraisal on the EXXON CHARLESTON included an "above normal" for the category "steers in confined waters" with the comment, "steers well to pilot's orders." The chief mate commented that "[he] is not ready at this time to sail as AB." In January 1988, the first assistant engineer on the EXXON BALTIMORE rated him less than the midpoint for overall performance, "needs improvement." The helmsman noted on the same performance appraisal that his ambition was to "sail on my AB's papers and/or obtain my oiler's endorsement and sail in the engine department." The helmsman also received a performance appraisal for his duties in the steward's department on the EXXON BALTIMORE and was given an overall assessment of "generally meets requirements," a midpoint rating. In August 1988, the helmsman received a performance appraisal for his maintenance duties in the engine department on the EXXON BALTIMORE and was rated with an overall assessment of "generally meets requirements."

The helmsman indicated that from March 17 through March 23 he had experienced a normal routine at sea, adhering to 4-hour watches with the customary 8 hours off. The helmsman indicated that he usually slept from about 0400 until called some time after 1100 in time for lunch before his afternoon watch. After the watch, he remained awake to eat supper about 1700 and then returned to his room to sleep about 1800 until called at 2320 for the next morning watch. He indicated that on March 23, he obtained his usual sleep between the morning watch and an unusually early call for lunch at about 1030. He then worked from noon to about 1600 loading cargo, ate supper, and went to bed. The helmsman indicated that he assisted during the undocking from the terminal from about 2000 until 2200. He indicated that he returned to his room for a nap until called for watch at 2320. The helmsman declined most voluntary opportunities to work in excess of 8 hours a day.

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[15]An entry-level position in the engineering department on board a merchant ship. A wiper assists in the performance of general work in the engineroom and is so named because he is commonly occupied in cleaning machinery, etc.

> Issue rules specifying zero (no alcohol) as the blood alcohol concentration for private sector employees in safety sensitive positions in all transportation modes and for Federal employees in safety sensitive positions. (Class II, Priority Action) (I-89-12)

The DOT has not responded to these recommendations and they are still classified as "Open--Await Response." The Safety Board believes that the EXXON VALDEZ accident demonstrates the continuing need for action on these recommendations; accordingly, they are reiterated.

Manning on the EXXON VALDEZ

The EXXON VALDEZ was operated with a reduced crew complement. Evidence indicated that watchkeeping safeguards on the EXXON VALDEZ had been compromised because of the manning level. The number of unlicensed crewmembers in the deck department was not sufficient to provide uninterrupted lookout capability when other routine deck-department duties arose. When one AB was required to serve as helmsman, the remaining ABs on duty had to cover all work and lookout responsibilities unless an AB from another watch was "turned to" on overtime. Moreover, when a lookout was required for long transits through congested waterways, no other qualified persons on duty were available to relieve that crewmember for breaks. As a result, on the EXXON VALDEZ, the lookout position routinely went unattended when the AB was called for other tasks or took a break.

The Exxon Seamen's Union officials testified during depositions that the sea passages for voyages between Alaska and California were not long enough for conducting necessary maintenance or permitting thorough crew rest between the around-the-clock demands of cargo handling in port. When the current minimum crew requirements were established for the EXXON VALDEZ, the vessel had been scheduled for the Valdez-Panamanian trade. But that trade was discontinued after December 1988, and the EXXON VALDEZ then began operating regularly between Valdez and ports in California.

According to company and union officials, crewmembers in addition to those required by the COI were regularly assigned to the EXXON VALDEZ. The minimum crew for the EXXON VALDEZ required by the Coast Guard was 15, including the master, and the company regularly assigned 4 additional unlicensed crewmembers to the vessel. Two of these crewmembers were QMEDs; one performed pumpman's duties and the other performed maintenance. These additional crewmembers, specifically the two QMEDs, showed the company's awareness of manpower needs in addition to those recognized by the Coast Guard. The other two additional seamen regularly assigned to the EXXON VALDEZ were members of the steward's department and prepared meals for the crew. A third unlicensed engine department crewmember was aboard when the vessel was grounded but apparently was riding for only that one trip. The Safety Board believes that the additional crewmembers regularly assigned to the EXXON VALDEZ engineering department were needed to perform essential work and that the number of crewmembers required by the Coast Guard was not adequate.

The mates on the EXXON VALDEZ were usually fatigued after cargo handling operations in Valdez, and the vessel usually put to sea with a fatigued crew. Although the EXXON VALDEZ had cargo handling automation, the equipment did not eliminate the need for deck officers to spend many hours on cargo watches. The Safety Board is concerned that the manning and working conditions producing fatigue on the EXXON VALDEZ are likely to exist on other U.S. tankships that carry three mates and/or have reduced manning.

Compliance with Exxon Shipping Company procedures that require two officers on the bridge during maneuvering may have provided sufficient sharing of the workload to prevent the grounding of the EXXON VALDEZ. However, the Safety Board is reluctant to endorse the routine use of two officers, who may not have had adequate rest, as a means of obtaining a sufficient number of personnel for a navigation watch. The Safety Board contends that manning levels aboard ships should incorporate realistic expectations for human endurance and fallibilities so that the amount of work required for peak periods, such as cargo handling in port and tank cleaning at sea, can be accomplished without debilitating fatigue.

Reduced Crews

Coast Guard Manning Practices.--The investigation reviewed relevant Coast Guard practices and standards for setting reduced-crew minimum manning levels for inspected vessels. The regulatory agency is admittedly under conflicting pressures from ship owners, operators, and labor unions. Long-standing manning practices are being replaced with more economically advantageous ones, and current manning appears to be at or near the limits for individual workloads. Although these circumstances explain some of the criticism of Coast Guard manning decisions and the manning review process, the Coast Guard's limited perspective for justifying reduced crews may be the primary shortcoming. The trend toward reducing crew complements has been based principally on labor-saving shipboard equipment and equipment reliability, which serve to reduce workload at sea primarily in the engineroom. However, in establishing reduced manning levels, the Coast Guard gave practically no thought to the work load in port. This omission is serious because tankship crews are required to perform much more demanding work in port than at sea, and this work leads to fatigued crews taking their ships to sea. Also, having fatigued crewmen in charge of cargo transfer operations increases the risk of a catastrophic accidental release of the cargo in port that could result in fire/explosion, as well as pollution.

The Safety Board believes that the Coast Guard must promptly implement manning safeguards that directly address crew working conditions in port, as well as at sea. If additional authority is needed, the Coast Guard should seek such authority. These safeguards should incorporate verifiable man-hour requirements for cargo handling in port and for all vessel operations, including tank cleaning, at sea. The safeguards should directly address risk factors associated with fatigue, low morale, and other consequences of longer work hours. The safeguards must also address the consequences of the social isolation that results from lower manning levels and longer tours of sea duty. The Safety Board believes that human capacities and limitations require no less attention in the manning process than the shipboard equipment criterion.

The Safety Board is particularly interested in the outcome of two research efforts sponsored by the Coast Guard that are intended to examine variables in human factors on reduced-crew vessels. One project, which is being conducted by the Marine Board at the National Academy of Sciences, has used input from vessel operators and marine labor unions to obtain information about existing workloads and working conditions. The Safety Board believes it is important that the Coast Guard evaluate different viewpoints in order to assess the current safety of manning and to develop guidelines to ensure that future manning levels are appropriate to the work load. Similarly, the Safety Board recognizes the interest that the Coast Guard and MARAD have shown in the fatigue factor in their companion project for manning vessels with smaller crews.

Although Coast Guard officers stated that the review process for manning decisions used a "worse case" criterion, there is no evidence of this consideration in documentation related to the manning of the EXXON VALDEZ or EXXON LONG BEACH. Nor is there any evidence that the Coast Guard considered the fact that crewmen may be fatigued from in-port work or additional work owing to tank cleaning or to machinery breakdown. The Safety Board believes that the Coast Guard should re-examine minimum manning practices and establish amended standards using the same care given to other safety standards for vessels. For example, calculations to obtain structural standards acceptable to the Coast Guard are normally predicated on the vessel being in adverse loading conditions and, in some cases, the most adverse conditions possible. Even if it can be argued that the vessel will seldom operate in those adverse conditions, standards based on less rigorous loading criteria are generally considered inadequate. The Safety Board urges the Coast Guard to exercise comparable rigor for manning standards and to set minimum manning requirements that provide safe vessel operation for all foreseeable operating circumstances.

The equipment currently installed for deck-department operation may not reduce manpower needs to the extent projected in the reduced manning requests. With the exception of cargo tank sounding automation, remotely controlled cargo tank valves, and newer equipment that required less maintenance than older equipment, no substantial labor-saving devices were on board the EXXON VALDEZ. In fact, crewmembers on Exxon vessels normally verified manually the operation of all automated sounding and cargo tank valve positions. Since reduced manning of vessels means fewer people on board to do about the same amount of work as was previously done by larger crew complements, the Safety Board views future verification of the assumed lower workload for deck-department personnel as important. Thus, the Coast Guard should develop procedures to more accurately gauge the manning requirements for modern tankships that also take into account human performance needs such as adequate rest, relief from isolation owing to smaller crews, and less time in port.

<u>Exxon Shipping Company Practices</u>.--The Safety Board identified several general operating practices of the Exxon Shipping Company pertaining to

reduced crews that prompted concern. First, no evidence indicated that the company had policies or procedures intended to compensate for the risks involved in having smaller crews on its vessels. For example, Exxon had no program to ensure that mates complied with the requirement in U.S.C. 8401(a) that they have 6 hours of off-duty time in 12 hours before taking charge of the navigation watch. Aside from one introductory reduced-crew manning conference, officers received no specific supervisory training in recognizing fatigue in subordinates or in understanding the debilitating effects of fatigue on themselves or on their subordinates.

Finally, Exxon Shipping Company policy was to manipulate overtime records relevant to crew workload for vessels assigned to at least one "ship group coordinator" in order to support periodic unmanned status for enginerooms and thus to permit reducing crew size. Payment of overtime for officers on all Exxon vessels had been discontinued several years earlier, and during the investigation, no company method was identified that was designed to monitor officers' work in excess of 8 hours daily. Aside from concern about the morale problem created by the loss of direct compensation for time worked, the Safety Board is concerned that unrecorded overtime was not reflected in the work load data used by Coast Guard personnel who evaluated reduced-manning requests. Also, this investigation uncovered evidence that deck officers were used to do maintenance and other work previously done by unlicensed crew who had since been eliminated from service on the vessels.

Because of the Exxon Shipping Company memoranda that directed officers to minimize reports of equipment maintenance and overtime, the minimum manning requirements on Exxon Shipping Company vessels may have been based upon incomplete and inaccurate information. Assuming that the recipients of the memoranda complied with the directive, their maintenance and overtime records would not be representative of actual crew work loads. In addition, the Coast Guard had probably agreed to minimum manning reductions using the same deficient information for its evaluations and consequently may have underestimated crew workloads on all reduced-crew Exxon Shipping Company vessels.

Exxon submitted graphs to the Safety Board that showed a favorable comparison between lower manning levels and casualty and personal injury statistics. The Safety Board does not consider these comparisons useful evidence of safe vessel operation. Gross measurements, such as the number of oil spills per vessel or injuries per million man-hours over a 15-year interval, do not provide sufficient information for causal inferences about any safeguards on these vessels. The evaluations did not provide information on safety programs in effect, composition of crew complements, crew overtime, length of crewmember tours, equipment installed on the vessels, or other variables from which the effects of lower manning on safety may be methodically deduced.

The Safety Board is also concerned that Exxon has continued to increase crew work load in its fleet even after the grounding of the EXXON VALDEZ. A recent company directive, issued after the grounding, required manning of periodically unmanned machinery spaces while vessels are in inland waterways. Since engineering crew complements were reduced on these vessels because the machinery spaces were said to no longer require monitoring, the reestablishment of watchstanding without replacing the deleted engineers and QMEDs places an additional workload on the number of engineers retained. In another directive issued after the grounding, the company restricted off-duty crewmembers to their vessels when cargo handling operations are in progress. The apparent intent of requiring off-duty crewmembers to remain on board was to ensure the availability of enough manpower for cargo-related incidents or other emergencies. These measures may show a necessary concern for engineroom and cargo safety, but they impose additional burdens on crewmembers without compensating for the human factors involved. As a result, the Safety Board is concerned that Exxon's measures may not adequately provide for the safety of personnel, the vessel, or the environment.

Evidence also indicated that the Exxon Shipping Company planned to further reduce the crew size and to lower crew qualifications for most vessels in its operating fleet. The company was planning to eliminate the current position of the radio electronics officer by assigning communication and maintenance duties to the master and engineers, respectively. The company also planned to institute a separate maintenance department of unlicensed seamen having duties across deck, engine, and steward's departments. Implementation of such a department would have weakened the navigation watch by enabling a minimally manned vessel to operate with a complement of only four ABs and two ordinary seaman instead of six ABs. According to the Coast Guard, implementation of the new department was delayed only by the Exxon Seamen's Union. In the interim, the Coast Guard issued a directive requiring that the company retain six certified ABs on each vessel. The maintenance department concept under which ordinary seamen are employed to perform maintenance is reasonable, but its implementation should not lead to a reduction in the number of ABs. Six ABs, two per watch, are needed for an underway navigation watch in order to provide two qualified helmsman so that the helm can be relieved, thereby reducing the possibility of having a fatigued seaman steering.

The Safety Board considers the reduced manning practices of the Exxon Shipping Company generally incautious and without apparent justification from the standpoint of safety. The financial advantage derived from eliminating officers and crew from each vessel does not seem to justify incurring the foreseeable risks of serious accidents.[90] Regarding company manning practices that related to the EXXON VALDEZ, the Safety Board does not believe that the Exxon Shipping Company showed sufficient regard for the known debilitations that occur as a result of crewmember fatigue. Furthermore, the Safety Board could find no reasonable explanation for the following: the absence of company programs to ensure that crewmembers observed hours-of-service regulations; the lack of procedures to ensure that at least one rested deck officer, in addition to the master, was available for watch at departure; the practice of rating a crewmember's performance in part according to willingness to work overtime, thus giving an incentive to work

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[90] The cost of cleanup is expected to exceed $2 billion.

an excessive number of hours; and the indiscriminate increase in work loads and standby time throughout the fleet before and after the grounding of the EXXON VALDEZ.

Fatigue in Transportation Safety

In a letter dated May 12, 1989, to the Secretary of Transportation, the Safety Board expressed its concerns about the far-reaching effects of fatigue, sleepiness, sleep disorders, and circadian factors in transportation system safety. The Board further stated that:

> poor scheduling of work and rest time continues to affect the performance of operating personnel in virtually all modes of transportation. Safety Board experience also indicates that most employees and supervisors in the transportation industry do not receive training on the problems associated with work and rest schedules and the effects such schedules have on safety and performance. Additionally, proper living habits, including attention to exercise, diet, and rest, are important to good health. However, many transportation operating personnel may not adequately appreciate the importance of these habits in relationship to their fitness for duty and their susceptibility to fatigue in the face of their irregular and often unpredictable work/rest patterns. Therefore, the Safety Board believes there is a need to develop and disseminate educational materials that will assist transportation employees in adapting living habits appropriate to their work/rest patterns.
>
> Furthermore, it appears that, with minor exceptions, neither management nor the labor segments of the transportation industry properly considers the adverse effects of irregular and unpredictable cycles of work and rest on its vehicle-operating personnel. Although some private research has been conducted on this safety issue, the Safety Board is unaware of any systematic activity by the DOT to address the safety concerns of inadequate work and rest scheduling in any of the transportation modes.
>
> Since 1972, the Safety Board has issued about 39 safety recommendations to transportation modal administrations, operators, and associations concerning fatigue, duty time, and hours of service. Collectively, these recommendations addressed most aspects of the fatigue and fitness-for-duty issues, but they constitute uncoordinated and piecemeal efforts directed to various government and industry segments of the transportation community. The Safety Board is aware of the March 1989 DOT report entitled "Transportation-Related Sleep Research," which was prepared in respcnse to a request by

the U.S. Senate Committee on Appropriations and which describes current departmental activities in this field. This report provides an overview of current diverse activities by various departmental administrations regarding the role of fatigue, sleep disorders, and sleepiness in their respective modes. However, the Board believes a review of the report also indicates a need for more overall planning, direction, and control of these activities to assure that they are administered as a coordinated, effective program that will provide the best possible safety benefits for the entire transportation community.

Based on its experience in accident investigation, the Safety Board believes it is time for an aggressive Federal program to address the problems of fatigue and sleep issues in transportation safety. Such a program should include a coordinated research effort, an extensive educational effort directed toward all segments of the transportation industry, and a systematic review and improvement of regulations governing hours of service across all transportation modes.

Therefore, the National Transportation Safety Board recommends that the DOT:

> Expedite a coordinated research program on the effects of fatigue, sleepiness, sleep disorders, and circadian factors on transportation system safety. (Class II, Priority Action) (I-89-1)
>
> Develop and disseminate educational material for transportation industry personnel and management regarding shift work; work and rest schedules; and proper regimens of health, diet, and rest. (Class II, Priority Action) (I-89-2)
>
> Review and upgrade regulations governing hours of service for all transportation modes to assure that they are consistent and that they incorporate the results of the latest research on fatigue and sleep issues. (Class III, Longer-Term Action) (I-89-3)

These recommendations are currently classified as "Open--Acceptable Action." The Safety Board believes that these safety recommendations are pertinent to the EXXON VALDEZ accident and reiterates them to the Secretary of Transportation.

Response Activities During the First 24 Hours

<u>Coast Guard Response Activities</u>.--At 0027 on March 24, 1989, the Coast Guard VTC at Valdez was advised by the master of the EXXON VALDEZ that his

vessel was aground and leaking oil. About 10 minutes later, the CO and XO of the Coast Guard MSO in Valdez arrived at the VTC and activated the COTP Prince William Sound Pollution Action Plan, and the CO assumed responsibility as the OSC. Soon after arriving, they notified the Alyeska Terminal's marine operations watchstander, the local ADEC representative, and the Seventeenth Coast Guard District Office staff of the accident. The CO also advised the Alyeska Terminal watchstander to send its pollution contingency barge to Bligh Reef. The XO and SIO were sent to the vessel to initiate the casualty and pollution investigations and to determine the extent of the oil spill. The CO of the MSO expected that the spill would be classed as a "major" oil spill (in excess of 100,000 gallons, about 2,380 barrels) because the vessel was a large tanker and had grounded on a rocky reef. At 0249, he asked for assistance from the PACAREA Strike Team. He believed that asking for assistance from the strike team was a prudent action because it has the additional manpower, expertise, and equipment needed to supplement the local response to a major oil spill.

The CO, as Federal OSC for the oil spill, followed proper procedures in initiating Coast Guard actions in response to the report of the spill. Because Alyeska was responsible for cleaning up oil spilled at its Terminal and from ships that carry North Slope crude oil and had successfully cleaned up oil spills from ships carrying such crude oil in the past, the Federal OSC, in accordance with the NCP and RCP, assumed his customary duties: investigating the accident and oil spill, assessing the situation, monitoring the removal actions, and providing guidance and assistance as necessary for the cleanup activities. During the first 24 hours, Alyeska employed company personnel and local workers, ordered additional workers, and was using or had ordered all cleanup equipment available in the area to be delivered to the Terminal or the EXXON VALDEZ. If the OSC had taken over the cleanup during the first 24 hours, he would have had to employ the same people and contract for the same equipment that Alyeska was using at the time. His work load would have expanded considerably because he would not only have been directing the cleanup but also increasing his record keeping and contracting responsibilities. Such an action would not have enhanced the cleanup effort already under way; it would only have changed who was directing and paying for cleanup actions. The Safety Board believes that it was unwarranted for the Federal OSC to assume cleanup responsibility from Alyeska during the first 24-hour period after the spill for the following reasons: all equipment in the area was being used, other equipment was being mobilized or ordered into the area by Alyeska and Exxon, and the only change in cleanup actions would have been who paid directly for the cleanup.

<u>Alyeska's Response Activities</u>.--The contingency barge was not loaded with oil spill response equipment as had been the Terminal's practice in the past and the expectation of the ADEC. However, the Alyeska Contingency Plan, which had been approved by ADEC, did not specify that response equipment had to be kept on board the barge at all times. The barge had been used in response to a pollution incident in early January 1989, and its equipment had been offloaded so that it and the barge could be cleaned. The barge had also been damaged above the waterline during a storm in February 1989, and reloading of the response equipment had been delayed to allow for repairs. Alyeska had not thought it necessary to inform the ADEC that the

barge was not loaded with equipment because the barge could still be loaded and used in an emergency.

When it became apparent that the EXXON VALDEZ could not be moved safely off Bligh Reef in its damaged condition, the Federal OSC assigned a high priority to lightering the EXXON VALDEZ, and Alyeska and Exxon prepared for the lightering of the vessel. Exxon had to request lightering hoses and fittings from tankships at anchor near Bligh Reef and hired a small freighter in the area to collect and deliver the equipment to the EXXON VALDEZ. Lightering of a damaged or stranded tanker was covered in the Alyeska contingency plan, and the plan included a list of some of the equipment needed for the process. Large ship fenders for mooring the EXXON VALDEZ and the lightering vessel together had to be found in Valdez, and other lightering equipment had to be located and gathered from various storage areas at the Terminal, requiring additional time to load the barge. The extra effort and time necessary to locate and collect sufficient lightering equipment demonstrated a lack of preparation on the part of Alyeska and the need to have such equipment readily available.

On the night of the spill, poor weather conditions, darkness, and the gathering of extra cleanup equipment, including lightering equipment, prolonged the loading of the Alyeska contingency barge. Had another contingency barge been preloaded with lightering equipment, locating, collecting, and gathering the equipment would not have been necessary and the cleanup supervisors could have used the additional time to plan other cleanup activities. These actions increased the time needed to load and prepare the barge for towing from the 2.5 hours provided in the plan to 10 hours. It took another 5 hours to tow the barge to the EXXON VALDEZ, which was about 28 miles from the Terminal. The Alyeska contingency plan's 200,000-barrel oil spill scenario, which was predicated on daylight and summer weather conditions, allowed a total of 5 hours for preparation and towing of the barge to a spill site about 30 miles from the Terminal. This timetable can only be met if the barge is already loaded. If the contingency barge had been preloaded with its cleanup equipment and had left the dock as soon as the tug PATHFINDER received orders to proceed to the EXXON VALDEZ, the barge could have been at Bligh Reef within the 5 hours prescribed in the Alyeska contingency plan. The Safety Board believes that the almost 10 additional hours needed to load, prepare, and tow the barge to the site constituted an unwarranted delay that could have been avoided if the barge had been loaded. The 10-hour loss had no material impact on the cleanup because of the size of the spill. However, had the spill been more manageable, the opportunity for quick response would have been lost. Even though the 10-hour delay did not make a difference in this spill, the delay might have been significant under other conditions.

Because every spill is different in size and location, a variety of cleanup equipment is required. Equipment stored on one barge may be adequate for a small spill, while larger spills may require additional equipment that must be loaded on two or more barges. An accident may also necessitate the use of lightering equipment, as was the case in this spill. To save time in gathering and loading response equipment and to allow cleanup supervisors to use their time for other activities, such equipment should be preloaded on barges and ready for deployment. Thus, Alyeska should be prepared beforehand with barges loaded with different levels of cleanup equipment so that the response to an accident is not delayed by the need to load or unload equipment.

The cost of an additional barge or barges with equipment aboard, compared to the value of the oil on board a tankship and the large volume of oil transported from the Alyeska Terminal in Valdez, should more than justify the need for additional barges loaded with cleanup and response equipment. Moreover, the equipment on the barges should be placed in protective containers, and the loaded barges should be moored under shelters to protect them from the detrimental effects of weather. The Safety Board believes that barges should be loaded with different levels of oil spill cleanup equipment and lightering equipment and that the barges should be ready at all times for immediate deployment to the scene of a spill.

<u>State of Alaska's Activities</u>.--ADEC also established an emergency response center in Valdez that was fully operational by the evening of the day of the spill. It planned to monitor, assess, and oversee the cleanup response from the response center. During the first day of the spill, ADEC was concerned that Alyeska had not deployed cleanup equipment to the scene as provided for in the Alyeska contingency plan. The State wanted to make sure that the Federal OSC would intervene early in the response process and take over the cleanup if the responsible parties did not do what was expected in a timely and effective manner. A letter was drafted by the ADEC for the State representative to the RRT. Although the letter mentioned the State's concerns, it was not conveyed to the RRT during the first day. ADEC was following the requirements of its contingency plan to assess, monitor, and oversee spill cleanup activities.

<u>Contingency Plans</u>.--Not covered in the Alyeska contingency plans was a procedure for the transfer of cleanup responsibility from Alyeska to the shipping company that was responsible for the oil spill because it came from one of that company's vessels. A procedure for transferring cleanup responsibility should be developed by Alyeska and the individual shipping companies loading oil at the Valdez Terminal so that there will be continuity in the cleanup work and so that the transfer can be fully monitored by the Coast Guard and the State of Alaska. Because of the remote location of Valdez and the time it takes for a shipping company's oil spill response personnel to arrive on the scene, Alyeska should continue to be the initial responder to oil spills from vessels carrying oil from the Valdez Terminal in Prince William Sound. The vessel's parent company should have an organization or plan to respond effectively so that it can relieve Alyeska of long-term cleanup responsibility within a reasonably short period of time. After being relieved, Alyeska should remain on the scene to support the responsible company by providing continuity to the cleanup activity, local knowledge, and advice.

ARCO Marine had conducted a simulated oil spill drill in 1988, during which ARCO relieved Alyeska. The Coast Guard, ADEC, and local government officials participated in the drill. ARCO was the only company that had a State-approved plan that included procedures for relieving Alyeska of cleanup responsibilities. As a result of this drill, the OSC apparently assumed that Alyeska and Exxon would follow similar procedures. Alyeska and Exxon did not have any State-approved procedures for relieving Alyeska of cleanup responsibilities, probably because Alaska had not required any such procedures. Exxon had submitted proposed oil spill cleanup plans on two previous occasions, but the State had returned the plans to Exxon because, according to the State, they were not required. Alyeska stated that it had an understanding with Exxon that Exxon would assume cleanup responsibilities for a major spill, but the understanding was not written into Alyeska procedures. Exxon announced soon after it was advised of the spill that it would assume cleanup responsibility, supporting the contention that such an arrangement had existed with Alyeska. After Exxon received notice of the spill, the president of Exxon Shipping Company activated the Exxon-wide spill response teams, and he and his staff proceeded to Valdez to take over the cleanup responsibilities from Alyeska. They arrived on the afternoon of the accident day, but they did not relieve Alyeska immediately, although Exxon was taking action to assume responsibility for the cleanup. Companies shipping oil from the Alyeska Terminal at Valdez should amend their individual plans to include procedures for assuming cleanup responsibility for major oil spills from Alyeska and have the individual plans approved by the State. It is possible that some companies may not be fully capable of assuming responsibility quickly. Each company's response capability and procedures should be listed in the Alyeska contingency plan. Following State approval of a company's plan, it should be included in the Alyeska contingency plan for Prince William Sound.

Use of Dispersants.--The Alaska RCP addresses the use of oil dispersants in the State. It provides a decision matrix and a description of the biological effects of dispersants in the water but no guidance or information about the conditions under which the application of dispersants is effective. Wind and sea conditions and the length of time that the oil has been on the water when dispersants are applied alter their effectiveness. Such information about dispersant application should be included in the Alaska RCP and other contingency plans so that proper dispersant procedures are readily available. An OSC would then know when to use dispersants and would not waste time using them when they would not be effective. On the afternoon of the spill, a test was conducted using dispersants when the sea was calm. However, calm sea conditions are not conducive to the effective use of dispersants, which must mix with the oil in order to cause it to break into droplets and disperse into the water column. If the OSC had had guidelines in the RCP that described the wind and sea conditions necessary for effective use of dispersants, a test application would have been unnecessary.

The company contracted by Alyeska needed more than 3 hours to prepare a helicopter with a 300-gallon spray bucket to conduct a dispersant test application, which was done about 18 hours after the spill was reported. Air-deliverable dispersant system (ADDS) packs for fixed-wing aircraft were not available in Valdez and had to be ordered from storage sites in Alaska and the continental United States. The Alyeska plan states that aircraft capable of applying dispersants are to be available in 9 to 17 hours. However, the aircraft and ADDS packs were not available for use during the first 24 hours after the spill occurred. If dispersants are to be used on an oil spill, especially in such a remote area as Valdez, the delivery system must be readily available and stored on or near the Terminal. The Safety Board believes that if dispersants continue to be regarded as an oil spill response option, ADDS packs and other dispersant application equipment should be stored in Valdez and ready for immediate use and that appropriate aircraft or vessels should be available on short notice.

In-Situ Burning.--The Alaska RCP and the Alyeska plans also mention in-situ burning of oil as an approved alternative to mechanical cleanup, but the plans provide no guidance about how to proceed with in-situ burning or about possible results of burning, such as smoke or oil and tar residue. The use of in-situ burning is at the discretion of the OSC, with guidance from the RRT. Thus, the OSC is in the difficult position of being able to authorize certain methods--dispersant use and in-situ burning--but only after consulting and seeking advice from the RRT. The RRT may provide some information and agree to the use of a particular method, but the final decision is the OSC's. At times, the OSC may not be able to contact the RRT, or the RRT may not provide clear guidance. Such problems may result in delays that could render the application of dispersants useless and in-situ burning ineffectual. The OSC could also make an incorrect decision because of the lack of sufficient guidance or information, but incorrect action probably would not be as harmful as no action while awaiting a consensus from the RRT. In any case, the OSC's decisions will probably be second guessed during and after the cleanup because the results may not be acceptable to all parties. The cleanup party may think there was a delay in authorizing a certain procedure; the environmentalists may believe the physical environment was damaged or fish and wildlife were destroyed; fishermen may think their livelihood was threatened; the State may regard the impact on its environment, revenue, or tourism as negative; or the RRT may think its guidance was interpreted incorrectly. OSCs need more than advice from a committee. They need guidance in writing, before a spill occurs, from the NCP and the RCP about the use of dispersant chemicals and in-situ burning so that their decisions can be based on accepted procedures.

During the first 24 hours after the spill, Exxon applied to the RRT to conduct in-situ burning of the spilled oil. The RRT recommended approval if the OSC was satisfied that the burning could be done without degrading other cleanup efforts. In addition, the State had to issue a burn permit. "Approval to open burn" was issued by the ADEC on the same day, March 24, but the permit was not sent to Exxon until the next day. Even though the permit was not received until the next day, neither Alyeska nor Exxon was prepared to burn oil on the first day of the spill because neither one had a fire- or burn-proof boom on hand. The boom had to be shipped in from the North Slope and Seattle. Had the boom been immediately available and a burn permit issued earlier, this method of cleanup could have been used on heavy concentrations of oil before the wind and currents spread the oil so far that effective containment was not possible.

The burn permit stated: "Exxon has the responsibility to ensure smoke from their burning does not impact public health or violate Air Quality Standards. Following the limits of this permit does not relieve Exxon of been fitted with a double hull, the risk of oil spills owing to collision or grounding would have been significantly reduced.

The United States has taken unilateral action and will require U.S. flag and foreign flag tank vessels entering U.S. waters to have double hulls. Although this action will not afford total protection of the U.S. coastline from accidental oil spills in international waters off the U.S. coast, it will protect U.S. coastal waters from oil spills as a result of groundings and collisions in U.S. waters. Since a large percentage of the world's tank vessels operate in U.S. waters, this action by the United States will probably promote double-hull construction of many new foreign flag tank vessels so that these vessels can be used in the U.S. market. This action by the United States may also lead to international requirements for double hulls or unilateral action by other countries.[92]

CONCLUSIONS

Findings

1. The master's decision to depart from the Traffic Separation Scheme to avoid ice was probably reasonable, even though it required a heading toward shoal water.

2. Navigating the EXXON VALDEZ between the ice field and Bligh Reef required a diligent, competent navigation watch capable of conning the vessel, watching for ice, and fixing the vessel's position frequently; hence, two officers were required on the bridge--one with conning and shiphandling experience to conn the vessel and one to fix the vessel's position frequently--to navigate the vessel safely.

3. The master's decision to leave the third mate in charge of the navigation watch was contrary to Federal regulations and Exxon policy and was improper given the course of the vessel, the uncertain extent of the ice conditions, the proximity of a dangerous reef and the fact that the third mate did not have the required pilotage endorsement.

4. The master's judgment was impaired by alcohol during the critical period the vessel was transiting Valdez Arm.

5. The performance of the third mate was deficient, probably because of fatigue, when he assumed supervision of the navigation watch from the master about 2350.

6. The third mate's failure to turn the vessel at the proper time and with sufficient rudder probably was the result of his excessive workload and fatigued condition, which caused him to lose awareness of the location of Bligh Reef.

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[92] Finland has already implemented an oil protection fee in order to minimize the number of single-bottom tank vessels in its waters.

7. The vessel was in the red sector of Busby Island Light for several minutes before grounding, which afforded a warning of the reef that apparently was not noticed by the third mate or the lookout.

8. There were no rested deck officers on the EXXON VALDEZ available to stand the navigation watch when the vessel departed from the Alyeska Terminal.

9. Many conditions conducive to producing crew fatigue on the EXXON VALDEZ exist on other Exxon Shipping Company vessels because many are three-mate vessels and because the company has pursued reduced manning procedures.

10. The Exxon Shipping Company did not adequately monitor the master for alcohol abuse after his alcohol rehabilitation program.

11. Exxon Shipping Company did not have a sufficient program to identify, remove from service, if necessary, and provide treatment for employees who had chemical dependency problems.

12. Exxon Shipping Company manning policies do not adequately consider the increase in workload caused by reduced manning.

13. The Exxon Shipping Company had incentives and work requirements that could be conducive to fatigue.

14 The Exxon Shipping Company had manipulated shipboard reporting of crew overtime information that was to be submitted to the Coast Guard for its assessments of workloads on some tankships.

15. The Coast Guard was unduly narrow in its perspective when it evaluated reduced manning requests for the EXXON VALDEZ; it based manning reductions primarily on the assumption that shipboard hardware and equipment might reduce the workload at sea but did not consider the heavier workload associated with cargo operations in port and the frequency of such operations.

16. The Coast Guard was not adequately prepared to implement the requirement to obtain toxicology samples from mariners involved in marine accidents.

17. Department of Transportation regulations for postaccident/incident drug testing of employees in safety-sensitive positions are not adequate.

18. Drug testing of Vessel Traffic Center watchstanders was not conducted in a timely manner in accordance with Department of Transportation directives.

19. The Coast Guard needs to have access to National Driver Register information and other information regarding alcohol-related traffic offenses committed by licensed maritime officers in order to better determine a merchant mariner's fitness to hold a Federal license.

20. The Alyeska Pipeline Service Company failed to meet the expected response-time objective of its approved spill plan because it failed to have an oil spill cleanup barge loaded and ready for deployment.

21. The Alyeska Pipeline Service Company should have, at a minimum, a second barge that is loaded with additional cleanup and lightering equipment so that cleanup equipment will be ready for immediate deployment at all times.

22. The National Oil and Hazardous Substance Pollution Contingency Plan and Alaska Regional Oil and Hazardous Substances Pollution Contingency Plan both lack adequate guidance for On-Scene Commanders about the use of dispersants and in-situ burning.

23. Requiring the On-Scene Commander to confer with the Regional Response Team before using dispersants or in-situ burning needlessly delays the use of these methods and complicates the decision process.

24. There was no evidence that the Federal Government (Coast Guard) or any other organization would have been capable of increasing the efforts under way during the first 24 hours after the spill.

25. The Alyeska Pipeline Service Company contingency plans lacked procedures that would allow individual companies transporting oil from the Valdez Terminal in Prince William Sound to relieve Alyeska of cleanup responsibilities in a manner that would prevent interruption.

26. The Alyeska Pipeline Service Company plan should include guidelines that describe the wind and sea conditions under which different types of skimmers, dispersants, and in-situ burning can be used most effectively for North Slope crude oil.

27. Ice in Valdez Arm is a significant hazard to navigation and requires closer monitoring and reporting.

28. The limited supervision of the Vessel Traffic Center probably contributed to the commanding officer's and operations officer's lack of awareness that tankships were departing from the traffic separation scheme to avoid ice and were passing close to Bligh Reef.

29. The Vessel Traffic Service radar was operating satisfactorily, and the detection range of the radar was not significantly reduced by weather or sea conditions while the EXXON VALDEZ was transiting Valdez Arm.

30. The Vessel Traffic Center lost radar contact with the EXXON VALDEZ about 7.7 miles from the radar site, which is about 5.5 miles from the northern part of Bligh Reef, because the Center's watchstander did not use a higher range scale and not because of any limitation or malfunction of the radar. Had he used a higher range scale, the vessel probably could have been tracked as far as the site of the grounding, but no firm policy required that he do so.

31. The monitoring of vessels in Valdez Arm was left to the discretion of the Vessel Traffic Center watchstander because the senior watchstander decided to allow the Center's watchstanders to monitor instead of plot the positions of vessels transiting Valdez Arm.

32. A firm policy requiring the Vessel Traffic Center to plot tankships transiting the full length of Valdez Arm could have alerted the commanding officer of the Marine Safety Office to the fact that tankships were departing from the traffic separation scheme in the vicinity of Bligh Reef to avoid ice.

33. Monitoring the EXXON VALDEZ by radar as it transited Valdez Arm would have revealed to the Vessel Traffic Center watchstander that the vessel had changed course to 180°, had departed the vessel traffic separation scheme, and was headed for shoal water east of Bligh Reef.

34. A query or warning from the Vessel Traffic Center might have alerted the third mate to the impending danger from Bligh Reef.

35. Ice reports issued by the Vessel Traffic Center frequently are neither sufficiently timely nor sufficiently accurate to enable masters to ascertain before leaving Port Valdez the ice conditions that will be encountered in Valdez Arm.

36. The policy adopted by the Coast Guard about 1985 to discontinue independent collection of ice information and statistics about vessel deviations from the traffic separation scheme probably contributed to the commanding officer and the operations officer not knowing that ice was causing vessels to depart from the traffic lanes and pass close to Bligh Reef.

37. A radar site near Bligh Reef would enable the Vessel Traffic Center to obtain current information on ice in Valdez Arm and to reliably track vessels in Valdez Arm.

38. The communication and microwave systems for the Vessel Traffic Service, Prince William Sound, were not reliable owing to age, the scarcity of proper replacement parts, and improvised repairs.

39. The Coast Guard has not maintained an effective vessel traffic service in Prince William Sound.

40. Although moving the pilot station to Rocky Point was apparently based on a consideration for pilot safety, the move also resulted in a reduction in pilotage services past Bligh Reef, where local knowledge is needed.

41. Moving the pilot station to a position south of Bligh Reef enhanced navigation safety by ensuring the presence of an officer with local knowledge of the area on the bridge of each vessel transiting Valdez Arm past Bligh Reef.

42. Former COTP Order 1-80, which included requirements for two officers on the bridge and for plotting and position reporting by vessels, contributed to navigation safety.

43. Current monitoring of the amount and size of ice being calved from the Columbia Glacier is inadequate for the safety of tankships transiting Prince William Sound.

44. The EXXON VALDEZ met all U.S. and international segregated-ballast regulations.

45. Current standards for segregated ballast and cargo tank size do not provide sufficient protection against oil spills caused by groundings or collisions.

46. If the EXXON VALDEZ had been fitted with an 11-foot double bottom (based on the 1/15 of the beam criterion), the resulting oil spill would have been small, and possibly eliminated.

47. Double bottoms on all U.S. and foreign tank vessels (tankships and barges) that enter U.S. waters and have a capacity of more than 20,000 deadweight tons would minimize oil pollution in U.S. waters caused by groundings.

Probable Cause

The National Transportation Safety Board determines that the probable cause of the grounding of the EXXON VALDEZ was the failure of the third mate to properly maneuver the vessel because of fatigue and excessive workload; the failure of the master to provide a proper navigation watch because of impairment from alcohol; the failure of Exxon Shipping Company to provide a fit master and a rested and sufficient crew for the EXXON VALDEZ; the lack of an effective Vessel Traffic Service because of inadequate equipment and manning levels, inadequate personnel training, and deficient management oversight; and the lack of effective pilotage services.

RECOMMENDATIONS

As a result of its investigation, the National Transportation Safety Board made the following recommendations:

--to the Exxon Shipping Company and all shipping companies operating in Prince William Sound:

> Eliminate personnel policies, including performance appraisal criteria, that encourage marine employees to work long hours without concern for debilitating fatigue and commensurate reduction in safety of vessel operations. (Class II, Priority Action) (M-90-26)

Implement manning policies that prevent excessively long working hours for crewmembers during cargo handling operations. (Class II, Priority Action) (M-90-27)

Institute a written policy forbidding deck officers to share navigation and cargo watch duties on a 6-hours-on, 6-hours-off basis, except in emergencies. (Class II, Priority Action) (M-90-28)

Require that two licensed watch officers be present to conn and navigate vessels in Prince William Sound. (Class II, Priority Action) (M-90-29)

Implement an alcohol/drug program for seagoing employees that prevents such personnel from returning to sea until their alcohol/drug dependency problem is under control. (Class II, Priority Action) (M-90-30)

Train persons who monitor the alcohol/drug rehabilitation program in the recognition of recidivism after treatment, in the utilization of appropriate professional referrals, and in the interpersonal skills necessary for competent rehabilitation supervision. (Class II, Priority Action) (M-90-31)

--to the Coast Guard:

Develop a means for rigorous enforcement of 46 U.S.C.8104(a) to ensure that officers on watch during departures from ports have had at least 6 hours of off-duty time in the previous 12 hours. (Class II, Priority Action) (M-90-32)

Expedite the study programs to establish manning levels and safeguards based on human factors, as well as on shipboard hardware and equipment, and incorporate the findings into the manning review process. (Class II, Priority Action) (M-90-33)

Establish manning standards to ensure that crew complements reflect all expected shipboard operating situations and that procedures are in place for dealing with unusually high workloads at sea, such as tank cleaning, and with cargo handling operations in port. (Class II, Priority Action) (M-90-34)

Seek authority for access to the National Driver Register and other driving records and make use of the information from these sources to prevent any person with a drug and/or alcohol problem from holding a merchant marine license. (Class II, Priority Action) (M-90-35)

Adopt a permanent policy to plot all vessels participating in the Valdez Vessel Traffic System between the pilot station south of Bligh Reef, or as near the pilot station as possible, and their berths in Port Valdez. (Class II, Priority Action) (M-90-36)

Increase the manning level at the Marine Safety Office, Valdez, Alaska, to provide the following: enough watchstanders to plot all participating vessels between the pilot station south of Bligh Reef and their berths in Port Valdez; an officer-in-charge of the Vessel Traffic System who will have time to manage and supervise the system effectively; and sufficient additional officers to staff a duty officer watch with officers capable of monitoring and supervising vessel traffic watchstanders outside normal working hours. (Class II, Priority Action) (M-90-37)

Install an additional radar site as close to Bligh Reef as feasible to enable the Vessel Traffic Center to accurately monitor and plot all participating vessels and ice in the area of Valdez Arm from Busby Island to the pilot station south of Bligh Reef. (Class II, Priority Action) (M-90-38)

Initiate procedures to collect information on ice conditions in Valdez Arm so that all participating vessels receive accurate and timely ice reports before departing port and so that all supervisory personnel associated with the Valdez Traffic System are cognizant of ice conditions in Valdez Arm. (Class II, Priority Action) (M-90-39)

Improve the communications system operated by the Marine Safety Office in Valdez, Alaska. (Class II, Priority Action) (M-90-40)

Improve the microwave system operated by the Marine Safety Office in Valdez, Alaska. (Class II, Priority Action) (M-90-41)

Limit any proposed reduction in Federal pilotage to that part of Prince William Sound from the entrance outside Cape Hinchinbrook to the current pilot station at latitude 69°49'N, longitude 174° 01'W, which is south of Bligh Reef, thus ensuring that Federal pilots will be required between the entrance to Valdez Arm south of Bligh Reef and the berths in Port Valdez. (Class II, Priority Action) (M-90-42)

Incorporate into the Vessel Traffic Service regulations for all vessels the provisions of former COTP Order 1-80 (except the requirement for daylight transit), including the requirements about vessel condition, crews, navigation equipment, and publications, as well as the requirement that a licensed officer in addition to the licensed officer on watch be available to plot the vessel's position. (Class II, Priority Action) (M-90-43)

--to the Environmental Protection Agency:

Develop guidance in the National Contingency Plan for Regional Response Teams and On-Scene Coordinators about dispersant use. (Class II, Priority Action) (M-90-44)

Develop guidance for Regional Response Teams and On-Scene Coordinators about in-situ burning of oil and include the guidance in the National Contingency Plan. (Class II, Priority Action) (M-90-45)

Develop procedures that would eliminate the need for the On-Scene Coordinator to obtain burn permits from a State after the Regional Response Team has agreed that the spilled oil can be burned in situ. (Class II, Priority Action) (M-90-46)

Develop guidance for Regional Response Teams that enables them to establish the minimum amount of cleanup equipment that must be immediately available to initiate a cleanup response. (Class II, Priority Action) (M-90-47)

--to the Alaska Regional Response Team:

Develop clearer guidance for dispersant use in order to eliminate the need for a dispersant test before dispersants are used on an oil spill and include that information in the Alaska Regional Contingency Plan. (Class II, Priority Action) (M-90-48)

Develop guidelines and procedures for in-situ burning of oil, identify the range of wind and sea conditions for which in-situ burning of oil can be used effectively, and incorporate that information into the Alaska Regional Contingency Plan. (Class II, Priority Action) (M-90-49)

--to the State of Alaska:

Require that the oil spill contingency barge or barges at the Alyeska Pipeline Service Company Terminal at Valdez be loaded at all times with the response equipment specified in the plan. If a barge is unloaded and unavailable for immediate deployment, require that a replacement barge be provided and loaded with the equipment specified in the plan. (Class II, Priority Action) (M-90-50)

Require that the companies loading oil at the Alyeska Pipeline Service Company Terminal in Valdez provide a plan for assuming cleanup responsibility from Alyeska Pipeline Service Company in the event of a major oil spill or potential major oil spill of more than 100,000 gallons. (Class II, Priority Action) (M-90-51)

Develop and require minimum levels of mechanical oil spill cleanup equipment, fire- or burn-proof boom, air-deployable dispersant system packs, and other dispersant application equipment to be stockpiled and immediately available at the Alyeska Pipeline Service Company's Valdez Terminal. (Class II, Priority Action) (M-90-52)

--to Alyeska Pipeline Service Company:

Provide at its Valdez terminal two or more oil spill contingency barges that are loaded with pollution-response cleanup equipment, lightering equipment, and fire- or burn-proof booms that are maintained and ready for immediate deployment, thus facilitating an effective response to different spill conditions. (Class II, Priority Action) (M-90-53)

Identify the range of wind and sea conditions for which dispersants can be used effectively and incorporate that information into company contingency plans. (Class II, Priority Action) (M-90-54)

In conjunction with each of the companies that load oil at its terminal in Valdez, develop a plan or procedures for relieving Alyeska Pipeline Service Company of primary cleanup responsibility in the event of a major oil spill or potential major oil spill of more than 100,000 gallons and include the procedures in its contingency plan after they have been approved by the State of Alaska. (Class II, Priority Action) (M-90-55)

In its company contingency plans, list also the companies that do not have a plan for relieving Alyeska Pipeline Service Company of cleanup responsibility. (Class II, Priority Action) (M-90-56)

Store air-deployable dispersant system packs and other dispersant application equipment at its Valdez Terminal, as agreed upon with the State of Alaska, for use with fixed wing aircraft, or helicopters, or vessels. (Class II, Priority Action) (M-90-57)

Store fire- or burn-proof booms at its Valdez Terminal, as agreed upon with the State of Alaska, and include procedures for their use in the company's oil spill contingency plan. (Class II, Priority Action) (M-90-58)

--to the US Geological Survey:

Intensify efforts to monitor the state of the Columbia Glacier, particularly to identify the amount of ice calving from the glacier and any changes in the rate that might affect the number and size of icebergs emanating from the glacier, and make this information available to agencies, such as the U.S. Coast Guard, tasked with assuring the safety of shipping into and out of Valdez Harbor. (Class II, Priority Action) (M-90-59)

Also, the Safety Board reiterated the following safety recommendations:

--to the Department of Transportation:

I-89-1

Expedite a coordinated research program on the effects of fatigue, sleepiness, sleep disorders, and circadian factors on transportation system safety.

I-89-2

Develop and disseminate educational material for transportation industry personnel and management regarding shift work; work and rest schedules; and proper regimens of health, diet, and rest.

I-89-3

Review and upgrade regulations governing hours of service for all transportation modes to assure that they are consistent and that they incorporate the results of the latest research on fatigue and sleep issues.

I-89-4

Develop postaccident and postincident testing regulations that are separate from the pre-employment, random, and reasonable suspicion testing regulations in all modal agencies.

APPLICABLE TO ALL COUNTS: 18 USC§3571(d) which allows fine up to twice the pecuniary loss

I. Violation of 33 USC Sec. 1311(a) / 1319(c)(1)
Negligent Discharge of a pollutant into navigable waters [33 USC §1311(a)]
Misdemeanor
[33 USC 1319(c)] Max penalty = $25,000 per day of violation; imprisonment to 1yr.

II Violation of 33 USC § 407, 411
Unlawful discharge of refuse into navigable waters, without a permit [33 USC § 407]
Misdemeanor
Max. penalty = $2,500, 1yr in prison [33 USC§411]

III Violation of 16 USC §703, 707(a); 50 CFR 21.11
Killing a migratory bird [§703] without a permit
Misdemeanor: Max penalty = $500 / Six months [§711]

IV Violation of 33USC§1232(b)(1), 33CFR 164.11(b)
[redacted]) [Required by 33 CFR 164.11(a)]
[redacted] ~~misdemeanor~~: ~~Max~~ Max penalty $50,000, 5 years
[33USC 1232(b)(1)

V Violation of 46 USC 3718(b); 46 CFR 35.05-20
[redacted] [required by 46CFR 35.05-20]
[redacted] per 46USC 3718(b): Max penalty = $50,000 + 5 years

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 97-117, see 1981 U.S. Code Cong. and Adm.News, p. 2629.

Library References

Health and Environment ⇐25.7(1).
C.J.S. Health and Environment §§ 106, 125.

§ 1299. State certification of projects

Whenever the Governor of a State which has been delegated sufficient authority to administer the construction grant program under this subchapter in that State certifies to the Administrator that a grant application meets applicable requirements of Federal and State law for assistance under this subchapter, the Administrator shall approve or disapprove such application within 45 days of the date of receipt of such application. If the Administrator does not approve or disapprove such application within 45 days of receipt, the application shall be deemed approved. If the Administrator disapproves such application the Administrator shall state in writing the reasons for such disapproval. Any grant approved or deemed approved under this section shall be subject to amounts provided in appropriation Acts.

(June 30, 1948, c. 758, Title II, § 219, as added Dec. 29, 1981, Pub.L. 97-117, § 20, 95 Stat. 1631.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 97-117, see 1981 U.S. Code Cong. and Adm.News, p. 2629.

Library References

Health and Environment ⇐25.7(10).
C.J.S. Health and Environment §§ 106, 107, 133.

SUBCHAPTER III—STANDARDS AND ENFORCEMENT

§ 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, § 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in

Historical and Statutory Notes

1987 Amendment. Subsec. (c). Pub.L. 100-4, § 206(d), substituted "1990" for "1985".

Legislative History. For legislative history and purpose of Pub.L. 100-4, see 1987 U.S.Code Cong. and Adm.News, p. 5.

§ 1292. Definitions

Notes of Decisions

Replacement wetlands 2
Treatment works 1

2. Replacement wetlands

Environmental Protection Agency had authority to award county sanitation district grant under Clean Water Act for building of artificial wetlands to compensate for loss of natural wetlands as result of construction of solids processing and disposal facility at waste water treatment plant, where federal and state agencies involved in construction determined that district had to build artificial wetlands to compensate for loss of natural wetlands. Sacramento Regional County Sanitation Dist. v. Thomas, E.D.Cal.1987, 668 F.Supp. 1427.

§ 1293a. Contained spoil disposal facilities

[See main volume for text of (a) to (i)]

(j) Period for Depositing Dredged Materials

The Secretary of the Army, acting through the Chief of Engineers, is authorized to continue to deposit dredged materials into a contained spoil disposal facility constructed under this section until the Secretary determines that such facility is no longer needed for such purpose or that such facility is completely full.

(k) Study and Monitoring Program

(1) Study

The Secretary of the Army, acting through the Chief of Engineers, shall conduct a study of the materials disposed of in contained spoil disposal facilities constructed under this section for the purpose of determining whether or not toxic pollutants are present in such facilities and for the purpose of determining the concentration levels of each of such pollutants in such facilities.

(2) Report

Not later than 1 year after November 17, 1988, the Secretary shall transmit to Congress a report on the results of the study conducted under paragraph (1).

(3) Inspection and monitoring program

The Secretary shall conduct a program to inspect and monitor contained spoil disposal facilities constructed under this section for the purpose of determining whether or not toxic pollutants are leaking from such facilities.

(4) Toxic pollutant defined

For purposes of this subsection, the term "toxic pollutant" means those toxic pollutants referred to in sections 1311(b)(2)(C) and 1311(b)(2)(D) of this title and such other pollutants as the Secretary, in consultation with the Administrator of the Environmental Protection Agency, determines are appropriate based on their effects on human health and the environment.

(As amended Pub.L. 100-676, § 24, Nov. 17, 1988, 102 Stat. 4027.)

Historical and Statutory Notes

1988 Amendment. Subsec. (j). Pub.L. 100-676, § 24(a), added subsec. (j).

Subsec. (k). Pub.L. 100-676, § 24(b), added subsec. (k).

SUBCHAPTER III—STANDARDS AND ENFORCEMENT

§ 1311. Effluent limitations

[See main volume for text of (a)]

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

[See main volume for text of (1) to (2)(B)]

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

[See main volume for text of (c) to (e)]

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

(g) Modifications for certain nonconventional pollutants

(1) General authority

The Administrator, with the concurrence of the State, may modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge from any point source of ammonia, chlorine, color, iron, and total phenols (4AAP) (when determined by the Administrator to be a pollutant covered by subsection (b)(2)(F) of this section) and any other pollutant which the Administrator lists under paragraph (4) of this subsection.

(2) Requirements for granting modifications

A modification under this subsection shall be granted only upon a showing by the owner or operator of a point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;

from their mines, Environmental Protection Agency's failure to require biological monitoring was not arbitrary and capricious, since this chapter gave Environmental Protection Agency discretion to require such monitoring, and petitioner challenging validity of permits made no effort to show why action under Environmental Protection Agency was an abuse of that discretion. Webb v. Gorsuch, C.A.4, 1983, 699 F.2d 157.

Environmental Protection Agency, in determining monitoring requirements to be contained in National Pollutant Discharge Elimination System permit granted to steel company, and in setting separate requirements for each effluent outfall, appropriately considered nature of discharges and their impact on receiving stream; variability of discharges; volume of water discharged; and present monitoring practices of steel company. U.S. Steel Corp. v. Train, C.A.Ill.1977, 556 F.2d 822.

If preconditions for application of requirement of this section that the Administrator require the owner or operator of any point source to sample the effluent and monitor and report on the operation of the facility do exist, Administrator has a nondiscretionary obligation to require monitoring and reports. Environmental Defense Fund, Inc. v. Costle, D.C.N.Y.1977, 439 F.Supp. 980.

5. Sampling of effluents

This chapter authorized the Environmental Protection Agency to sample oil refiner's untreated waste water. Mobil Oil Corp. v. U.S. E.P.A., C.A.Ill.1983, 716 F.2d 1187, certiorari denied 104 S.Ct. 2363, 80 L.Ed.2d 835.

6. Necessity of order

Discharger cannot be in violation of provisions of this section directing Administrator to require owner or operator of any point source to maintain records, sample effluents, and provide other information unless such an order has in fact been issued. Committee for Consideration of Jones Falls Sewage System v. Train, D.C.Md.1974, 375 F.Supp. 1148, affirmed 539 F.2d 1006.

§ 1319. Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon

request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(d) Civil penalties

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutants into treatment works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this chapter.

(June 30, 1948, c. 758, Title III, § 309, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 859, and amended Dec. 27, 1977, Pub.L. 95–217, §§ 54(b), 55, 56, 67(c)(2), 91 Stat. 1591, 1592, 1606.)

Historical Note

1977 Amendment. Subsec. (a)(1). Pub.L. 95–217, §§ 55(a), 67(c)(2)(A), substituted "1318, 1328, or 1345 of this title" for "or 1318 of this title", and "1342 or 1344 of this title" for "1342 of this title".

Subsec. (a)(2). Pub.L. 95–217, § 56(a), substituted "except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation" for "the Administrator shall enforce any permit condition or limitation".

Subsec. (a)(3). Pub.L. 95–217, §§ 55(b), 67(c)(2)(B), substituted "1318, 1328, or 1345 of this title" for "or 1318 of this title", added "or in a permit issued under section 1344 of this title by a State" following "in a permit issued under section 1342 of this title by him or by a State".

Subsec. (a)(4). Pub.L. 95–217, § 56(b), struck out provision that any order issued under this subsection had to be by personal service and had to state with reasonable specificity the nature of the violation and a time for compliance, not to exceed thirty days, which the Administrator determined to be reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. See section subsec. (a)(5) of this section.

Subsecs. (a)(5), (6). Pub.L. 95–217, § 56(c), added pars. (5) and (6).

Subsec. (c)(1). Pub.L. 95–217, § 67(c)(2)(C), substituted "by a State or in a permit issued under section 1344 of this title by a State, shall be punished" for "by a State, shall be punished".

14. Moot questions

Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 [main volume] certiorari denied 104 S.Ct. 2668, 467 U.S. 1219, 81 L.Ed.2d 373, rehearing denied 104 S.Ct. 3573, 468 U.S. 1204, 82 L.Ed.2d 872.

15. Settlement agreement—Generally

National Ass'n of Metal Finishers v. E.P.A., 719 F.2d 624 [main volume] reversed 105 S.Ct. 1102, 470 U.S. 116, 84 L.Ed.2d 90.

Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 [main volume] certiorari denied 104 S.Ct. 2668, 467 U.S. 1219, 81 L.Ed.2d 373, rehearing denied 104 S.Ct. 3573, 468 U.S. 1204, 82 L.Ed.2d 872.

Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 [main volume] certiorari denied 104 S.Ct. 2668, 467 U.S. 1219, 81 L.Ed.2d 373, rehearing denied 104 S.Ct. 3573, 468 U.S. 1204, 82 L.Ed.2d 872.

16. —— Notice

Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 [main volume] 205 U.S.App.D.C. 101 certiorari denied 104 S.Ct. 2668, 467 U.S. 1219, 81 L.Ed.2d 373, rehearing denied 104 S.Ct. 3573, 468 U.S. 1204, 82 L.Ed.2d 872.

§ 1318. Records and reports; inspections

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title—

[See main volume for text of (A)]

(B) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials—

[See main volume for text of (i) and (ii)]

(b) Availability to public; trade secrets exception; penalty for disclosure of confidential information

Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18. Any authorized representative of the Administrator (including an authorized contractor acting as a representative of the Administrator) who knowingly or willfully publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information which is required to be considered confidential under this subsection shall be fined not more than $1,000 or imprisoned not more than 1 year, or both. Nothing in this subsection shall prohibit the Administrator or an authorized representative of the Administrator (including any authorized contractor acting as a representative of the Administrator) from disclosing records, reports, or information to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

[See main volume for text of (c)]

(d) Access by Congress

Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this chapter shall be made available, upon written request of any duly authorized committee of Congress, to such committee.

(As amended Feb. 4, 1987, Pub.L. 100–4, Title III, § 310, Title IV, § 406(d)(1), 101 Stat. 41, 73.)

Historical and Statutory Notes

1987 Amendment. Subsec. (a)(4). Pub.L. 100–4, § 406(d)(1), in provision preceding subpar. (A) substituted "1345, and 1364" for "and 1364".

Pub.L. 100–4, § 310(a)(2), in subpar. (B) inserted "(including an authorized contractor acting as a representative of the Administrator)" after "or his authorized representative".

Subsec. (b). Pub.L. 100–4, § 310(a)(1), inserted provision specifying the penalty for unauthorized disclosure of confidential information by any authorized representative of the Administrator, including an authorized contractor acting as a representative of the Administrator.

Subsec. (d). Pub.L. 100–4, § 310(b), added subsec. (d).

Legislative History. For legislative history and purpose of Pub.L. 100–4, see 1987 U.S.Code Cong. and Adm.News, p. 5.

Law Review Commentaries

Federal wetlands protection under the Clean Water Act: Regulatory ambivalence, intergovernmental tension, and a call for reform. Michael C. Blumm & D. Bernard Zaleha, 60 U.Colo.L.Rev. 695 (1989).

Warrior and the Druid—the DOD and environmental law. Michael Donnelly and James G. Van Ness, 33 Fed.Bar News 37 (1986).

Notes of Decisions

Search warrants 7

2. Access to information

Repairer of damaged automobile bumpers violated Clean Water Act by exceeding wastewater discharge limits contained in its discharge permit and by failing to report in various instances contents and quality of its wastewater discharges. Sierra Club v. Simkins Industries, Inc., D.C.Md. 1985, 617 F.Supp. 1120, affirmed 847 F.2d 1109.

4. Monitoring and reports

Decision to require visual sheen test as method for monitoring compliance of no discharge of oil limitation was appropriate in National Pollutant Discharge Elimination System permit proceedings regarding limitations on discharge of pollutants from oil and gas operations. Natural Resources Defense Council, Inc. v. U.S. E.P.A., C.A.9, 1988, 863 F.2d 1420.

National Pollution Discharge Elimination System requirement that applicant provide Environmental Protection Agency with list of any toxic pollutant which applicant currently used or manufactured as immediate or final product or byproduct was reasonable exercise of EPA's statutory authority. Natural Resources Defense Council, Inc. v. U.S. E.P.A., 1987, 822 F.2d 104, 261 U.S.App.D.C. 372.

5. Sampling of effluents

Mobil Oil Corp. v. U.S. E.P.A., 716 F.2d 1187 [main volume] certiorari denied 104 S.Ct. 2363, 466 U.S. 980, 80 L.Ed.2d 835.

7. Search warrants

Administrative search warrant issued pursuant to the Clean Water Act for investigation of landfill activities on landowner's property could properly provide for entry of private individuals not employed by the EPA to assist in investigation; these independent contractors qualified as "authorized representatives," for purpose of enforcement provisions of Act. Matter of Alameda County Assessor's Parcel Nos. 537–801–2–4 and 537–850–9, N.D.Cal.1987, 672 F.Supp. 1278.

§ 1319. Enforcement

[See main volume for text of (a) and (b)]

(c) Criminal penalties

(1) Negligent violations

Any person who—

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph—

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury—

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of—

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title,[1] and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

[See main volume for text of (e) and (f)]

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available—

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interested persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation—

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which—

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an allege[1] violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation is filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment—

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have

jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

(As amended Feb. 4, 1987, Pub.L. 100–4, Title III, §§ 312, 313(a)(1), (b)(1), (c), 314(a), 101 Stat. 42, 45, 46.)

1 So in original.

Historical and Statutory Notes

References in Text. The Solid Waste Disposal Act, referred to in subsec. (c)(7) is Title II of Pub.L. 89–272, as amended generally by Pub.L. 94–580, § 2, Oct. 21, 1976, 90 Stat. 2795, which is classified generally to chapter 82 (section 6901 et seq.) of Title 42, The Public Health and Welfare. Section 3001 of the Solid Waste Disposal Act is classified to section 6921 of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 6901 of Title 42 and Tables.

1987 Amendment. Subsec. (c)(1). Pub.L. 100–4, § 312, struck out provision that the violation be willful and reference to a violation of a condition in a permit issued under section 1344 of this title and inserted reference to sections 1328 and 1345 of this title and provision relating to negligent introduction into a sewer system or into a publicly owned treatment works of any pollutant or hazardous substance as a negligent violation.

Subsec. (c)(2). Pub.L. 100–4, § 312, added par. (2) and redesignated former par. (2) as (4).

Subsec. (c)(3). Pub.L. 100–4, § 312, added par. (3) and redesignated former par. (3) as (6).

Subsec. (c)(4). Pub.L. 100–4, § 312, redesignated former par. (2) as (4), and in par. (4) as so redesignated, provided that the false statement, representation, or certification be material, that any falsification or tampering be done knowingly, that imprisonment for a first conviction be increased to two years from six months, and that the penalty for a conviction after the first conviction be a fine of not more than $20,000 per day of violation, or imprisonment of not more than 4 years, or both.

Subsec. (c)(5). Pub.L. 100–4, § 312, added par. (5).

Subsec. (c)(6). Pub.L. 100–4, § 312, redesignated former par. (3) as (6).

Subsec. (c)(7). Pub.L. 100–4, § 312, added par. (7).

Subsec. (d). Pub.L. 100–4, § 313(a)(1), (b)(1), (c), inserted ", or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title," after "section 1344 of this title by a State,", "$25,000 per day for each violation" for "$10,000 per day of such violation", and provision specifying factors to consider in determining the penalty amount.

Subsec. (g). Pub.L. 100–4, § 314(a), added subsec. (g).

Savings Provision. Section 313(a)(2) of Pub.L. 100–4 provided that: "No State shall be required before July 1, 1988, to modify a permit program approved or submitted under section 402 of the Federal Water Pollution Control Act [section 1342 of this title] as a result of the amendment made by paragraph (1) [amending subsec. (d) of this section by inserting reference to requirements imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title]."

Increased Penalties Not Required Under State Programs. Section 313(b)(2) of Pub.L. 100–4 provided that: "The Federal Water Pollution Control Act [this chapter] shall not be construed as requiring a State to have a civil penalty for violations described in section 309(d) of such Act [subsec. (d) of this section] which has the same monetary amount as the civil penalty established by such section, as amended by paragraph (1) [amending subsec. (d) of this section by increasing the penalty to $25,000]. Nothing in this paragraph shall affect the Administrator's authority to establish or adjust by regulation a minimum acceptable State civil penalty."

Legislative History. For legislative history and purpose of Pub.L. 100–4, see 1987 U.S.Code Cong. and Adm.News, p. 5.

Law Review Commentaries

Citizen-suit provisions under the Federal Water Pollution Control Act: Are remedies available for past violations? Comment, 19 Conn.L.Rev. 589 (1987).

Criminal sanctions under federal and state environmental statutes. Richard H. Allan, 14 Ecology L.Q. 117 (1987).

Dubois v. Thomas: The nature of the Environmental Protection Agency administrator's investigatory and enforcement duties under the Federal Water Pollution Control Act. Note, 10 J.Energy L. & Policy 119 (1989).

Federal wetlands protection under the Clean Water Act: Regulatory ambivalence, intergovernmental tension, and a call for reform. Michael C. Blumm & D. Bernard Zaleha, 60 U.Colo.L.Rev. 695 (1989).

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation: Its implications for citizen suits under the Clean Water Act. Note, 16 Ecology L.Q. 571 (1989).

Warrior and the Druid—the DOD and environmental law. Michael Donnelly and James G. Van Ness, 33 Fed.Bar News 37 (1986).

Notes of Decisions

Jury trial 25

COUNT II

conducting further fill or excavation and to require defendants to restore canals to their original depth and width and to plug and fill other canals constructed by defendants. U.S. v. Sexton Cove Estate, Inc., C.A.Fla.1976, 526 F.2d 1293.

75. Estoppel

Where Army Corps of Engineers, which issued permit for construction of dike showing that top dike elevation was to be 235 feet above mean sea level, did not object to height of dike until 1973, five years after it was completed, where dike as constructed did not constitute in any significant way an obstruction to flow or capacity of river or to navigation, where marina owners who constructed dike had spent considerable sums on construction, maintenance and operation of dike, and where owners' marina would not even be functionally viable if dike height were at elevation 235, the equities were with marina owners, and Government was estopped to assert height violation and would be denied injunctive relief sought against marina owners. U.S. v. Bailey, D.C.Ark.1979, 467 F.Supp. 925.

Even if estoppel applies to prevent United States from enforcing a statute, neither equitable estoppel nor laches precluded injunctive relief, under this section as regards private developer's work on tidal canals where Army Corps of Engineers' regulation in effect at time of subject activity provided that plans for excavation or fill in navigable waters must be recommended by the Chief of Engineers, that a letter of application must show that the structure is not likely to injure the navigable capacity of any public navigable waters and regulations required that certain information be furnished in connection with any work which might affect navigable capacity of the waterway. U.S. v. Sexton Cove Estates, Inc., D.C.Fla.1975, 389 F.Supp. 602.

76. Limitations

Michigan period of limitations, M.C.L.A. § 600.5839(1), for actions to recover damages for injury to property did not apply to United States' action under this chapter for removal or cost of removal of sewer line, which was allegedly constructed across creek at insufficient depth to permit navigation, regardless of whether period was one of limitations or of repose. U.S. v. Burton, D.C.Mich.1984, 580 F.Supp. 660.

77. Res judicata

The acquittal of a defendant indicted under this section (as originally enacted) for creating an obstruction in navigable stream, in violation of section 403 of this title, is not a bar to a subsequent suit in equity brought by the United States under this section against the same defendant to compel the removal of such obstruction, the issues and measure of proof required in the two proceedings not being the same. U.S. v. Donaldson-Schultz Co., Va.1906, 148 F. 581, 79 C.C.A. 403.

78. Burden of proof

Burden on plaintiff, in civil action for preliminary and permanent injunctive relief against coal corporation to cause cessation of alleged continuing discharges of blackwaters into waters under federal protection, was to show irreparable injury to some degree, giving due accord to fact that considerations to be given public interests practically lessened the burden; these considerations, however, did not eliminate the requirement of showing some element of irreparable injury. U.S. v. Kentland-Elkhorn Coal Corp., D.C.Ky.1973, 353 F.Supp. 451.

79. Questions of fact

When proceedings are instituted, it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. U.S. v. Rio Grande Dam, etc., Co., N.M.1899, 19 S.Ct. 770, 174 U.S. 690, 43 L.Ed. 1136.

80. Damages

While the Corps of Engineers has the authority to initiate criminal proceedings resulting in fines or imprisonment and may sue civilly for removal of structures which have been erected in violation of section 403 of this title, Corps does not have authority to compensate parties injured by such illegal activities. Potomac River Ass'n., Inc. v. Lundeberg Maryland Seamanship School, Inc., D.C. Md.1975, 402 F.Supp. 344.

81. Issues reviewable

Since the duty of the United States to its own citizens, to preserve the navigability of the Rio Grande River, is as great as any arising out of a treaty with Mexico, the court, on a bill by the United States to enjoin the erection of a dam in such river, will not consider the question whether the erection of such dam would be a violation of the treaty. U.S. v. Rio Grande Dam, etc., Co., N.M. 1899, 19 S.Ct. 770, 174 U.S. 690, 43 L.Ed. 1136.

82. Contempt

Where city's misuse of riparian property owned by city resulted in creation of a shoal in navigable channel of river, District Court could have issued injunction directing city to

remove the shoal, and could have held city in civil contempt for disobedience. U.S. v. Perma Paving Co., C.A.N.Y.1964, 332 F.2d 754.

83. Remand

A decree dismissing a suit by the United States, under Act Sept. 19, 1890, c. 907, § 10, 26 Stat. 454, superseded in part, to enjoin the creation of an obstruction of a navigable stream, will be reversed in the exercise of the power, on an appeal in equity, to render such a decree as under all the circumstances may seem proper, and the cause will be remanded for further hearing, where material evidence is absent from the record because of the action of the trial court in not giving sufficient time to the government to prepare its case for the inquiry directed on a prior appeal to be made on the question whether the navigability of the stream would be substantially diminished by the creation of such obstruction. U.S. v. Rio Grande Dam & Irrigation Co., N.M.1902, 22 S.Ct. 428, 184 U.S. 416, 46 L.Ed. 619.

§ 407. Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

(Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152.)

Historical Note

Prior Provisions. This section and sections 408, 411, and 412 of this title, superseded Act Aug. 18, 1894, c. 299, §§ 6, 7, 8, 28 Stat. 363, which prohibited the depositing of refuse in navigable waters for the improvement of which money had been appropriated, and the injury to sea walls and other works built by the Government, and prescribed penalties for violations, including penalties against masters, etc., and vessels.

Section also superseded Act Sept. 19, 1890, c. 907, § 6, 26 Stat. 453, which prohibited obstructing navigation by deposits of refuse, etc., in navigable waters.

Change of Name. The Department of War was designated the Department of the Army and the title of the Secretary of War was changed to Secretary of the Army by section 205(a) of Act July 26, 1947, c. 343, Title II, 61 Stat. 501. Section 205(a) of Act July 26, 1947, was repealed by section 53 of Act Aug.

104, 42 Am.Rep. 584; Collins v. Howard, 1889, 18 A. 794, 65 N.H. 190; Connecticut River Lumber Co. v. Olcott Falls Co., 1889, 21 A. 1090, 65 N.H. 290, 13 L.R.A. 826; Morgan v. King, 1866, 35 N.Y. 454, 91 Am. Dec. 58; Weise v. Smith, 1869, 3 Or. 445, 8 Am.Rep. 621; Felger v. Robinson, 1869, 3 Or. 455; Shaw v. Oswego Iron Co., 1882, 10 Or. 371, 45 Am.Rep. 146; Haines v. Hall, 1888, 20 P. 831, 17 Or. 165; Stuart v. Clark's Lessee, 1852, 32 Tenn. 9, 2 Swan 9, 58 Am.Dec. 49; Gaston v. Mace, 1889, 10 S.E. 60, 33 W.Va. 14, 25 Am.St.Rep. 848, 5 L.R.A. 392; Whisler v. Wilkinson, 1868, 22 Wis. 572; Sellers v. Union Lumbering Co., 1876, 39 Wis. 525; Olson v. Merrill, 1877, 42 Wis. 203; Stevens Point Boom Co. v. Reilly, 1878, 44 Wis. 295; Falls Mfg. Co. v. Oconto River Imp. Co., 1894, 58 N.W. 257, 87 Wis. 134.

§ 411. Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

(Mar. 3, 1899, c. 425, § 16, 30 Stat. 1153.)

Historical Note

Codification. Section is part of section 16 of Act Mar. 3, 1899. The balance of such section, relating to liability of masters, pilots, and so forth and of vessels engaged in violations, is set out as section 412 of this title.

Cross References

Duty of United States attorneys and other federal officers in enforcement of this section, see section 413 of this title.

Flood control of Mississippi River, section as applicable, see section 702i of this title.

Liability of masters, pilots, vessels, etc., engaged in violations of sections 407, 408 and 409 of this title, punishment pursuant to this section, see section 412 of this title.

Misdemeanor defined, see section 1 of Title 18, Crimes and Criminal Procedure.

New York Harbor, provisions for protection of unaffected by this section, see section 418 of this title.

Regulations governing dumping into navigable waters, see section 419 of this title.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

Code of Federal Regulations

Interference with or damage to aids to navigation, see 33 CFR 70.01-1 et seq.

Library References

Navigable Waters ⟹27.
C.J.S. Navigable Waters §§ 52-54.

Notes of Decisions

I. GENERALLY

Subdivision Index

1. Constitutionality

This section was not invalid as encroachment of admiralty and maritime jurisdiction. The Gansfjord, D.C.La.1928, 25 F.2d 736.

This section is within the constitutional power of Congress. The Scow No. 9, D.C. Mass.1907, 152 F. 548.

2. Power of Congress

This section was enacted in the exercise of the police power of the Government. Scow No. 36, Mass.1906, 144 F. 932, 75 C.C.A. 572.

3. Exclusive nature of section

Remedies and procedures specified in this chapter for enforcement of section 409 of this title rendering it unlawful to carelessly sink vessel in navigable channel are not intended to be exclusive in case of a negligent or careless sinking of vessel. Wyandotte Transp. Co. v. U.S., La.1967, 88 S.Ct. 379, 389 U.S. 191, 19 L.Ed.2d 407.

4. Mandatory nature of penalty

Penalty which can be imposed under this section for violation of section 409 of this title requiring removal of vessel sunken in navigable waters is mandatory only in an in rem

COUNT III

Library References

Game ⇐3½, 5 to 10.
States ⇐3 to 6.
United States ⇐82, 85, 88.

C.J.S. Game §§ 7, 9 to 18.
C.J.S. States §§ 31, 32, 143.
C.J.S. United States §§ 122, 123, 134.

§ 702. Importation of eggs of game birds for propagation

The Secretary of the Interior shall have the power to authorize the importation of eggs of game birds for purposes of propagation, and he shall prescribe all necessary rules and regulations governing the importation of eggs of said birds for such purposes.

(June 3, 1902, c. 983, 32 Stat. 285; 1939 Reorg.Plan No. II, § 4(f), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433.)

Historical Note

Transfer of Functions. Transfer of functions of Secretary of Agriculture to Secretary of the Interior by Reorg.Plan No. II of 1939, see Transfer of Functions note set out under section 701 of this title.

SUBCHAPTER II—MIGRATORY BIRD TREATY

Cross References

Availability of appropriations for administration and enforcement of sections 703 to 708, 710, and 711 of this title, see section 668d of this title.
Conservation of fauna and flora of Antarctica—
  Application for permits with respect to protected native birds, see section 2404 of this title.
  Civil penalties and convictions not to preclude application of sections 703 to 708, 710, and 711 of this title, see sections 2407 and 2408 of this title.
Hunting permitted under prescribed rules and regulations—
  Cape Hatteras National Seashore Recreational Area, see section 459a-1 of this title.
  Migratory waterfowl and other wildlife refuge in California, see section 695b of this title.
Public and Native lands of Alaska, subsistence management and use provisions not to modify or repeal sections 703 to 708, 710, and 711 of this title, see section 3125 of this title.
Tule Lake National Wildlife Refuge, sump level regulations to accommodate waterfowl management needs, see section 695p of this title.

§ 703. Taking, killing, or possessing migratory birds unlawful

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for

shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972.

(July 3, 1918, c. 128, § 2, 40 Stat. 755; June 20, 1936, c. 634, § 3, 49 Stat. 1556; June 1, 1974, Pub.L. 93-300, § 1, 88 Stat. 190.)

Historical Note

1974 Amendment. Pub.L. 93-300 substituted "any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof" for "any part, nest, or egg of any such birds", and included the convention between the United States and the Government of Japan concluded March 4, 1972.

1936 Amendment. Act June 20, 1936 made changes in phraseology.

Effective Date of 1974 Amendment. Section 3 of Pub.L. 93-300 provided that: "The amendments made by this Act [to this section] shall take effect on the date on which the President proclaims the exchange of ratifications of the convention between the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment, concluded March 4, 1972, or on the date of the enactment of this Act [June 1, 1974], whichever date is later."

Effective Date of 1936 Amendment. Section 1 of Act June 20, 1936, provided that the amendment of this section and sections 704, 705, 707, 708 and the addition of section 709a of this title by that Act, should become effective as of the day on which the President should proclaim the exchange of ratifications of the convention between the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, or on June 20, 1936, "whichever date is later". Such proclamation was made on June 30, 1937.

Appropriation. Authorization of appropriation, see section 709a of this title.

Federal Jury Practice and Instructions

Liability of corporation, see § 64.08 and Notes thereunder.

Code of Federal Regulations

Hunting, generally, see 50 CFR 32.1 et seq.
Migratory bird hunting, see 50 CFR 20.1 et seq.

Library References

Game ⇐7.
C.J.S. Game §§ 1, 5.

Notes of Decisions

of the Interior as federal game agent and served as deputy federal game agent without pay was not an "employee" of Department within this section. U.S. v. Verret, D.C.La. 1969, 302 F.Supp. 492.

3. Searches—Generally

Where federal agents had kept fields under surveillance because of suspected baiting in violation of this subchapter governing hunting of migratory game birds, agents' recording of names of persons coming out of a field and visually observing their clothing did not constitute a "search". McDowell v. U.S., C.A.S.D.1967, 383 F.2d 599.

4. —— Reasonableness

Even if shack on hunting club property were a protected place, search by game wardens who, after entering to inspect property, found a hunter in possession of illegal number of birds and then entered trapper's shack where fowl were visible and seized untagged ducks, was not unreasonable. U.S. v. Greenhead, Inc., D.C.Cal.1966, 256 F.Supp. 890.

5. —— Warrantless searches

Since it was proper to delay arrest of defendant for offering for sale and selling two American flamingos until completion of the sale and transfer of possession of the flamingos, there was no need for the officers to obtain a search warrant. U.S. v. Drake, C.A.Colo.1981, 655 F.2d 1025.

Where search of automobile by special enforcement agents of Department of the Interior was not incidental to arrest or to seizure of contraband, and was made without warrant, it was without authority under this section and could not be sustained for probable cause. Aiuppa v. U.S., C.A.Kan.1964, 338 F.2d 146.

Louisiana game agents who heard shotgun blast coming from direction of a light, observed automobile coming from field where light was seen, stopped automobile and, upon doing so, observed two shotguns and a headlight in back seat had probable cause to believe that L.S.A.-R.S. 56-124(8) had been violated and when, pursuant to L.S.A.-R.S. 56-108, they searched automobile without warrant, search did not violate U.S.C.A. Const.Amend. 4, and 45 freshly-killed coots found in search of automobile were admissible in prosecution for violation of this subchapter. U.S. v. Verret, D.C.La.1969, 302 F.Supp. 492.

Federal Fish and Wildlife Service agents who followed defendant in accordance with federal regulations to determine why he was in restricted area, one of whom detected odor of marijuana coming from large bags strapped to defendant's motorcycle and upon cutting open one of bags found substance subsequently determined to be marijuana, made lawful search, and agents had sufficient information to establish probable cause to believe that felony had been committed and that defendant had committed it. State v. Goldberg, 1975, 540 P.2d 674, 112 Ariz. 202.

6. Immunity from suit

Official conduct of federal game wardens in making inspection and seizure of game bird storage records and improperly tagged birds was immune from suit, even if conducted in manner unwarranted by circumstances. Hughes v. Johnson, C.A.Cal.1962, 305 F.2d 67.

7. Presumptions

Presumption existed that game wardens' inspection of premises of owners engaged in business of cold storage of game birds of hunters and seizure of business records were within scope of wardens' official duty and owners were required to be specific in their charge of impropriety. Hughes v. Johnson, C.A.Cal.1962, 305 F.2d 67.

8. Suppression of evidence

Fact that undercover agents of Fish and Wildlife Service delayed execution of warrant to arrest defendant for offering for sale and selling two American flamingos in order to complete the purchase and strengthen the case against defendant did not entitle defendant to a motion to suppress the flamingos as evidence, as the evidence obtained by such delay could have been lawfully secured without the arrest warrant. U.S. v. Drake, C.A. Colo.1981, 655 F.2d 1025.

Where motion to suppress was made pursuant to rule 41, Federal Rules of Criminal Procedure, Title 18, and followed prescribed form, it was sufficient to challenge lawfulness of seizure though it did not specifically invoke this section which impliedly withheld from special enforcement agents power to make warrantless search on probable cause. Aiuppa v. U.S., C.A.Kan.1964, 338 F.2d 146.

Mere fact that game wardens had not been given permission to enter hunting club property did not require suppression of illegally possessed birds found. U.S. v. Greenhead, Inc., D.C.Cal.1966, 256 F.Supp. 890.

9. Forfeiture of property

Since arrest of defendant for offering for sale and selling two American flamingos and the taking of the birds were proper, order requiring the return of the flamingos to defendant could not stand, as this section requires that protected birds be forfeited to the United States upon conviction of the offender, and as even if defendant was not convicted under the indictment, if the birds were found to be "possessed contrary to the provisions this subchapter" they would be forfeited to the United States. U.S. v. Drake, C.A.Colo. 1981, 655 F.2d 1025.

§ 707. Violations and penalties; forfeitures

(a) Except as otherwise provided in this section, any person, association, partnership, or corporation who shall violate any provisions of said conventions or of this subchapter, or who shall violate or fail to comply with any regulation made pursuant to this subchapter shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both.

(b) Whoever, in violation of this subchapter, shall—

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both.

(c) All guns, traps, nets and other equipment, vessels, vehicles, and other means of transportation used by any person when engaged in pursuing, hunting, taking, trapping, ensnaring, capturing, killing, or attempting to take, capture, or kill any migratory bird in violation of this subchapter with the intent to offer for sale, or sell, or offer for barter, or barter such bird in violation of this subchapter shall be forfeited to the United States and may be seized and held pending the prosecution of any person arrested for violating this subchapter and upon conviction for such violation, such forfeiture shall be adjudicated as a penalty in addition to any other provided for violation of this subchapter. Such forfeited property shall be disposed of and accounted for by, and under the authority of, the Secretary of the Interior.

(July 3, 1918, c. 128, § 6, 40 Stat. 756; June 20, 1936, c. 634, § 2, 49 Stat. 1556; Sept. 8, 1960, Pub.L. 86-732, 74 Stat. 866.)

Historical Note

1960 Amendment. Pub.L. 86-732 designated existing provisions as subsec. (a), inserted "Except as otherwise provided in this section" therein, and added subsecs. (b) and (c).

1936 Amendment. Act June 20, 1936 substituted "conventions" for "convention".

Effective Date of 1936 Amendment. Amendment by Act June 20, 1936 effective June 30, 1937, see section 1 of Act June 20, 1936, set out as an Effective Date of 1936 Amendment note under section 703 of this title.

Legislative History. For legislative history and purpose of Pub.L. 86-732, see 1960 U.S. Code Cong. and Adm.News, p. 3459.

West's Federal Forms

Sentence and fine, see § 7531 et seq.

Code of Federal Regulations

Seizure and forfeiture procedures, 50 CFR 12.1 et seq.

4 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1 of this title and Tables.

§ 698o. Protection of significant historical assets for Timucuan Ecological and Historic Preserve

The Secretary, with the consent of the owners thereof, may acquire by donation or purchase with donated funds the following properties or sites of significant historic interest in Duval County, Florida:

(1) Spanish sixteenth century forts San Gabriel and San Estaban.

(2) Spanish eighteenth century fort Dos Hermanas.

(3) English eighteenth century forts at Saint Johns Bluff and Fort George Island.

(4) Spanish sixteenth and seventeenth century mission San Ju: n del Puerto.

(5) Site of the American Revolutionary War battle of Thomas Creek.

(6) The Zephaniah Kingsley plantation, with its eighteenth and nineteenth century buildings.

(7) The Spanish American War fortification on Saint Johns Bluff.

(8) The confederate fort known as the Yellow Bluff Fort State Historic Site.

(Pub.L. 100-249, Title II, § 202, Feb. 16, 1988, 102 Stat. 14.)

§ 698p. Integrated administration and interpretation for Timucuan Ecological and Historic Preserve

Any properties of historic interest acquired under section 698o of this title shall become part of the Preserve established under section 698n of this title. The Secretary shall administer such properties in accordance with a plan that integrates the administration and interpretation of the ecological values of the Preserve and the historical values of the sites so acquired and the histor-al features of Fort Caroline. Such administration and interpretation shall be conducte. hrough the facilities and staff of Fort Caroline National Memorial consistent with sec. 2 of the Act of September 21, 1950 (64 Stat. 897).

(Pub.L. 100-249, Title II, § 203, Feb. 16, 1988, 102 Stat. 15.)

Historical and Statutory Notes

References in Text. Section 2 of Act September 21, 1950, referred to in text, is section 2 of Act Sept. 21, 1950, c. 973, 64 Stat. 897, which was not classified to the Code.

CHAPTER 7—PROTECTION OF MIGRATORY GAME AND INSECTIVOROUS BIRDS

SUBCHAPTER III—MIGRATORY BIRD CONSERVATION

Sec.
715k-5. Acquisition of lands.

Law Review Commentaries

Comment, of birds and men: The Migratory Bird Treaty Act. Comment, 26 Idaho L.Rev. 371 (1990).

The Migratory Bird Treaty Act—Protecting wildlife on our nati nal refuges. 26 Nat.Resources J. 609 (1986).

SUBCHAPTER II—MIGRATORY BIRD TREATY

§ 703. Taking, killing, or possessing migratory birds unlawful

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive

for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

(As an nded Dec. 13, 1989, Pub.L. 101-233, § 15, 103 Stat. 1977.)

Historical and Statutory Notes

1989 Amendment. Pub.L. 101-233 added reference to the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

Legislative History. For legislative history and purpose of Pub.L. 101-233, see 1989 U.S.Code Cong. and Adm.News, p. 1437.

Law Review Commentaries

Developing law of land use planning on the federal lands. George Cam.ron Coggins, 61 U.Colo.L.Rev. 307 (1990).

Notes of Decisions

Defenses 20a
Notice 21a

8. Birds within section

White-winged dove was "migratory bird" within meaning of statute that proscribes taking or attempting to take any migratory bird by aid of baiting or on or over any baited area. U.S. v. Angueira, D.Puerto Rico 1990, 744 F.Supp. 36.

10. Hunting—Generally

Humane Soc. of U.S. v. Watt, 551 F.Supp. 1310 [main volume] affirmed 713 F.2d 865, 230 U.S. App.D.C. 71.

11. —— Bag or kill limitations

Information charging defendant with unlawfully "possessing" more than daily bag limit of doves in violation of federal law supported conviction, even though magistrate found that defendant "killed" doves all on same day, in that killing birds was necessary antecedent to possession of them. U.S. v. Carson, C.A.10 (Kan.) 1985, 762 F.2d 833, on remand 614 F.Supp. 507, affirmed 793 F.2d 1141, certiorari denied 107 S.Ct. 315, 479 U.S. 914, 93 L.Ed.2d 289.

12. —— Baiting or luring

Fish and Wildlife Service agent, who allegedly told defendant that bona fide livestock feeding operations were exempt from baiting regulation and then determined that corn scattered in field as feed constituted baiting and allowed number of Canadian geese to be killed or wounded in field before citing defendant, did not entrap defendant, in that defendant's own statements and actions prior to the citation indicated clear predisposition to violate the baiting regulation. U.S. v. Manning, C.A.8 (S.D.) 1986, 787 F.2d 431.

Uncontradicted evidence that corn was in one of the ponds on which defendants were hunting ducks within ten days prior to date on which defendant's hunting activities occurred and that corn remained in an adjacent pond on that date was sufficient to support finding that defendants were shooting over a "baited area," thereby supporting their convictions of taking or attempting to take waterfowl by aid of bait. U.S. v. Chandler, C.A.Va.1985, 753 F.2d 360.

Sufficient evidence showed that defendants took at least one migratory bird on or over area that had been baited; evidence showed that defendants strategically positioned themselves to west of baited area so that, no matter how far away they stood, eastbound migratory doves necessarily had to fly over them to reach bait. U.S. v. Angueira, D.Puerto Rico 1990, 744 F.Supp. 36.

14. —— Seasonal limitations

Humane Soc. of U.S. v. Watt, 551 F.Supp. 1310 [main volume] affirmed 713 F.2d 865, 230 U.S. App.D.C. 71.

20. Knowledge or intent

U.S. v. Catlett, 747 F.2d 1102 [main volume] certiorari denied 105 S.Ct. 2153, 471 U.S. 1074, 85 L.Ed.2d 509.

Neither the text nor history of the Migratory Bird Treaty Act provides basis from which to infer intent requirement as an element of criminal liability absent specific provision in Act. U.S. v. Engler, C.A.3 (Pa.) 1986, 806 F.2d 425, certiorari denied 107 S.Ct. 1900, 481 U.S. 1019, 95 L.Ed.2d 506.

Statute prohibiting taking of migratory birds was not unconstitutionally overbroad as applied to defendant who claimed that trapping of great horned owls was necessary to protect his property; statute did not forbid owner from defending his property but rather required him to seek assistance of government official who could be expected to act in public interest. U.S. v. Darst, D.Kan. 1989, 726 F.Supp. 286.

The Migratory Bird Treaty Act was unconstitutionally vague as applied to a defendant whose application of a mixture of registered pesticides resulted in death of a flock of geese; defendant was strictly liable under statute even though he had not applied pesticides in a reckless manner and even though he and other area farmers had used the pesticides in the past with no problems. U.S. v. Rollins, D.Idaho 1989, 706 F.Supp. 742.

20a. Defenses

Property owner had no unconditional or absolute right to kill federally protected birds in defense of his property. U.S. v. Darst, D.Kan.1989, 726 F.Supp. 286.

21a. Notice

Violation notice charging defendants with taking or attempting to take waterfowl by aid of bait gave adequate notice of charge to defendants, notwithstanding that it may have created some ambiguity as to which of two alternative factual means of committing the offense Government was alleging defendants had employed, as defendants' remedy was to seek a bill of particulars to clarify the specific factual theory or theories upon which Government was proceeding. U.S. v. Chandler, C.A.Va.1985, 753 F.2d 360.

24. Weight and sufficiency of evidence

Evidence that defendants were raising ducks on property, that ducks were unaffected by close proximity of defendants or agents of United States Fish and Wildlife Service, together with expert testimony concerning advantages of using live decoys as opposed to artificial ducks was sufficient to support finding that ducks were "tame" so as to sustain convictions of defendants for killing game birds while using live birds as decoys in violation of Migratory Bird Treaty Act. U.S. v. Mebane, C.A.4 (N.C.) 1988, 839 F.2d 230.

Evidence supported verdict that defendant was guilty of aiding and abetting hunters in taking Canadian geese, which were migratory birds, over a baited area; Fish and Wildlife Service agent discovered scattered corn in field under defendant's control after finding no corn in same field two days earlier, and defendant stated to agent that hunters had been shooting geese from bluff pits near baited area. U.S. v. Manning, C.A.8 (S.D.) 1986, 787 F.2d 431.

§ 704. Determination as .o when and how migratory birds may be taken, killed, or possessed

Notes of Decisions

8. Requisites and validity of regulations

Environmental Protection Agency's continued registration of strychnine rodenticide for aboveground use resulted in impermissible "taking" of birds protected by Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act where incidental poisoning of protected birds caused by their ingestion of rodenticide had not been authorized by prior approval of Secretary of Interior. Defenders of Wildlife v. Administrator, E.P.A., D.Minn.1988, 688 F.Supp. 1334.

13. Seasonal or time restrictions

Decision of Fish and Wildlife Service to set January 13, rather than January 31, as closing date of Mississippi duck hunting season, based on declining status of mallards and substantial impact caused by late hunting seasons, was neither arbitrary nor capricious. Department of Wildlife Conservation of State of Miss. v. Jantzen, D.C. Miss.1985, 621 F.Supp. 838.

§ 707. Violations and penalties; forfeitures

[See main volume for text of (a)]

(b) Whoever, in violation of this subchapter, shall knowingly—

[See main volume for text of (1) and (2); (c)]

(As amended Pub.L. 99-645, Title V, § 501, Nov. 10, 1986, 100 Stat. 3590.)

Historical and Statutory Notes

1986 Amendment. Subsec. (b). Pub.L. 99-645, § 501, substituted "shall knowingly" for "shall" in provisions preceding par. (1).

Legislative History. For legislative history and purpose of Pub.L. 99-645, see 1986 U.S.Code Cong. and Adm.News, p. 6113.

Notes of Decisions

1. Constitutionality

Capture and sale of species protected by Migratory Bird Treaty Act was not conduct that was wholly passive, but more closely resembled conduct that reasonable person would not be surprised to learn was not innocent so that strict liability provisions of Act, imposing criminal liability without requirement of scienter, did not offend requirements of due process; declining to follow *United States v. Wulff*, 758 F.2d 1121 (6th Cir.); *United States v. St. Pierre*, 578 F.Supp. 1424 (W.D.S.D.). U.S. v. Engler, C.A.3 (Pa.) 1986, 806 F.2d 425, certiorari denied 107 S.Ct. 1900, 481 U.S. 1019, 95 L.Ed.2d 506.

Felony provision of Migratory Bird Treaty Act, which makes sale of migratory bird parts a felony but does not require proof of scienter, violates due process, since crime was one not known to common law, precluding reading of scienter requirement into statute, since maximum penalty of two years' imprisonment or fine of $2,000 is severe, and since felony conviction irreparably damages reputation. U.S. v. Wulff, C.A.6 (Mich.) 1985, 758 F.2d 1121.

§ 712. Treaty and convention implementing regulations; seasonal taking of migratory birds for essential needs of indigenous Alaskans to preserve and maintain stocks of the birds; protection and conservation of the birds

Notes of Decisions

½. Construction with other laws

Migratory Bird Treaty Act was not superseded in Alaska by 1925 Alaska Game Law. Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle, C.A.9 (Alaska) 1987, 829 F.2d 933, certiorari denied 108 S.Ct. 1290, 99 L.Ed.2d 501.

2. Treaty and regulation in conflict

Cooperative agreements entered into by Fish and Wildlife Service governing subsistence hunting of migratory birds in Alaska were invalid to extent they conflicted with treaties entered into under Migratory Bird Treaty Act. Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle, C.A.9 (Alaska) 1987, 829 F.2d 933, certiorari denied 108 S.Ct. 1290, 99 L.Ed.2d 501.

3. Jurisdiction

Court of Appeals had jurisdiction to consider wildlife conservation fund's claim that Fish and Wildlife Service violated Migratory Bird Treaty Act by entering into cooperative agreements permitting subsistence hunting of migratory birds by Alaskan Natives. Alaska Fish and Wildlife Federation and Outdoor Council, Inc. v. Dunkle, C.A.9 (Alaska) 1987, 829 F.2d 933, certiorari denied 108 S.Ct. 1290, 99 L.Ed.2d 501.

SUBCHAPTER III—MIGRATORY BIRD CONSERVATION

§ 715a. Migratory Bird Conservation Commission; creation; composition; duties; approval of areas of land and water recommended for purchase or rental

A commission to be known as the Migratory Bird Conservation Commission, consisting of the Secretary of the Interior, as chairman, the Administrator of the Environmental Protection Agency, the Secretary of Agriculture and two Members of the Senate, to be selected by the President of the Senate, and two Members of the House of Representatives to be selected by the Speaker, is created and authorized to consider and pass upon any area of land, water, or land and water that may be recommended by the Secretary of the Interior for purchase or rental under this subchapter, and to fix the price or prices at which such area may be purchased or rented; and no purchase or rental shall be made of any such area until it has been duly approved for purchase or rental by said commission. Any Member of the House of Representatives who is a member of the commission, if reelected to the succeeding Congress, may serve on the commission notwithstanding the expiration of a Congress. Any vacancy on the commission shall be filled in the same manner as the original appointment. The ranking officer of the branch or department of a State to which is committed the administration of its game laws, or his authorized representative, and in a State having no such branch or department, the governor thereof, or his authorized representative, shall be a member ex officio of said commission for the purpose of considering and voting on all questions relating to the acquisition, under this subchapter, of areas in his State. For purposes of this subchapter, the purchase or rental of any area of land, water, or land and water includes the purchase or rental of any interest in any such area of land, water, or land and water.

(As amended Dec. 13, 1989, Pub.L. 101-233, § 13, 103 Stat. 1977.)

Historical and Statutory Notes

1989 Amendment. Pub.L. 101-233 substituted "the Administrator of the Environmental Protection Agency," for "the Secretary of Transportation,".

Legislative History. For legislative history and purpose of Pub.L. 101-233, see 1989 U.S.Code Cong. and Adm.News, p. 1437.

§ 715e. Examination of title; easements and reservations

Notes of Decisions

2. Environmental impact statement

Clear language of lease of lake by state to United States Fish and Wildlife Service, as well as prior conduct and statements of parties, granted

AUTHORITY: Pub. L. 95-616, 92 Stat. 3112 (16 U.S.C. 712(2)).

SOURCE: 39 FR 1178, Jan. 4, 1974, unless otherwise noted.

Subpart A—Introduction

§ 21.1 Purpose of regulations.

The regulations contained in this part supplement the general permit regulations of part 13 of this subchapter with respect to permits for the taking, possession, transporation, sale, purchase, barter, importation, exportation, and banding or marking of migratory birds. This part also provides certain exceptions to permit requirements for public, scientific, or educational institutions, and establishes depredation orders which provide limited exceptions to the Migratory Bird Treaty Act (16 U.S.C. 703-712).

[54 FR 38150, Sept. 14, 1989]

§ 21.2 Scope of regulations.

(a) Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act (16 U.S.C. 703-712) may be possessed or transported without a permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale or barter, and all shipments of such birds must be marked as provided by part 14 of this subchapter: *Provide*, no exemption from any statute or regulation shall accrue to any offspring of such migratory birds.

(b) This part 21, except for § 21.22 (banding or marking permits), does not apply to the bald eagle (*Haliaeetus leucocephalus*) or the golden eagle (*Aquila chrysaetos*) for which regulations are provided in part 22 of this subchapter.

(c) The provisions of this part are in addition to, and are not in lieu of other regulations of this subchapter B which may require a permit or prescribe additional restrictions or conditions for the importation, exportation, and interstate transportation of wildlife (see also part 13).

[39 FR 1178, Jan. 4, 1974, as amended at 46 FR 42680, Aug. 24, 1981]

§ 21.3 Definitions.

In addition to definitions contained in part 10 of this chapter, and unless the context requires otherwise, as used in this part:

Bred in captivity or *captive-bred* refers to raptors, including eggs, hatched in captivity from parents that mated or otherwise transferred gametes in captivity.

Captivity means that a live raptor is held in a controlled environment that is intensively manipulated by man for the purpose of producing raptors of selected species, and that has boundaries designed to prevent raptors, eggs or gametes of the selected species from entering or leaving the controlled environment. General characteristics of captivity may include, but are not limited to, artificial housing, waste removal, health care, protection from predators, and artificially supplied food.

Falconry means the sport of taking quarry by means of a trained raptor.

Raptor means a live migratory bird of the Order *Falconiformes* or the Order *Strigiformes*, other than a bald eagle (*Haliaeetus leucocephalus*) or a golden eagle (*Aquila chrysaetos*).

[48 FR 31607, July 8, 1983]

§ 21.4 Information collection requirements.

(a) The information collection requirements contained within this part 21 have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned Clearance Number 1018-0022. This information is being collected to provide information necessary to evaluate permit applications. This information will be used to review permit applications and make decisions, according to criteria established in the Migratory Bird Treaty Act, 16 U.S.C. 703-712 and the regulations promulgated thereunder on the issuance, suspension, revocation, or denial of permits. The obligation to respond is required in order to obtain or retain a permit.

(b) The public reporting burden for these reporting requirements is estimated to vary from 15 minutes to 4 hours per response, with an average of 0.803 hours per response, including time for reviewing instructions, gathering and maintaining data, and completing and reviewing the forms. Comments regarding the burden estimate or any other aspect of these reporting requirements should be directed to the Service Information Collection Clearance Officer, MS-224 ARLSQ, Fish and Wildlife Service, Washington, DC 20240, or the Office of Management and Budget, Paperwork Reduction Project (1018-0022), Washington, DC 20503.

[54 FR 38151, Sept. 14, 1989]

Subpart B—General Requirements and Exceptions

§ 21.11 General permit requirements.

No person shall take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase or barter, any migratory bird, or the parts, nests, or eggs of such bird except as may be permitted under the terms of a valid permit issued pursuant to the provisions of this part and part 13, or as permitted by regulations in this part or part 20 (the hunting regulations).

[54 FR 38151, Sept. 14, 1989]

§ 21.12 General exceptions to permit requirements.

The following exceptions to the permit requirement are allowed.

(a) Employees of the Department of the Interior authorized to enforce the provisions of the Migratory Bird Treaty Act of July 3, 1918, as amended (40 Stat. 755; 16 U.S.C. 703-711), may, without a permit, take or otherwise acquire, hold in custody, transport, and dispose of migratory birds or their parts, nests, or eggs as necessary in performing their official duties.

(b) State game departments, municipal game farms or parks, and public museums, public zoological parks, accredited institutional members of the American Association of Zoological Parks and Aquariums (AAZPA) and public scientific or educational institutions may acquire by gift or purchase, possess, transport, and by gift or sale dispose of lawfully acquired migratory birds or their progeny, parts, nests, or eggs without a permit: *Provided*, That such birds may be acquired only from persons authorized by this paragraph or by a permit issued pursuant to this part to possess and dispose of such birds, or from Federal or State game authorities by the gift of seized, condemned, or sick or injured birds. Any such birds, acquired without a permit, and any progeny therefrom may be disposed of only to persons authorized by this paragraph to acquire such birds without a permit. Any person exercising a privilege granted by this paragraph must keep accurate records of such operations showing the species and number of birds acquired, possessed, and disposed of; the names and addresses of the persons from whom such birds were acquired or to whom such birds were donated or sold; and the dates of such transactions. Records shall be maintained or reproducible in English on a calendar year basis and shall be retained for a period of five (5) years following the end of the calendar year covered by the records.

[39 FR 1178, Jan. 4, 1974, as amended at 50 FR 8638, Mar. 4, 1985; 54 FR 38151, Sept. 14, 1989]

§ 21.13 Permit exceptions for captive-reared mallard ducks.

Captive-reared and properly marked mallard ducks, alive or dead, or their eggs may be acquired, possessed, sold, traded, donated, transported, and disposed of by any person without a permit, subject to the following conditions, restrictions, and requirements:

(a) Nothing in this section shall be construed to permit the taking of live mallard ducks or their eggs from the wild.

(b) All mallard ducks possessed in captivity, without a permit, shall have been physically marked by at least one of the following methods prior to 6 weeks of age and all such ducks hatched, reared, and retained in captivity thereafter shall be so marked prior to reaching 6 weeks of age.

Navigation safety regulations, see 33 CFR 164.01 et seq.
Regulated navigation areas and limited access areas, see 33 CFR 165.1 et seq.
Traffic management, see 33 CFR 161.101 et seq.

1231a. Towing Safety Advisory Committee

(a) Establishment; membership

There is established a Towing Safety Advisory Committee (hereinafter referred to as the "Committee"). The Committee shall consist of sixteen members with particular expertise, knowledge, and experience regarding shallow-draft inland and coastal waterway navigation and towing safety as follows:

(1) seven members from the barge and towing industry, reflecting a regional geographic balance;

(2) one member from the offshore mineral and oil supply vessel industry; and

(3) two members from each of the following—

(A) port districts, authorities, or terminal operators;

(B) maritime labor;

(C) shippers (of whom at least one shall be engaged in the shipment of oil or hazardous materials by barge); and

(D) the general public.

(b) Appointments; Chairman, Vice Chairman, and observers; publication in Federal Register

The Secretary of the department in which the Coast Guard is operating (hereinafter referred to as the "Secretary") shall appoint the members of the Committee. The Secretary shall designate one of the members of the Committee as the Chairman and one of the members as the Vice Chairman. The Vice Chairman shall act as Chairman in the absence or incapacity of, or in the event of a vacancy in the office of, the Chairman. The Secretary may request the Secretary of the Army and the Secretary of Commerce to each designate a representative to participate as an observer on the Committee. The Secretary shall, not less often than once a year, publish notice in the Federal Register for solicitation of nominations for membership on the Committee.

(c) Functions; meetings; public proceedings and records; disclosures to Congress

The Committee shall advise, consult with, and make recommendations to the Secretary on matters relating to shallow-draft inland and coastal waterway navigation and towing safety. Any advice or recommendation made by the Committee to the Secretary shall reflect the independent judgment of the Committee on the matter concerned. The Secretary shall consult with the Committee before taking any significant action affecting shallow-draft inland and coastal waterway navigation and towing safety. The Committee shall meet at the call of the Secretary, but in any event not less than once during each calendar year. All proceedings of the Committee shall be open to the public, and a record of the proceedings shall be made available for public inspection. The Committee is authorized to make available to

CONT IV

Congress any information, advice, and recommendations which the Committee is authorized to give to the Secretary.

(d) Compensation and travel expenses; administrative services; personnel; authorization of appropriations

Members of the Committee who are not officers or employees of the United States shall serve without pay and members of the Committee who are officers or employees of the United States shall receive no additional pay on account of their service on the Committee. While away from their homes or regular places of business, members of the Committee may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5. The Secretary shall furnish to the Committee an executive secretary and such secretarial, clerical, and other services as are considered necessary for the conduct of its business. There are authorized to be appropriated such sums as may be necessary to implement the provisions of this subsection.

(e) Termination

Unless extended by subsequent Act of Congress, the Committee shall terminate on September 30, 1990.

(Pub.L. 96–380, Oct. 6, 1980, 94 Stat. 1521; Pub.L. 97–322, Title I, § 118(d), Oct. 15, 1982, 96 Stat. 1587; Pub.L. 98–557, § 16(a), Oct. 30, 1984, 98 Stat. 2866.)

Historical Note

Codification. Section was not enacted as part of the Ports and Waterways Safety Act which comprises this chapter.

1984 Amendment. Subsec. (e). Pub.L. 98–557 substituted reference to Sept. 30, 1990, for reference to five years from Oct. 6, 1980.

1982 Amendment. Subsec. (b). Pub.L. 97–322, § 118(d)(1), required the Secretary, not less often than once a year, to publish notice in the Federal Register for solicitation of nominations for membership on the Committee.

Subsec. (c). Pub.L. 97–322, § 118(d)(2), authorized the Committee to make available to Congress any information, advice, and recommendations which the Committee is authorized to give to the Secretary.

Subsec. (d). Pub.L. 97–322, § 118(d)(3), inserted introductory provisions respecting compensation and travel expenses of members of the Committee.

Legislative History. For legislative history and purpose of Pub.L. 97–322, see 1982 U.S. Code Cong. and Adm. News, p. 3138. See, also, Pub.L. 98–557, 1984 U.S. Code Cong. and Adm. News, p. 4831.

§ 1232. Enforcement provisions

(a) Civil penalty

(1) Any person who is found by the Secretary, after notice and an opportunity for a hearing, to have violated this chapter or a regulation issued hereunder shall be liable to the United States for a civil penalty, not to exceed $25,000 for each violation. Each day of a continuing violation shall constitute a separate violation. The amount of such civil penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any

history of prior offenses, ability to pay, and such other matters as justice may require.

(2) The Secretary may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which has been imposed under this section.

(3) If any person fails to pay an assessment of a civil penalty after it has become final, the Secretary may refer the matter to the Attorney General of the United States, for collection in any appropriate district court of the United States.

(b) Criminal penalty

(1) Any person who willfully and knowingly violates this chapter or any regulation issued hereunder shall be fined not more than $50,000 for each violation or imprisoned for not more than five years, or both.

(2) Any person who, in the willfull and knowing violation of this chapter or of any regulation issued hereunder, uses a dangerous weapon, or engages in conduct that causes bodily injury or fear of imminent bodily injury to any officer authorized to enforce the provisions of this chapter or the regulations issued hereunder, shall, in lieu of the penalties prescribed in paragraph (1), be fined not more than $100,000, or imprisoned for not more than ten years, or both.

(c) In rem liability

Any vessel subject to the provisions of this chapter, which is used in violation of this chapter, or any regulations issued hereunder, shall be liable in rem for any civil penalty assessed pursuant to subsection (a) of this section and may be proceeded against in the United States district court for any district in which such vessel may be found.

(d) Injunction

The United States district courts shall have jurisdiction to restrain violations of this chapter or of regulations issued hereunder, for cause shown.

(e) Denial of entry

Except as provided in section 1228 of this title, the Secretary may, subject to recognized principles of international law, deny entry into the navigable waters of the United States or to any port or place under the jurisdiction of the United States to any vessel not in compliance with the provisions of this chapter or the regulations issued hereunder.

(f) Withholding of clearance

The Secretary of the Treasury shall withhold or revoke, at the request of the Secretary, the clearance, required by section 91 of Title 46, of any vessel, the owner or operator of which is subject to any of the penalties in this section. Clearance may be granted in such cases upon the filing of a bond or other surety satisfactory to the Secretary.

(Pub.L. 92-340, § 13, as added Pub.L. 95-474, § 2, Oct. 17, 1978, 92 Stat. 1478.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 95-474, see 1978 U.S. Code Cong. and Adm.News, p. 3270.

Cross References

Authority of Secretary under port and tanker safety program unaffected by ship pollution provisions, see section 1911 of this title.

West's Federal Forms

Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.
Sentence and fine, see § 7531 et seq.

Notes of Decisions

1. Private right of action

Congress did not intend that plaintiffs be permitted to bring private enforcement actions under this chapter. Patentas v. U. S., C.A.Pa.1982, 687 F.2d 707.

§ 1233. Regulations as to regattas or marine parades

The Commandant of the Coast Guard is authorized and empowered in his discretion to issue from time to time regulations, not contrary to law, to promote the safety of life on navigable waters during regattas or marine parades.

(Apr. 28, 1908, c. 151, § 1, 35 Stat. 69; Mar. 4, 1913, c. 141, § 1, 37 Stat. 736; 1946 Reorg.Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.)

Historical Note

Codification. Section was not enacted as part of the Ports and Waterways Safety Act which comprises this chapter.

Section was formerly classified to section 454 of Title 46, Shipping.

Transfer of Functions. The Coast Guard was transferred to the Department of Transportation, and all functions, powers, and duties relating to the Coast Guard of the Secretary of the Treasury and of other officers and offices of the Department of the Treasury were transferred to the Secretary of Transportation by Pub.L. 89-670, § 6(b)(1), Oct. 15, 1966, 80 Stat. 938. Section 6(b)(2) of Pub.L. 89-670, however, provided that notwithstanding such transfer of functions, the Coast Guard shall operate as part of the Navy in time of war or when the President directs as provided in section 3 of Title 14, Coast Guard. See section 108 of Title 49, Transportation.

For transfer of functions of other officers, employees, and agencies of the Department of the Treasury, with certain exceptions, to the Secretary of the Treasury with power to delegate, see Reorg. Plan No. 26 of 1950, §§ 1, 2, eff. July 31, 1950, 15 F.R. 4935, 64 Stat. 1280, 1281, set out in Appendix 1 to Title 5, Government Organization and Employees. Functions of the Coast Guard, and the Commandant of the Coast Guard, were excepted from transfer when the Coast Guard is operating as part of the Navy under sections 1 and 3 of Title 14.

"Commandant of the Coast Guard" was substituted for "Secretary of Commerce" on authority of sections 101 to 104 of Reorg. Plan No. 3 of 1946, set out in Appendix 1 to Title 5, Government Organization and Employees.

Upon incorporation into the Code, the words "Secretary of Commerce" were substituted for "Secretary of Commerce and Labor" to conform to Act Mar. 4, 1913, which provided that the Secretary of Commerce and Labor should be called the Secretary of Commerce.

(f) Dredges working in the prosecution of the work shall not obstruct the channel unnecessarily.

(g) The dredge will slack lines running across the channel from the dredge on the passing side, for passing vessels, when notified by signal, with whistle or horn.

(h) The position of anchors of the dredge shall be marked by buoys plainly visible to passing vessels.

§ 162.270 Restricted areas in vicinity of Maritime Administration Reserve Fleets.

(a) The regulations in this section shall govern the use and navigation of waters in the vicinity of the following National Defense Reserve Fleets of the Maritime Administration, Department of Transportation:

(1) James River Reserve Fleet, Fort Eustis, Virginia.

(2) Beaumont Reserve Fleet, Neches River near Beaumont, Texas.

(3) Suisun Bay Reserve Fleet near Benicia, California.

(b) No vessels or other watercraft, except those owned or controlled by the United States Government, shall cruise or anchor between Reserve Fleet units within 500 feet of the end vessels in each Reserve Fleet unit, or within 500 feet of the extreme units of the fleets, unless specific permission of do so has first been granted in each case by the enforcing agency.

(c) The regulations in this section shall be enforced by the respective Fleet Superintendents and such agencies as they may designate.

[CGD 75-082, 42 FR 51759, Sept. 29, 1977, as amended by CGD 86-053, 51 FR 43742, Dec. 4, 1986]

PART 163—TOWING OF BARGES

Sec.

AUTHORITY: 33 U.S.C. 180, 30 Stat. 90; 49 CFR 1.46(c)(2); 28 Stat. 647, 33 U.S.C. 258; 49 CFR 1.46(c)(3); sec. 4233 R.S., 33 U.S.C. 322.

§ 163.01 Application.

(a) The regulations in this part apply to vessels navigating the harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal, the Red River of the North, the Mississippi River and its tributaries above Huey P. Long Bridge, and that part of the Atchafalaya River above its junction with the Plaquemine-Morgan City alternate waterway.

(b) Seagoing barges and their towing vessels shall be subject to the requirements in this part under the provisions of section 14 of the Act of May 28, 1908, as amended (sec. 14, 35 Stat. 428, as amended; 33 U.S.C. 152). Under the provisions of section 15 of the Act of May 28, 1908, as amended (sec. 15, 35 Stat. 429; 33 U.S.C. 153), the penalty for use of an unlawful towline shall be an action against the master of the towing vessel seeking the suspension or revocation of his license.

[CGFR 60-61, 25 FR 9045, Sept. 21, 1960, as amended by CGFR 66-59, 31 FR 13647, Oct. 22, 1966. Redesignated by CGD 81-017, 46 FR 28154, May 26, 1981]

§ 163.05 Tows of seagoing barges within inland waters.

(a) The tows of seagoing barges when navigating the inland waters of the United States shall be limited in length to five vessels, including the towing vessel or vessels.

[CGFR 60-61, 25 FR 9045, Sept. 21, 1960. Redesignated by CGD 81-017, 46 FR 28154, May 26, 1981]

§ 163.20 Bunching of tows.

(a) In all cases where tows can be bunched, it should be done.

(b) Tows navigating in the North and East Rivers of New York must be bunched above a line drawn between Robbins Reef Light and Owls Head, Brooklyn, but the quarantine anchorage and the north entrance to Ambrose Channel shall be avoided in the process of bunching tows.

(c) Tows must be bunched above the mouth of the Schuylkill River, Pa.

[CGFR 60-61, 25 FR 9045, Sept. 21, 1960, as amended by CGFR 64-21, 29 FR 5733, Apr. 30, 1964. Redesignated by CGD 81-017, 46 FR 28154, May 26, 1981]

PART 164—NAVIGATION SAFETY REGULATIONS

Sec.

AUTHORITY: 33 U.S.C. 1223, 46 U.S.C. 3703. Sec. 164.61 also issued under 46 U.S.C. 6101; 49 CFR 1.46 (n).

§ 164.01 Applicability.

(a) This part (except as specifically limited herein) applies to each self-propelled vessel of 1600 or more gross tons (except foreign vessels described in § 164.02) when it is operating in the navigable waters of the United States except the St. Lawrence Seaway.

[CGD 83-004, 49 FR 43466, Oct. 29, 1984]

§ 164.02 Applicability exception for foreign vessels.

(a) This part (including §§ 164.38 and 164.39) does not apply to vessels that:

(1) Are not destined for, or departing from, a port or place subject to the jurisdiction of the United States; and

(2) Are in:

(i) Innocent passage through the territorial sea of the United States; or

(ii) Transit through navigable waters of the United States which form part of an international strait.

[CGD 77-063, 44 FR 66530, Nov. 19, 1979, amended by CGD 79-148, 45 FR 54039, Aug. 14, 1980]

§ 164.03 Incorporation by reference.

(a) Certain materials are incorporated by reference into this part with the approval of the Director of the Federal Register. The Office of the Federal Register publishes a table, "Materials Approved for Incorporation by Reference," which appears in the Finding Aids section of this volume. In that table is found the date of the edition approved, citations to the particular sections of this part where the material is incorporated, addresses where the material is available, and the date of the approval by the Director of the Federal Register. To enforce any edition other than the one listed in the table, notice of the change must be published in the FEDERAL REGISTER and the material made available. All approved material is on file at the Office of the Federal Register, Washington, DC 20408 and at Room 440[illegible], U.S. Coast Guard Headquarters, 21[illegible] Second St. S.W., Washington, D.C.

(b) The materials approved for incorporation by reference in this part are: Radio Technical Commission For Marine Services (RTCM) Paper 12-7[illegible] DO-100 dated 12/20/77.

[CGD 81-081, 47 FR 58244, Dec. 30, 1982]

§ 164.11 Navigation underway: General.

The owner, master, or person in charge of each vessel underway shall ensure that:

(a) The wheelhouse is constantly manned by persons who:

(1) Direct and control the movement of the vessel; and

(2) Fix the vessel's position;

(b) Each person performing a duty described in paragraph (a) of this section is competent to perform that duty;

(c) The position of the vessel at each fix is plotted on a chart of the area and the person directing the movement of the vessel is informed of the vessel's position;

(d) Electronic and other navigational equipment, external fixed aids to navigation, geographic reference points, and hydrographic contours are used when fixing the vessel's position;

(e) Buoys alone are not used to fix the vessel's position;

NOTE: Buoys are aids to navigation placed in approximate positions to alert the mariner to hazards to navigation or to indicate the orientation of a channel. Buoys may not maintain an exact position because strong or varying currents, heavy seas, ice, and collisions with vessels can move or sink them or set them adrift. Although buoys may corroborate a position fixed by other means, buoys cannot be used to fix a position: however, if no other aids are available, buoys alone may be used to establish an estimated position.

(f) The danger of each closing visual or each closing radar contact is evaluated and the person directing the movement of the vessel knows the evaluation;

(g) Rudder orders are executed as given;

(h) Engine speed and direction orders are executed as given;

(i) Magnetic variation and deviation and gyrocompass errors are known and correctly applied by the person directing the movement of the vessel;

(j) A person whom he has determined is competent to steer the vessel is in the wheelhouse at all times;[1]

(k) If a pilot other than a member of the vessel's crew is employed, the pilot is informed of the draft, maneuvering characteristics, and peculiarities of the vessel and of any abnormal circumstances on the vessel that may affect its safe navigation.

(l) Current velocity and direction for the area to be transited are known by the person directing the movement of the vessel;

(m) Predicted set and drift are known by the person directing movement of the vessel;

(n) Tidal state for the area to be transited is known by the person directing movement of the vessel;

(o) The vessel's anchors are ready for letting go;

(p) The person directing the movement of the vessel sets the vessel's speed with consideration for:

(1) The prevailing visibility and weather conditions;

(2) The proximity of the vessel to fixed shore and marine structures;

(3) The tendency of the vessel underway to squat and suffer impairment of maneuverability when there is small underkeel clearance;

(4) The comparative proportions of the vessel and the channel;

(5) The density of marine traffic;

(6) The damage that might be caused by the vessel's wake;

(7) The strength and direction of the current; and

(8) Any local vessel speed limit;

(q) The tests required by § 164.25 are made and recorded in the vessel's log; and

(r) The equipment required by this part is maintained in operable condition.

(s) Upon entering U.S. waters, the steering wheel or lever on the navigating bridge is operated to determine if the steering equipment is operating properly under manual control, unless the vessel has been steered under manual control from the navigating bridge within the preceding 2 hours, except when operating on the Great Lakes and their connecting and tributary waters.

(t) At least two of the steering gear power units on the vessel are in operation when such units are capable of simultaneous operation, except when operating on the Great Lakes and their connecting and tributary waters.

[CGD 74-77, 42 FR 5956, Jan. 31, 1977, as amended by CGD 83-004, 49 FR 43466, Oct. 29, 1984]

§ 164.19 Requirements for vessels at anchor.

The master or person in charge of each vessel that is anchored shall ensure that:

(a) A proper anchor watch is maintained;

(b) Procedures are followed to detect a dragging anchor; and

(c) Whenever weather, tide, or current conditions are likely to cause the vessel's anchor to drag, action is taken to ensure the safety of the vessel, structures, and other vessels, such as being ready to veer chain, let go a second anchor, or get underway using the vessel's own propulsion or tug assistance.

[CGD 74-77, 42 FR 5956, Jan. 31, 1977]

§ 164.25 Tests before entering or getting underway.

(a) Except as provided in paragraphs (b) and (c) of this section no person may cause a vessel to enter into or get underway on the navigable waters of the United States unless no more than 12 hours before entering or getting underway, the following equipment has been tested:

(1) Primary and secondary steering gear. The test procedure includes a visual inspection of the steering gear and its connecting linkage, and, where applicable, the operation of the following:

(i) Each remote steering gear control system.

(ii) Each steering position located on the navigating bridge.

(iii) The main steering gear from the alternative power supply, if installed.

(iv) Each rudder angle indicator in relation to the actual position of the rudder.

(v) Each remote steering gear control system power failure alarm.

(vi) Each remote steering gear power unit failure alarm.

(vii) The full movement of the rudder to the required capabilities of the steering gear.

(2) All internal vessel control communications and vessel control alarms.

(3) Standby or emergency generator, for as long as necessary to show proper functioning, including steady state temperature and pressure readings.

(4) Storage batteries for emergency lighting and power systems in vessel control and propulsion machinery spaces.

(5) Main propulsion machinery, ahead and astern.

(b) Vessels navigating on the Great Lakes and their connecting and tributary waters, having once completed the test requirements of this subpart, are considered to remain in compliance until arriving at the next port of call on the Great Lakes.

(c) Vessels entering the Great Lakes from the St. Lawrence Seaway are considered to be in compliance with this sub-part if the required tests are conducted preparatory to or during the passage of the St. Lawrence Seaway or within one hour of passing Wolfe Island.

(d) No vessel may enter, or be operated on the navigable waters of the United States unless the emergency steering drill described below has been conducted within 48 hours prior to entry and logged in the vessel logbook, unless the drill is conducted and logged on a regular basis at least once every three months. This drill must include at a minimum the following:

(1) Operation of the main steering gear from within the steering gear compartment.

(2) Operation of the means of communications between the navigating bridge and the steering compartment.

(3) Operation of the alternative power supply for the steering gear if the vessel is so equipped.

(92 Stat. 1471 (33 U.S.C. 1221 et seq.); 49 CFR 1.46(n)(4))

[CGD 77-183, 45 FR 18925, Mar. 24, 1980, as amended by CGD 83-004, 49 FR 43466, Oct. 29, 1984]

§ 164.30 Charts, publications, and equipment: General.

No person may operate or cause the operation of a vessel unless the vessel has the marine charts, publications, and equipment as required by §§ 164.33 through 164.41 of this part.

[CGD 82-055, 48 FR 44535, Sept. 29, 1983]

§ 164.33 Charts and publications.

(a) Each vessel must have the following:

(1) Marine charts of the area to be transited, published by the National Ocean Service, U.S. Army Corps of Engineers, or a river authority that—

(i) Are of a large enough scale and have enough detail to make safe navigation of the area possible; and

(ii) Are currently corrected.

(2) For the area to be transited, a currently corrected copy of, or applica-

[1] See also 46 U.S.C. 672, which requires an able seaman at the wheel on U.S. vessels of 100 gross tons or more in narrow or crowded waters or during low visibility.

(6) requirements for communication and prearrival messages.

(Pub.L. 98–89, Aug. 26, 1983, 97 Stat. 526.)

Historical and Statutory Notes

Effective Date. Section 2(g)(2) of Pub.L. 98–89, Aug. 26, 1983, 97 Stat. 599, provided that: "Section 3715(a) of title 46 [subsec. (a) of this section] (as enacted by section 1 of this Act) is effective on the day after the effective date of the regulations prescribed by the Secretary under section 3715(b) of title 46 [subsec. (b) of this section]." [Regulations effective Apr. 26, 1984, see 49 F.R. 11170, Mar. 26, 1984.]

§ 3716. Tank washings

(a) A vessel may not transfer cargo in a port or place subject to the jurisdiction of the United States if, before arriving, the vessel has discharged tank washings containing oil or hazardous material in preparation for loading at that port or place in violation of the laws of the United States or in a manner or quantities inconsistent with a treaty to which the United States is a party.

(b) The Secretary shall establish effective control and supervisory measures to carry out this section.

(Pub.L. 98–89, Aug. 26, 1983, 97 Stat. 527.)

§ 3717. Marine safety information system

(a) The Secretary shall establish a marine safety information system that shall contain information about each vessel to which this chapter applies that operates on the navigable waters of the United States, or that transfers oil or hazardous material in a port or place under the jurisdiction of the United States. In acquiring this information, the Secretary shall make full use of publicly available information. The Secretary may by regulation require the vessel to provide information that the Secretary considers necessary to carry out this subsection, including—

(1) the name of each person with an ownership interest in the vessel;

(2) details of compliance with the financial responsibility requirements of applicable laws or regulations;

(3) registration information, including all changes in the name of the vessel;

(4) the history of marine casualties and serious repair problems of the vessel; and

(5) a record of all inspections and examinations of a vessel conducted under section 3714 of this title.

(b) On written request from the Secretary, the head of each department, agency, or instrumentality of the United States Government shall provide available information that the Secretary considers necessary to confirm the information received under subsection (a) of this section.

(Pub.L. 98–89, Aug. 26, 1983, 97 Stat. 527.)

§ 3718. Penalties

(a)(1) A person violating this chapter or a regulation prescribed under this chapter is liable to the United States Government for a civil penalty of not more than $25,000. Each day of a continuing violation is a separate violation.

(2) Each vessel to which this chapter applies that is operated in violation of this chapter or a regulation prescribed under this chapter is liable in rem for a civil penalty under this subsection.

(b) A person willfully and knowingly violating this chapter or a regulation prescribed under this chapter shall be fined not more than $50,000, imprisoned for not more than 5 years, or both.

(c) Instead of the penalties provided by subsection (b) of this section, a person willfully and knowingly violating this chapter or a regulation prescribed under this chapter, and using a dangerous weapon, or engaging in conduct that causes bodily injury or fear of imminent bodily injury to an official authorized to enforce this chapter or a regulation prescribed under this chapter, shall be fined not more than $100,000, imprisoned for not more than 10 years, or both.

(d) The district courts of the United States have jurisdiction to restrain a violation of this chapter or a regulation prescribed under this chapter.

(e) At the request of the Secretary, the Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes (46 App.U.S.C. 91) of a vessel the owner or operator of which is subject to a penalty under this section. Clearance may be granted on filing a bond or other surety satisfactory to the Secretary.

(Pub.L. 98–89, Aug. 26, 1983, 97 Stat. 527.)

West's Federal Forms

Bonds and undertakings, see §§ 1521 to 1524.
Jurisdiction and venue in district courts, matters pertaining to, see § 1003 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.
Sentence and fine, see § 7531 et seq.

easily confused with that for approved life preservers.

§ 35.03-20 Shipboard inspections—TB/ALL.

(a) Each work vest shall be subject to examination by a marine inspector to determine its serviceability. If found to be satisfactory, it may be continued in service, but shall not be stamped by a marine inspector with a Coast Guard stamp. If a work vest is found not to be in a serviceable condition, then such work vest shall be removed from the vessel. If a work vest is beyond repair, it shall be destroyed or multilated in the presence of a marine inspector so as to prevent its continued use as a work vest.

§ 35.03-25 Additional requirements for hybrid work vests.

(a) In addition to the other requirements in this subpart, commercial hybrid PFD's must be—

(1) Used, stowed, and maintained in accordance with the procedures set out in the manual required for these devices by § 160.077-29 of this chapter and any limitation(s) marked on them; and

(2) Of the same or similar design and have the same method of operation as each other hybrid PFD carried on board.

[CGD 78-174A, 51 FR 4350, Feb. 4, 1986; 51 FR 15497, Apr. 24, 1986]

Subpart 35.05—Officers and Crews

§ 35.05-1 Licensed officers and crews of tankships—T/ALL.

No tankship of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew, including certificated lifeboatmen and certificated tankermen where required by the regulations in this subchapter, separately stated, as called for in her certificate of inspection.

§ 35.05-5 [Reserved]

§ 35.05-10 [Reserved]

§ 35.05-15 Watchman for a tank vessel—TB/ALL.

(a) *Manned tank vessel.* At least one member of the crew of a manned tank vessel shall be on board at all times except when the vessel is gas free or is moored at a dock or terminal at which watchman service is provided.

(b) *Unmanned barge.* (1) A strict watch of each unmanned barge in tow must be maintained from the towing vessel while underway.

(2) When a barge is moored and contains more oil than the normal clingage and unpumpable bilge or sump residues, the barge must be kept under surveillance by a person responsible for the security of the barge and for keeping unauthorized persons off the barge.

(3) When a barge is moored and contains no oil but is not gas free:

(i) It must be maintained under surveillance as required in paragraph (b)(2) of this section; or

(ii) All cargo tank hatches must be clearly marked in not less than three inch lettering "Danger—Keep Out," and all hatch covers must be closed and dogged down in such a way that the hatch cannot be opened by the use of bare hands alone.

[CGFR 65-50, 30 FR 16704, Dec. 30, 1965, as amended by CGD 80-009,48 FR 36459, Aug. 11, 1983]

§ 35.05-20 Physical condition of crew—TB/ALL.

No person shall be engaged as a member of the crew on a tank vessel if he is known by the employer to be physically or mentally incapable of performing the duties assigned him.

§ 35.05-25 Illness, alcohol, drugs—TB/ALL.

(a) No person, known by the individual in charge of a tank vessel to be under the influence of liquor or other stimulant, or to be ill to such an extent as to unfit him for any particular service on the tank vessel, shall be allowed to perform such service while in such condition.

(b) When a member of the crew of a tank vessel which is loading bulk cargo of Grade A, B, or C arrives at the gangway and is observed to be in an intoxicated condition, he shall not be permitted to board the vessel without escort.

Subpart 35.07—Logbook Entries

§ 35.07-1 Application—TB/ALL.

(a) Except as specifically noted, the provisions of this subpart shall apply to all tank vessels.

§ 35.07-5 Logbooks and records—TB/ALL.

(a) *General—TB/ALL.* Under various statutes or by regulations in this subchapter, specified tank vessels shall have certain logbooks or records, and, when the occasion arises, it is the duty of the master or person in charge to place therein specific entries as required by law or regulations in this subchapter.

(b) *Official Logbook—TB/OC.* R.S. 4290, as amended (46 U.S.C. 201), states: "Every vessel making voyages from a port in the United States to any foreign port, or, being of the burden of 75 tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall have an Official Logbook; * * *." This Official Logbook is furnished gratuitously to masters of United States' flag vessels by the Coast Guard, as Form CG-706B or CG-706C, depending upon the number of persons employed as crew. There is printed in the first several pages of this Official Logbook various acts of Congress relating to logbooks and the entries required to be made therein. When a voyage is completed, or after a specified period of time is completed, the Official Logbooks with required entries therein shall be filed with the Officer in Charge, Marine Inspection, at or nearest the port where the vessel may be.

(c) *Logs or records—TB/ALL.* For vessels other than those required to have Official Logbooks by R.S. 4290, the owners, operators, and/or masters are to supply their own logs or records in any form desired, which will be considered to take the place of the Official Logbooks and may be used for the purpose of making entries therein as required by law or regulations in this subchapter. Such logs or records are not filed with the Officer in Charge, Marine Inspection, but shall be kept available for review by a marine inspector for a period of one year after the date to which the records refer, except for separate records of tests and inspections of firefighting equipment which shall be maintained with the vessels' logs for the period of validity of the vessels' certificate of inspection.

§ 35.07-10 Actions required to be logged—TB/ALL.

(a) *General—TB/ALL.* The actions and observations noted in this section shall be entered in the Official Logbook or in logs or records considered to take place of the Official Logbooks. This section contains no requirements which are not made in specific laws or in other regulations in this subchapter, the items being merely grouped together for convenience.

(b) *Entries—T/ALL.* Entries shall be made in the logs of tankships with respect to the following:

(1) Fire and lifeboat drills. Weekly. See § 35.10-5.

(2) Electric power-operated lifeboat winches. Once in each three months. See § 35.10-7.

(3) Draft and load line marks. For tankships of 150 gross tons and over, prior to leaving port for ocean, coastwise, and Great Lakes voyages only. See 46 U.S.C., sections 85e and 88e, and § 35.20-5.

(4) Steering gear tests. Prior to departure, or for tank ships on voyages of less than 48 hours duration or tankships operating on lakes, bays, sounds and rivers, once every week. See § 35.20-10.

(5) Fuel oil data. Upon receipt of fuel oil on board to be used as fuel. See § 35.25-10.

(6) Line-throwing appliances. Once every three months. See § 35.10-1(c).

(7) Inspections and tests of firefighting equipment. Once every year. See § 31.10-18 of this subchapter.

(8) Operation and inspection of the emergency lighting and power sys-

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MAR 27 1990

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By [illegible] Deputy

UNITED STATES OF AMERICA, Plaintiff v. EXXON CORPORATION and EXXON SHIPPING COMPANY, Defendants	SUPERSEDING INDICTMENT Criminal No. A90-015 Count I: Clean Water Act Vio. 33 U.S.C. §§ 1311(a), 1319(c)(1) Count II: Refuse Act Vio. 33 U.S.C. §§ 407, 411 Count III: Migratory Bird Treaty Act Vio. 16 U.S.C. §§ 703, 707(a) Count IV: Ports and Waterways Safety Act Vio. 33 U.S.C. § 1232(b)(1) Count V: Dangerous Cargo Act Vio. 46 U.S.C. § 3718(b)

COUNT ONE

The grand jury charges that:

1. Defendant EXXON CORPORATION is a corporation incorporated under the laws of the State of New Jersey.

2. Defendant EXXON SHIPPING COMPANY is a corporation incorporated under the laws of the State of Delaware. At all times pertinent to this indictment, EXXON CORPORATION was the sole shareholder of EXXON SHIPPING COMPANY, and EXXON SHIPPING COMPANY had a single director who reported to Exxon USA, a division of EXXON CORPORATION.

3. EXXON SHIPPING COMPANY was incorporated in 1973.

Superseding INDICTMENT

In 1982, EXXON SHIPPING COMPANY took over the functions of the Marine Department of Exxon USA, the primary purpose of which was to transport petroleum products for Exxon USA. EXXON CORPORATION or its affiliates were the source of all of EXXON SHIPPING COMPANY's initial assets and personnel, and EXXON CORPORATION continued to be the primary source of capital for EXXON SHIPPING COMPANY at all times pertinent to this indictment.

4. At all times pertinent to this indictment, EXXON SHIPPING COMPANY operated oil tankers for the benefit of EXXON CORPORATION; one such tanker was the Exxon Valdez. EXXON CORPORATION guaranteed the debt issued by EXXON SHIPPING COMPANY to build the Exxon Valdez.

5. At all times pertinent to this indictment, EXXON SHIPPING COMPANY's headquarters were in Houston, Texas, in the same building that housed the headquarters of Exxon Company USA. EXXON CORPORATION provided all of the computer, medical, accounting, administrative, and legal services used by EXXON SHIPPING COMPANY. EXXON CORPORATION set policies for EXXON SHIPPING COMPANY regarding capital expenditures, personnel, employee compensation, alcohol abuse, and contracting.

6. At all times pertinent to this indictment, the president of EXXON SHIPPING COMPANY reported to a vice-president of Exxon Company USA. All major investments by EXXON SHIPPING COMPANY were subject to the approval of EXXON CORPORATION.

7. At all times pertinent to this indictment, EXXON SHIPPING COMPANY was acting for the benefit of EXXON CORPORATION, and within the scope of authority granted it by EXXON

CORPORATION.

8. At all times pertinent to this indictment, EXXON SHIPPING COMPANY employed "able seamen" and officers aboard the Exxon Valdez who were responsible for the operation, direction, and control of the Exxon Valdez.

9. On March 23, 1989, at approximately 9:20 p.m., the Exxon Valdez departed from the Port of Valdez, Alaska carrying 53 million gallons of crude oil owned by EXXON CORPORATION, bound for an EXXON CORPORATION facility in Long Beach, California.

10. On March 23, 1989, shortly before midnight, the Exxon Valdez deviated from the designated shipping lanes in Prince William Sound. These lanes are used by ships entering or leaving the Port of Valdez, Alaska, and establish a route for the passage of ships.

11. After the Exxon Valdez deviated from the designated shipping lanes, the master left the ship's bridge. The ship then proceeded under the direction of an officer who lacked the required Coast Guard certification for pilotage in Prince William Sound, and a helmsman who was known by EXXON SHIPPING COMPANY to be incompetent at performing his assigned duties.

12. On March 24, 1989, shortly after midnight, the Exxon Valdez ran aground on Bligh Reef, a well-known and well-marked navigational hazard, and discharged more than ten million gallons of crude oil into Prince William Sound.

13. From March 24, 1989 through November 9, 1989, crude oil that discharged from the Exxon Valdez migrated more

than 700 miles from Bligh Reef, contaminating the waters and shorelines of Prince William Sound, the Gulf of Alaska, Kenai Fjords National Park, the Katmai National Park and Preserve, the Aniakchak National Monument and Preserve, the Alaska Peninsula National Wildlife Refuge, the Alaska Maritime National Wildlife Refuge, the Becharof National Wildlife Refuge, the Kodiak National Wildlife Refuge, the lower Kenai Peninsula, the Barren Islands, Kodiak Island, Shelikof Strait, and other parts of the Alaska Peninsula, causing the death of more than 36,000 migratory birds, including more than 100 bald eagles, and numerous other varieties of wildlife.

14. On March 24, 1989, in the District of Alaska, and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did negligently cause pollutants, namely more than ten million gallons of crude oil, to be discharged from a point source, namely the tank vessel Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all of which is in violation of and contrary to Title 33, United States Code, Sections 1311(a) and 1319(c)(1).

COUNT TWO

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY unlawfully did throw, discharge and deposit, and did cause, suffer and procure to be thrown, discharged and deposited, refuse matter, namely more than ten million gallons of crude oil, from a ship, namely the Exxon Valdez, into Prince William Sound, a navigable water of the United States, without a permit, all in violation of and contrary to Title 33, United States Code, Sections 407 and 411.

COUNT THREE

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. From on or about March 24, 1989 to on or about September 25, 1989, in the District of Alaska and elsewhere, the defendants EXXON CORPORATION and EXXON SHIPPING COMPANY, without being permitted to do so as required by law, did kill migratory birds, all in violation of and contrary to Title 16, United States Code, Sections 703 and 707(a) and Title 50, Code of Federal Regulations, Section 21.11.

COUNT FOUR

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 33, United States Code, Chapter 25, in that defendants, being the owners of the tank vessel Exxon Valdez, and the master of the Exxon Valdez, acting as the agent of the defendants, did willfully and knowingly fail to ensure that the wheelhouse of the Exxon Valdez, while underway, was constantly manned by persons who directed and controlled the movement of the vessel, each of whom was competent to perform that duty, all in violation of and contrary to Title 33, United States Code, Section 1232(b)(1), and Title 33, Code of Federal Regulations, Section 164.11(b).

COUNT FIVE

The grand jury further charges:

1. Paragraphs one through thirteen of Count I are realleged as if set forth in full herein.

2. On March 23 and March 24, 1989, in the District of Alaska and elsewhere, defendants EXXON CORPORATION and EXXON SHIPPING COMPANY did willfully and knowingly violate a regulation prescribed under Title 46, United States Code, Chapter 37, in that defendants did employ and cause persons to be engaged on the crew of the tank vessel Exxon Valdez, knowing such persons to be physically and mentally incapable of performing the duties assigned them, all in violation of Title 46, United States Code, Section 3718(b), and Title 46, Code of Federal Regulations, Section 35.05-20.

A true bill,

Foreperson

MARK R. DAVIS
Acting United States Attorney

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

U.S. rejects prosecution of Alyeska

Justice: Decision best for public

By DAVID WHITNEY
Daily News reporter

WASHINGTON — The Justice Department said this week it decided not to prosecute Alyeska Pipeline Service Co. for making false statements about its ability [illegible]spond to oil spills in [illegible]ka's Prince William Sound because exempting the company from criminal charges was "in the best interests of the public."

The Justice Department was responding to a suggestion last week from Rep. George Miller, D-California, that Alyeska face criminal charges because it didn't keep its cleanup promises when the Exxon Valdez ran aground two years ago and spilled about 10.8 million gallons of North Slope crude. Alyeska has been broadly criticized for not having sufficient equipment in working order available to respond to the spill as it had promised in its oil-spill contingency plans.

Instead of pursuing a case against Alyeska, the Justice Department agreed last month to include a non-prosecution pledge in its $1 billion settlement with Exxon Corp. The department said that was partly because the most it could have gotten

Please see Page B-3, ALYESKA

Officers arrest murder suspect

ALYESKA: Justice Department rejects prosecution

Continued from Page B-:

out of the pipeline company was a criminal conviction and a $500,000 fine.

Alyeska, which owns and operates the 800-mile trans-Alaska pipeline and the tanker terminal at Valdez, is owned by seven oil companies, including Exxon.

The Justice Department's disclosure was contained in a memorandum submitted Tuesday to U.S. District Judge H. Russel Holland in Anchorage, before whom the criminal plea bargain with Exxon is pending.

Under the settlement agreements, Exxon will pay $100 million in criminal fines and restitution for fouling the Sound and another $900 million to resolve separate state and federal natural-resources damage claims.

Thomas Campbell, general counsel for the National Oceanic and Atmospheric Administration, said last week the Alyeska immunity clause was included in the deal at Exxon's insistence. Exxon owns 20 percent of the pipeline company.

Alyeska's spokeswoman, Marnie Isaacs, declined comment Thursday on the Justice Department's memorandum.

Justice Department press aide Amy Castner, assigned to handle the Exxon Valdez settlement, also declined comment, saying "we don't have anything else to say about Alyeska."

In a letter to Holland released Thursday, Miller attacked the Justice Department for letting "Alyeska and its owner companies off the hook."

Miller cited the Justice Department's justifications for its deal with Exxon, which included harsh penalties demonstrating the need for just punishment and deterrence and promotion of respect for the law.

"It is difficult to understand how granting Alyeska and its owner companies immunity from criminal prosecution can conceivably 'promote respect for the law' or meet any of the other sentencing criteria," Miller wrote.

Miller's earlier letter to Holland was last week, when he urged that the judge reject the settlement because it immunizes Alyeska from any federal action. Miller provided internal memos showing the pipeline company knew it could not handle a spill in the Sound and that its owners committee had decided at a January 1988 meeting in Phoenix, Ariz., that it wouldn't promptly respond to spills outside of Valdez Narrows leading into the oil port.

The Justice Department immediately contacted Miller after his letter was filed with the court last week asking about the material he cited.

Alyeska has denied the material has any relevance to the 1989 oil spill. Isaacs, Alyeska's press aide, has said the memo referred to ongoing preparations for submitting a 1990 contingency plan to the state. She said Thursday that Alyeska would have a detailed response to Miller's accusations today.

The Justice Department said it elected not to bring false-statement charges against Alyeska "after carefully weighing" its evidence, the risk of going to trial and other factors.

Among these other factors was that the maximum fine it could get from an Alyeska conviction was $500,000 and "the unprecedented criminal fines and guilty plea the government would obtain from Exxon."

5

I. Payment Terms

A. Amount

Civil	Criminal	Total
$700 million	$500 million	$1.2 billion

B. Schedule

1. W/in 90 days: $100 m. civil, $500 m. criminal
2. W/in 1 year thereafter: $600 million civil

C. Other changes and details

1. The civil settlement will be paid as under the present Consent Decree, that is:
   $72 million to State as reimbursement
   $62 million to feds as reimbursement
   Cleanup, etc. deducted as in the present agreement; balance to Trust Fund

2. The criminal payments will be:
   $100 million fine to feds
   $100 million restitution to State
   $300 million restitution to Trust Fund

3. Delete reopener clause

4. Exxon agrees not to take a State tax deduction

II. Payment Mechanism

A. Dedicated Fund issue

Severability clause: Exxon must pay even if the Trust Fund is later determined to be an unconstitutional dedicated fund.

B. Appropriations issues

The process must be constitutional:

1. Appropriations <u>into</u> the Trust Fund must be approved by the legislature.

2. Appropriations <u>from</u> the Trust Fund must also be approved by the legislature.

III. Trust Fund Operations/Public Input

A. Two members of legislature, appointed by presiding officers, to be ex officio non-voting members of trustee board.

B. Funding decisions to be made w/ public input through broad-based Citizens Advisory Board (legislature must appropriate as stated above).

C. Subject to Open Meetings Act & Public Records Act.

D. Subject to GAO & Leg. Budget & Audit oversight and audit.

E. Establish procedures per rule-making provisions of Alaska Administrative Procedures Act.

IV. Release of Scientific and Economic Data to the Public

A. Release of information to be subject of separate agreement between legislature and administration.

B. State may withhold information only if it obtains an in camera protective order by showing:

(1) information is privileged pursuant to Public Records Act and Civil Rules of Procedure; and

(2) information would materially and substantially harm State's case in pending litigation.

V. Miscellaneous

A. Clarify status of archaeological claims.

B. Clarify ambiguity of Paragraph 13 relating to third party claims

C. Language to be included in Consent Decree requiring the parties to enter good faith negotiations regarding settlement of third party claims and seek to establish procedures for dispute resolution.

19
11
20
77
28
95 + 9 = 104

7 David Hall
Valdez
PWS Conservation Alliance
don't have enough info to assess settlement
want broader based representation on TCs

8 Chuck Totemoff (see also #1 Seward)
Pres Chenega Corp
Chr Chenega IRA
+ on B/2 Pt Graham + English Bay

9 Paul Kompkoff, Sr
~~Chenega~~ Chenega Bay (See #3 Seward

10 Tim Martin
Anchorage
more oil spilled than reported

11 Ted Rayner
Anchorage
more oil beneath the surface

12 Verena Gill
opposes settlement
restore the sound - no logging

13 Jeff Parker, Esq.
atty speaks on B/2 of TCs - against settlement
needs damages experts
Dr Carson
Dr Mitchell
Dr Hammond
Dr Cohen
do not put locational parameters on where the $ is to be spent.

14 Stan Wolff
Anch.

against settlement
We don't have the info in front of us

15 Karen Wood
Ak Center for the Environment
want PWS restored
don't favor settlement
1. not enough money
doesn't deter pollution enough
2 lets Alyeska off the hook
3 doesn't tell how $ will be spent
not enough data to evaluate the settlement
- legislature needs data
- people need the data
Can't quantify the value of prevention
Don't know what type of restoration is needed?
4 Want public input in how $ is to be spent

16 Thomas Lakosh
letter

17 Tim Robertson (in Cordova)
City of Seldovia
shellfish - soft shells

18 Steve Walters
Cordova

19 Melyssa Rice (see cordova #12 yesterday)
Cordova

20 Cathy Abaro? Avar

21 Walt Parker
Anch
don't accept the settlement
keep agenda open to make suggestions

22 Pamela Brodie
Anch
Sierra Club
don't accept current settlement
1. need to know the damage
(less than the 1 Billion proposed)
state must release the info
state should subpoena the economists
State won't even release amt of its
claims
2 worried about makeup of Tees. How
do they plan to spend the settlement?
Want it to go for acquisition of resources
& studies
Concerned re native shareholders
too much to reimburse cleanup costs
Reimbursement should be directly
Exxon

23 Walt ~~Sonen~~ Sonen
Seldovia
Seldovia oil spill response team
need to have training & equipment to respond

24 Patty Hansen Seldovia
SOS team adm'r
need more funding for prevention &
response

25 John Kvarford Seldovia
Bd of Dir SOS
$ for oil spill prevention & cleanup

26 Larry Smith Homer
Kachemak Resource Institute
doesn't like spill
not enough $

27 Tom Johnson
MatSu
1 Conflict of interest by Charlie Cole
2 supports disclosure of information by state
3 settlement not large enough
4 natives feel settlement ignores them. This is wrong
5 wants Exxon to feel the settlement
$10 B is enough

28 Hal Smith
Homer
1. Exxon should pay up front
2 State should release research results
3 state should not pay Exxon anything to clean it up

29 Linda Hyde
Whittier
good we are ~~now~~ getting ~~the~~ testimony from the public

30 Scott Walker Whittier
City Councilman Whittier
need the scientific data

31 Ken Miller Whittier
look at damage assessment reports
need information released

32 Clint ~~Robert~~ Roberts, Whittier

release information

33 Pete Dasly, Whittier
pres Deckhands Ass'n
don't withhold information
$10 billions

34 Bob Warner
Anch
wants punitive damages

35 David ~~Vandenbag~~ Van der Bag
Ak Environmental Lobby

release of studies
greater assurance of participation
in implementation of settlement
want to insure fees
① do restoration
② coordinate w/ people in affected
areas

36 Chip Thoma
testified on criminal case
1. very concerned 2 felony charges
dropped
2. $100 m penalty too small
3 doesn't like Alyeska not getting
criminally charged (George Miller)

Forest Service backwards + incompetent

37 Riki Ott
Oil Reform Alliance
opposes settlement
not strong enough settlement

[she has master's in oil pollution]
PhD in heavy metals
The system does not inspire public confidence
no Compound interest, tax deductible
~~state tax~~ citizens will have to sue state
for release of data.
opposes settlement

38 Greg Seidor
Ex Dir UFA
supports negotiated settlement, but not this one
No data to support this settlement
failure to require indemnification of the state.
terms "restore, enhance & rehabilitate" are vague.

39 Joe Sonneman
Settlement not in the public interest
increases exec's power @ expense of legislature - enhances judiciary, too (settlement)
there must be an appropriation passed.
Look at other uses for the $ besides putting it back into affected areas (e.g. infant deaths statewide)
settlement may not be under CWA because not deposited into federal treasure.

40 Leo A Lard
pay all @ once
$3 Bil.

41 Bob Van Brocklin (see Cordova #1)
reviewed major study

several bills didn't pass because Exxon et al said they'd negotiate the issues — then didn't.

ask Charlie Cole → Processors data secret.

question on 8 13(e) is very important. Need answer to question what the settlement will do to TP rights?

[would extinguishment of T rights be in essence an inverse condemnation?]

→ result was a large inventory of poor quality fish. yet Exxon claimed no effect on fish price.
↳ of spill

Need 6 mos

4/16 Henry
Attorney Gen Cole
Plea Agreement
③ doesn't know why Alyeska
He didn't see plea agmt.
letter
He agreed not to prosecute Exxon @ state level

~~Cliff~~
~~Bill~~
~~Gene~~
~~Phillips~~
MG → Ask the criminal statutes
Fran

→ Ask Baily if there ever was a decision not to prosecute by the Cowper adm'n.
"demand"
It was Exxon's idea not to ∆ Alyeska.

Gene
Cliff
Hudg
Nii'o

Matt Jaimin
3 problems w/settlement
1. Alyeska should not be released

2 Complete indemnification of Aka by Exxon

3 State should not settle the claims where it is a T.ee.
"Trust" claim is for lost resources
non trust claim is for reimbursement for out of pocket expenses

1. Alyeska should not be released

2. Indemnification - Exxon should completely indemnify the state.

Problems w/ ¶ 32 13(c) + 13(b)
in light of 32

3 State as Tee
science developed as part of Tee relationship
It is "a public trust"

→ delay for 6 mos w/ independent counsel
Tee protection
1. public participation beyond advisory bd.
2 audit of trust
3 open meetings of Tees

4. regulations must be subject to APA

~~Hudson~~
~~Hudson~~
~~AAG~~
~~[illegible]~~
→ Fisheries Enhancement $ should be
→ to Regional Aquaculture Assns

VVIP added like 313(d) CD

Raw Fish Tax
40% - 2% state
- 2% Mun.

get AG opinion tomorrow → Can we use 4% fund for litigation
+ analyze the case
+ potential for recovery