Chapter IX

REGULATION OF PETROLEUM

A. Bulk Storage

Requirements under both federal and some states' laws govern bulk storage of petroleum. While these provisions also contain spill reporting requirements, those requirements will be discussed in Chapter X. Further, state requirements applicable in New York will be discussed.

1. Federal Requirements

Federal regulations under RCRA cover underground storage tanks ("USTs") of at least 110 gallons which store petroleum or any substance defined as hazardous under CERCLA. 40 C.F.R. Part 280. (Hazardous waste tanks are excluded, since they are regulated as hazardous waste storage facilities under RCRA, pursuant to state regulations contained in 6 N.Y.C.R.R. Part 373.)

Under the federal UST standards, tanks must be registered (registration in New York has been delegated to DEC), 40 C.F.R. §280.22, and operating requirements are specified, including spill and overflow protection, inspection, maintenance of corrosion protection, and recordkeeping. 40 C.F.R. §§280.30-280.34. A method of release detection (such as tank tightness testing or inventory control) must be provided. 40 C.F.R. §280.41. Performance standards for new USTs are specified (including construction with fiber-glass-reinforced plastic, cathodically-protected steel, or other corrosion-proof materials), 40 C.F.R. §280.20, and existing USTs were required to be upgraded by December 22, 1998. 40 C.F.R. §280.21. Closure requirements are specified, 40 C.F.R. §§280.70-280.74, as well as financial responsibility requirements. 40 C.F.R. §§280.90-280.115.

2. New York State Requirements

Some states also regulate bulk storage of petroleum. Pursuant to Title 10 of Environmental Conservation Law Article 17, and regulations set forth at 6 N.Y.C.R.R. Parts 612, 613 and 614, New York requires registration and sets forth performance standards for bulk storage of petroleum in above-ground and below-ground tanks of greater than 1,100 gallons. Effective July 21, 2009, New York has broadened the definition of a regulated "facility" to include underground tanks totaling as little as 110 gallons (unless for on-premises heating or a farm). The new definition is as follows:

> "Facility" means a single property or contiguous or adjacent properties used for a common purpose which are owned or operated by the same person on or in which are located:
>
> a. one or more stationary tanks which are used singularly or in combination for the storage or containment of more than one thousand one hundred gallons of petroleum; or
>
> b. any tank whose capacity is greater than one hundred ten gallon that is used for the storage or containment of petroleum, the volume of which is ten percent or more beneath the surface of the ground.

ECL §17-1003(1). The law includes exceptions for certain heating oil tanks with a capacity less than 1,100 gallons used solely for on-premises consumption, and a farm or residence that includes tanks 1,100 gallons or less used to store motor fuel for non-commercial purposes. ECL §17-1003(1).

Further, the definition of "petroleum" was amended, effective July 21, 2009, to include:

> a. crude oil and any fraction thereof;
>
> b. any mixture containing crude oil or any fraction thereof; and
>
> c. synthetic forms of lubricating oil, dielectric oils, insulating boils, hydraulic oils and cutting oils.

ECL §17-1003(5). There are exceptions for hazardous wastes (as defined by ECL §27-0903), hazardous substance (as defined by ECL §40-0105), "animal or vegetable oils," and "substances that are gases at standard temperature and pressure." ECL §17-1003(5).

Under DEC regulations, new underground storage tanks must meet specified standards, including proper materials (plastic, cathodically protected steel, or fiberglass-clad steel) and a leak monitoring system. 6 N.Y.C.R.R. §614.2. New aboveground tanks must also meet construction requirements, be underlain by impermeable barriers, and include a leak monitoring system. 6 N.Y.C.R.R. §614.8. Requirements for new pipes are also specified. 6 N.Y.C.R.R. §614.14.

New and existing tanks must meet the handling and storage requirements set out at Part 613. These include overfill protection (including color coding) and secondary containment systems, inventory records (except No. 5 or 6 fuel oil), tightness testing of USTs, and inspection of aboveground facilities. Further, closure requirements apply to even tanks taken out of service temporarily for 30 days, and permanently closed USTs must be removed or filled with an inert material. 6 N.Y.C.R.R. §614.9.

Major petroleum facilities of greater than 400,000 gallons are regulated under Part 610. Waste oil facilities must be permitted, and must have a SPCC plan, as required under the Clean Water Act, and a contingency plan for fires, explosions, or other emergencies. 6 N.Y.C.R.R. §360-14.3.

Extensive requirements for petroleum storage tanks are also set forth in the New York State Fire Code, including the requirement that tanks taken out of service for more than one year must be permanently closed.

B. PETROLEUM SPILLS UNDER FEDERAL LAW

Several federal statutes provide for liability arising out of oil spills.

1. CERCLA

CERCLA specifically exempts petroleum, and thus does not apply even if petroleum exhibits a hazardous characteristic. CERCLA §§101(14,33), 42 U.S.C. §9601(14,33); *Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 901 (9th Cir. 1989); *Southern Pacific Transportation Co. v. California*, 34 E.R.C. 1188 (C.D. Cal. 1991). However, if petroleum is contaminated with hazardous substances (such as a hazardous solvent), it may fall under CERCLA. *U.S. v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992).

2. RCRA

There is no petroleum exclusion under RCRA, 42 U.S.C. §6901, *et seq.* (or under New York Environmental Conservation Law Article 27, governing hazardous wastes). Thus, once removed, soil contaminated by spilled or leaked materials such as petroleum may be "solid waste." *Zands v. Nelson*, 779 F.Supp. 1254 (S.D. Cal. 1991); *see also* 6 N.Y.C.R.R. §371.1(c)(2), 40 C.F.R. §261.2.

In some circumstances, petroleum-contaminated soil can be "hazardous waste." While constituents of petroleum, such as benzene and toluene, are listed as hazardous wastes, 6 N.Y.C.R.R. §371.4, petroleum itself is not considered a listed hazardous waste. However, petroleum-contaminated soil may be considered a hazardous waste if it exhibits one of the characteristics of hazardous waste such as ignitability or toxicity under the TCLP test. *See, e.g.*, DEC STARS Memo #1, *Petroleum-Contaminated Soil Guidance* at 3. Nonetheless, if soil only exhibits TCLP toxicity, and it comes from leaking USTs subject to corrective action under

federal UST regulations, it is exempted from being classified as hazardous. 40 C.F.R. 261.4(b)(10).

Although RCRA and Title 9 of ECL Article 27 regulate the management of hazardous wastes, they probably do not, in general, create any responsibility with regard to contaminated soil until it is actively managed by excavation. *See, e.g.*, DEC STARS Memo. #1, *Petroleum Contaminated Soil Guidance* (1992) at 3; *AL Tech Specialty Steel Corp. v. EPA*, 674 F.Supp. 72 (N.D. N.Y. 1987), *aff'd* 846 F.2d 158 (2d Cir. 1988).

3. Oil Pollution Act of 1990

This federal law creates a scheme very similar to CERCLA for discharges of oil on the high seas. Under the Oil Pollution Act, "each responsible party for a vessel or a facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone" is strictly liable for removal costs and damages including damages to natural resources and property. Oil Pollution Act §1002 (a,b), 33 U.S.C. §2702(a,b). Defenses are provided for acts of God and war, and actions of third parties, as well as gross negligence of a claimant. Oil Pollution Act §1003, 33 U.S.C. §2703.

If, following presentation, a responsible party fails to pay a claim, the claimant may proceed to either file a claim with the federal Oil Spill Liability Trust Fund, or file an action against a responsible party in court. Oil Pollution Act §1013, 33 U.S.C. §2713. The federal government can use the fund to pay claims and the cost of cleanup consistent with the National Contingency Plan, §1012, 33 U.S.C. §2712, and it can sue responsible parties to recover its costs. Clean Water Act §311 (f,g,h,i), 33 U.S.C. §1321(f,g,h,i), discussed above, does "not apply to any incident for which liability is established" under the Oil Pollution Act. §2002(a).

C. NEW YORK OIL SPILL LAW

New York Navigation Law Article 12 (the "Oil Spill Law") is the primary mechanism to deal with liability and cleanup for oil spills on land and water in New York State. Some states have similar laws, which are important due to the petroleum exclusion in CERCLA. The New York Oil Spill Law, enacted in 1977, prohibits the unpermitted discharge of petroleum. It follows the same basic pattern as the Superfund statutes, creating strict liability for "[a]ny person who has discharged petroleum," Navigation Law §181, and providing for cleanup financed by a government fund.

The law generally prohibits the "discharge of petroleum," but does not apply to discharges "in compliance with the conditions of a federal or state permit." Navigation Law §173. "Discharge" is defined to include all "intentional and unintentional... releasing, spilling, leaking... of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters..." Navigation Law §172(8). Those "waters" include "all lakes, springs, streams and bodies of surface or ground water." §172(18). Accordingly, even spills on the land that "might flow or drain" into "ground water" are covered.

Under the New York Oil Spill Law, DEC is authorized to clean up an oil spill site and hire contractors to assist it. Navigation Law §176. Such cleanups are funded by the New York Environmental Protection and Spill Compensation Fund (the "Oil Spill Fund"). Navigation Law §186. Dischargers are required to immediately contain a spill, §176(1), can be directed by DEC to undertake a cleanup, §176(2), or may voluntarily remediate with the approval of DEC and (if applicable) federal authorities. §176(7)(a). The state can recover its damages, including cleanup costs, under Navigation Law §181(1), which provides that a discharger is liable for "all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained."

Cleanups should be consistent with the federal National Contingency Plan. Navigation Law §176(4). Ground and surface water standards for various substances, including oil and constituents of petroleum are set forth at 6 N.Y.C.R.R. Part 703. For oil, the standards require no "visible oil film nor globules of grease." 6 N.Y.C.R.R. §703.2.

Residents faced with a health risk can be relocated through an emergency oil spill relocation network headed by the New York State Commissioner of Health. Navigation Law §177-a. If a discharger fails to relocate residents as recommended, pursuant to Navigation Law §176(7)(c), it can be liable for double the cost incurred by the Oil Spill Fund in such relocation. Navigation Law §181(1). Residents faced with a health risk can be relocated through an emergency oil spill relocation network headed by the Commissioner of Health. Navigation Law §177-a. If a discharger fails to relocate residents as recommended, pursuant to Navigation Law §176(7)(c), it can be liable for double the cost incurred by the Oil Spill Fund in such relocation. Navigation Law §181(1).

While DEC can proceed through formal administrative proceedings to require cleanups and collect fines for failure to report or clean a site, generally it proceeds through negotiated settlements that are memorialized in "consent orders," or a short uniform "Stipulation Agreement," by which an alleged discharger agrees to clean up a spill, but would not admit to liability.

The courts have broadly construed liability under the Oil Spill Law applies to encompass "any party discharging oil." *State v. Stewart's Ice Cream Co., Inc*., 64 N.Y.2d 83, 86, 484 N.Y.S.2d 810, 811 (1984). The operator of a facility which leaked gas, oil, or other forms of petroleum into the ground will generally be strictly liable for cleanup costs under the Oil Spill Law. *State v. King Service*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep't 1990); *Roosa v.*

Campbell, 291 A.D.2d 901, 737 N.Y.S.2d 461 (4th Dep't 2002). This may include both the operator of a service station, and an oil company that owns the tanks. *Leone v. Leewood Service Station, Inc.*, 212 A.D.2d 669, 624 N.Y.S.2d 610 (2d Dep't 1995), *mot. den'd* 86 N.Y.2d 709, 634 N.Y.S.2d 443 (1995); *State v. Tartan Oil Corp.*, 219 A.D.2d 111, 638 N.Y.S.2d 989 (3d Dep't 1996).

Furthermore, any person who "set in motion the events which resulted in the discharge" is liable, even if there is "no proof is required of a specific wrongful act or omission which directly caused the spill." *Domermuth Petroleum Equipment & Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 A.D.2d 957, 490 N.Y.S.2d 54, 56 (3d Dep't 1985); *see also State v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001). For example, a truck driver may be liable for a discharge from his truck resulting from an accident he did not cause. *Merrill Transport Co. v. State*, 94 A.D.2d 39, 43, 464 N.Y.S.2d 249, 252 (3d Dep't 1983), *mot. den'd* 60 N.Y.2d 555, 467 N.Y.S.2d 1030 (1983). While an owner is not automatically liable, a discharger will include landowners "who have both control over activities occurring on their property and reason to believe that their tenants will be using petroleum products." *State v. Green*, 96 N.Y.2d 403, 729 N.Y.S.2d 420 (2001). Liability turns on a "party's capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill." *State v. Speonk Fuel, Inc.*, 3 N.Y.3d 720, 724, 786 N.Y.S.2d 375, 378 (2004).

Navigation Law §181(5) provides the following private right of action:

> Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who discharged the petroleum.

This does not preempt other available common law and equitable remedies. Navigation Law §193; *Calabro v. Sun Oil Co.*, 276 A.D.2d 858, 714 N.Y.S.2d 781 (3d Dep't 2000). In *White v. Long*, 85 N.Y.2d 564, 626 N.Y.S.2d 989 (1995), the Court of Appeals decided that "faultless" owners can sue other dischargers under section 181(5) even if they qualify as a discharger liable under this law.

Navigation Law §176(8) provides that "every person providing cleanup, removal of discharge of petroleum or relocation of persons" pursuant to the Oil Spill Law "shall be entitled to contribution from any other responsible party. *See Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000); *145 Kisco Ave. Corp. v. Dufner Enterprises, Inc.*,198 A.D.2d 482, 604 N.Y.S.2d 963 (2d Dep't 1993). When considering the question of contribution, the court must make a determination of "comparative fault." *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep't 2002). Furthermore, under Navigation Law §190, not only the state, *State of N.Y. Central Mutual Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep't 1989), but also an injured party may bring suit directly against a discharger's *insurer* under the Oil Spill Law. *Snyder v. Newcomb Oil Co., Inc.*, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993).

The New York Oil Spill Law provides limited defenses. Defenses for an "owner or operator of a major facility or vessel responsible for a discharge" include an "act or omission solely caused by war, sabotage, or government negligence." Navigation Law §181(4). Defenses are also provided for "responders," Navigation Law §178-a; *see Hilltop Nyack Corp. v. TRMI Holdings*, 275 A.D.2d 440, 712 N.Y.S.2d 888 (2d Dep't 2000), good Samaritans, §176(7)(b), and volunteer firemen, §181(6), provided there is no "willful or gross negligence," as well as

non-negligent cleanup contractors. §176(7)(a). A defense for acts of third parties, similar to the defense under CERCLA, was added to the law in 2003 at Navigation Law §181(4), and provides:

> an act or omission caused solely by... (ii) and act or omission of a third party other than an employee or agent of the person responsible, or a third party whose act or omission occurs in connection with a contractual relationship with the person responsible, if the person responsible establishes by a preponderance of the evidence that the person responsible (a) exercised due care with respect to the petroleum concerned, taking into consideration the characteristics of petroleum and in light of all relevant facts and circumstances; and (b) took precautions against the acts or omissions of any such third party and the consequences of those acts or omissions.

Under New York CPLR §214, actions for property damage (or personal injury) must be brought within three years of the date of accrual of the claim. *New York v. King Service*, 167 A.D.2d 777, 563 N.Y.S.2d 331 (3d Dep't 1993). However, under CPLR §214-c, the time limit is extended to three years from the time of discovery of latent injuries. Further, claims for response costs in the nature of indemnification or contribution are subject to the six-year statute of limitations under CPLR §213, *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep't 2002). Claims for response costs in the nature of indemnification or contribution are subject to the six-year statute of limitations under CPLR §213, *State v. Griffith Oil Co., Inc.*, 299 A.D.2d 894, 750 N.Y.S.2d 685 (4th Dep't 2002). For each expense, the six years begins to run at the time of the expenditure. *State v. Speonk Fuel, Inc.*, 3 N.Y.3d 720, 786 N.Y.S.2d 375 (2004). For each expense, the six years begins to run at the time of the expenditure. *State v. Speonk Fuel, Inc.*, 3 N.Y.2d 720, 786 N.Y.S.2d 375 (2004).

Generally, a discharger is liable for "all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained." Navigation Law §181(1); *see also* Navigation Law §181(5). "Indirect damages" include "all costs associated with the cleanup and removal of

a discharge." *AMCO International, Inc. v. Long Island Railroad Co.*, 302 A.D.2d 338, 754 N.Y.S.2d 655 (2d Dep't 2003). Damages may also include natural resource damages, "[l]oss of income or impairment of earning capacity due to damage to real or personal property," loss of tax revenues to local governments, and interest on loans obtained for the purpose of "ameliorating the adverse effects" of a discharge. Navigation Law §181(2).