

Why Lawyers Should NOAA what CERCLAs in our Oceans: Laws and Regulations Governing Ocean Dumping

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I. Introduction

North Carolina heavily relies on clean coastal conditions for healthy coastal communities and a robust economy. The total economic impact of the seafood industry in North Carolina was \$336,537,384 in 2008,¹ though this impact has been decreasing since 2000.² The beach tourism and recreational sectors generated a total economic impact of approximately \$2.5 billion in 2008.³ These two industries contribute substantially to North Carolina's Gross Domestic Product ("GDP"), and are highly dependent on the coast. More specifically, these industries rely heavily on clean coastal water conditions.⁴ In light of the fact that 29% (approximately eighty-seven million people) of this nation's population resides in coastline counties (counties bordering coastal water or territorial sea),⁵ it is important to understand how these laws and regulations function and influence future decision making.

Part II gives a brief history of international ocean dumping regulations and their importance in the development of dumping legislation in the United States. Part III describes federal laws and regulations concerning ocean dumping. Part IV explains how federal and state regulations interact. Part V gives examples of recent instances of ocean dumping. Part VI

¹ DIVISION OF COASTAL MANAGEMENT, N.C. DEP'T. OF ENV'T AND NAT. RESOURCES, NC BEACH AND INLET MANAGEMENT PLAN FINAL REPORT, IV-24 (April 2011) [hereinafter NC BEACH REPORT], available at http://www.nccoastalmanagement.net/BIMP/BIMP%20Section%20IV%20-%20Socio-Economic%20Value%20of%20NC%20Beaches%20and%20Inlets_Formatted.pdf.

² SCOTT CROSSON, N.C. DIV. OF MARINE FISHERIES, A SOCIAL AND ECONOMIC ANALYSIS OF COMMERCIAL FISHERIES IN NORTH CAROLINA: BEAUFORT INLET TO THE SOUTH CAROLINA STATE LINE 16 (July 2010), available at http://portal.ncdenr.org/c/document_library/get_file?uuid=e62142f8-7844-4e88-a343-5802f1706408&groupId=38337.

³ NC BEACH REPORT, *supra* note 1, at IV-13.

⁴ Pam Smith, *Stepping up the Pace for Coastal Water Quality*, SEAGRANT N.C. (2009), <http://www.nceagrant.org/home/coastwatch/coastwatch-articles?task=showArticle&id=619>.

⁵ STEVEN G. WILSON & THOMAS R. FISCHETTI, US CENSUS BUREAU, COASTLINE POPULATION TRENDS IN THE UNITED STATES: 1960 TO 2008 1 (May 2010), available at <http://www.census.gov/prod/2010pubs/p25-1139.pdf>.

addresses effective legislation and explains incentives programs that attempt to mitigate illegal ocean dumping.

II. Initial International Regulation

An understanding of international regulations is important to any coastal state because the United States played a large role in developing and writing them, and they are reflected in both state and federal laws and regulations. Historically, countries worldwide have used the ocean as a dumping ground for unwanted wastes. It was not until the London Convention (Convention) in 1972 that global rules and standards were established.⁶ The Convention recognized the importance of regulating pollution of the ocean due to hazardous effects of dumping on humans, marine life, and other living resources.⁷ Among other things, the Convention defined “dumping”⁸ and directed each involved state to take effective measures to control pollution.⁹ The convention assigned a geographic area to each state and made that state responsible for protecting the geographic area from harmful dumping.¹⁰ The Convention states that parties involved must promote effective prevention methods to address pollution,¹¹ but it does not specifically list methods by which the parties should go about their obligations. The Convention only specified compositions of the matters being dumped, dumping sites, method of dumping, and general considerations and conditions.¹²

⁶ *Marine Pollution: Ocean Dumping*, NOAA OFFICE OF GEN. COUNCIL, http://www.gc.noaa.gov/gcil_mp_ocean_dumping.html (last updated September 12, 2012).

⁷ Int'l Maritime Org. [IMO], *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, Art. I (1972), available at http://www.gc.noaa.gov/documents/gcil_lc.pdf.

⁸ *Id.* at 2.

⁹ *Id.* at 3.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 1–2.

¹² *Id.* at 13–14.

The United Nations Convention on the Law of the Seas (“LOSC”) followed with similar rules and regulations for ocean dumping in 1982.¹³ The LOSC urged that countries have general obligations to protect the marine life and environment.¹⁴ The 1996 London Protocol was held to further define the obligations to prevent pollution and add necessary steps due to changing technology and conditions.¹⁵ The London Protocol further limits ocean dumping to only a small list of waste.¹⁶ The London Convention and Protocol prompted several different parties who were involved to make their own national rules and regulations.¹⁷ Many different governmental agencies and non-governmental organizations emerged during that time, including the International Maritime Organization (IMO); the U.S. Environmental Protection Agency (EPA); the Marine Protection, Research, and Sanctuaries Act (MPRSA); and the National Oceanic and Atmospheric Administration (NOAA).¹⁸

III. Federal Laws and Regulations

In 1980, the United States Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the Superfund, which, among other things, created a tax on chemical and petroleum industries that is used to help fund cleanup of hazardous ocean dumping sites.¹⁹ One of the purposes of CERCLA was to shift the burden of environmental hazards from taxpayers to those that benefitted from the chemical disposal that resulted in the hazard.²⁰ In 1986, Congress amended CERCLA with the

¹³ NOAA OFFICE OF GEN. COUNCIL, *supra* note 6.

¹⁴ Jay M. Zitter, Annotation, *Destruction and Application of United Nations Convention on the Law of the Sea—Global Cases*, 21 A.L.R. FED. 2d 109 (2007).

¹⁵ NOAA OFFICE OF GEN. COUNCIL, *supra* note 6.

¹⁶ IMO, *supra* note 7.

¹⁷ *Id.*

¹⁸ NOAA OFFICE OF GEN. COUNCIL, *supra* note 6.

¹⁹ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675) (1980) [hereinafter CERCLA].

²⁰ John L. Ropiequet, *Environmental Law Litigation under CERCLA*, 47 Am. Jur. Trials 1, § 1 (Aug. 2012).

Superfund Amendments and Reauthorization Act (SARA).²¹ SARA essentially increased the taxes for the trust fund and looked at new remedies for permanent clean up encouraged by new technologies.²²

CERCLA presents an extremely high regulatory burden for potentially responsible parties (PRPs) who dispose of hazardous chemicals, particularly when such disposal occurred before the SARA amendments.²³ Although a PRP may have been in compliance with all laws and regulations when it disposed of chemicals, it may still be held accountable if the site later becomes hazardous.²⁴

The Resource Conservation and Recovery Act (RCRA) regulates businesses that use hazardous material and gives EPA the authority to control the hazardous chemicals.²⁵ The ocean is a large dumping site for companies disposing of used chemicals.²⁶ Any amendments in ocean dumping laws and regulations could result in exposure to liabilities for companies that had previously legally dumped in the ocean.

When an ocean dumpsite is determined hazardous by EPA, the agency determines the PRPs, who are then responsible for the cleanup or must pay for EPA's cost to cleanup, determined by CERCLA, if found liable.²⁷ Normally, the cleanups costs can cost several million

²¹ Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

²² *Id.*

²³ 42 U.S.C. §§ 9601-9675.

²⁴ *Id.*

²⁵ Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976).

²⁶ *Id.*

²⁷ 42 U.S.C. §§ 9601-9675.

dollars.²⁸ Additionally, the most heated litigation battles occur between the PRPs themselves in allocating cleanup costs, rather than with EPA's determinations.²⁹

The United States also regulates ocean dumping through the Marine Protection, Research, and Sanctuaries Act (MPRSA), also known as the Ocean Dumping Act.³⁰ Title I prohibits dumping of any hazardous waste beyond the territorial jurisdiction of the United States.³¹ Title II authorizes EPA, the U.S Coast Guard, and the Secretary of Commerce to conduct research on short and long-term effects of ocean dumping.³² Titles I and II of the Ocean Dumping Act offer definitions for states to use when promulgating regulations and set guidelines for states regarding types of permits that should be required, the permitting process, and fees for permit violations.³³ The Secretary of Commerce has directed NOAA to monitor and further research ocean pollution.³⁴

IV. Ocean Dumping and Federalism

Ocean dumping regulations differ from marine fishery regulations along the lines of state and federal government jurisdictions.³⁵ In the marine fisheries context, states govern the first three nautical miles off the coast and the federal government governs approximately from three nautical miles to two hundred nautical miles off the coast.³⁶ Ocean dumping regulations are primarily federal to ensure that the common interests of protecting marine life and the

²⁸ Ropiequet, *supra* note 20.

²⁹ *Id.*

³⁰ Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (1972).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Regulations*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/sfa/PartnershipsCommunications/recfish/regulations.htm> (last visited Jan. 4, 2013).

³⁶ *Id.*

environment are enforced equally and fairly throughout all states.³⁷ The Ocean Dumping Act prohibits dumping within twelve nautical miles of the coast.³⁸

There are many federal and state laws to regulate ocean dumping; ultimately, federal law oversees state programs through federal legislation. For example, federal regulation oversees state programs through eight different subparts.³⁹ These subparts vary from regulating how programs are approved to program operations and enforcement.⁴⁰ The federal regulations also lay out how North Carolina elects its governing body for ocean dumping regulations and oversee which permits are granted and how regulations are enforced.⁴¹ State permits, programs, and review of currently-approved programs are regulated.⁴² The Clean Water Act and CERCLA are given priority to enforce regulations.⁴³ States often are responsible for the inspections and enforcement actions of policies in place.⁴⁴

Generally, states adopt all programs of the federal laws and regulations that are relevant to their boundaries.⁴⁵ However, states have the ability to adopt more stringent ocean dumping standards, as long as they are conducive to federal regulations already established.⁴⁶ A forum, The Environment Council of the United States, was created in an attempt to improve joint planning and communications between states and the EPA.⁴⁷

³⁷ Claudia Copeland, *Ocean Dumping Act: A Summary of the Law*, NOAA, 2 (2010), http://www.gc.noaa.gov/documents/gcil_crs_oda.pdf.

³⁸ Marine Protection Act, 86 Stat. 1052.

³⁹ 40 C.F.R. § 233-404 (2012).

⁴⁰ *Id.*

⁴¹ 40 C.F.R. §233.1- 233.71 (2012).

⁴² 40 C.F.R. §233.50- §233.53 (1988).

⁴³ ROBERT ESWORTHY, FEDERAL POLLUTION CONTROL LAWS: HOW ARE THEY ENFORCED?, 10 (2012), *available at* <http://www.fas.org/sgp/crs/misc/RL34384.pdf>.

⁴⁴ *Id.* at 11.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *About ECOS*, THE ENVTL. COUNCIL OF THE STATES, <http://www.ecos.org/> (last visited Jan. 4, 2013).

V. North Carolina Coastal Water Conditions and Illegal Dumping

Ocean dumping is not limited to hazardous liquids; other commonly discarded substances include oil-soaked rags, trash, containers holding hazardous materials, tires, and appliances.⁴⁸ In fact, ocean dumping includes three primary types of waste materials: sewage sludge, industrial wastes, and dredged materials.⁴⁹ During the Ocean Conservancy's International Coastal Cleanups⁵⁰ the main items found were are appliances, batteries, cars/car parts, building materials, 55-gallon drums, and tires.⁵¹ Over the past twenty-five years, Ocean Conservancy's International Coastal cleanup volunteers have recorded the millions of tons of trash collected.⁵²

Despite the increased laws and regulations attempting to control ocean dumping, illegal dumping still occurs frequently. Most illegal dumping happens during the night in international waters far from ports or magic pipes.⁵³ A magic pipe is an alteration to a ship, typically consisting of various hoses and pumps, used to dump large volumes of waste into the ocean.⁵⁴ Magic pipe dumping is widespread and increasingly more common.⁵⁵ These pipes can be assembled, disassembled, and hidden easily, making it very difficult for the U.S. Coast Guard to

⁴⁸ OCEAN CONSERVANCY, INTERNATIONAL COASTAL CLEANUP REPORT, 25 (2011), available at http://act.oceanconservancy.org/pdf/Marine_Debris_2011_Report_OC.pdf.

⁴⁹ Charles B. Anderson, *Ocean Dumping and The Marine Protection, Research and Sanctuaries Act*, 1 Loy. Mar. L.J. 79, 80 (2002).

⁵⁰ Ocean Conservancy's International Coast cleanup is the world's largest volunteer effort for ocean health. It has approximately 9 million volunteers and has 152 countries that participate. OCEAN CONSERVANCY, *supra* note 48.

⁵¹ *Id.* at 26.

⁵² In the past twenty-five years, Ocean Conservancy's International Coastal cleanup volunteers have found and recorded about a million tires, almost three quarters of a million batteries, and approximately 688,000 car parts (occasionally full cars are found). *Id.*

⁵³ CMTS Environmental Stewardship Discussion Group, *The Magic Pipe Epidemic: Combating illegal dumping of oily bilge water from vessels in Federal and international waters*, 2 (July 16, 2012).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1.

find such infractions. In 2010, for instance, the 21,145-ton cargo ship, M/T Chem Faros, entered the port at Morehead City, North Carolina.⁵⁶

When an inspector boarded the boat, a crewmember delivered to him a hand-written note confessing to illegally dumping in the ocean by use of a magic pipe.⁵⁷ Upon further investigation, it was found that the M/T Chem Faros had illegally dumped ten previous times in the previous six months.⁵⁸ The ship's owner was fined \$850,000 and given a five-year probation.⁵⁹

The example above is not unusual. Almost every large competitor in the commercial industry (such as cruise liners, oil tankers, barges) has been found guilty of illegal dumping.⁶⁰ Illegal dumping is not limited to oilers, barges, and large industrial ships—cruise liners are a large concern as well.⁶¹

IV. Effective Legislation

In compliance with international (MARPOL)⁶² and federal law, ships must dispose of oily wastewater and sludge by putting it through an oil-water separator.⁶³ All disposals on ships must be recorded in an oil record book (“ORB”) by a crewmember.⁶⁴ Due to lack of jurisdiction, the United States cannot prosecute a company for the mere act of illegally dumping in

⁵⁶ Ronnie Green, *Illegal ocean dumping persists despite DOJ crackdown*, CENTER FOR PUBLIC INTEGRITY (March 30, 2012), <http://www.publicintegrity.org/2012/03/30/8558/illegal-ocean-dumping-persists-despite-doj-crackdown>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Environment and Natural Resources Division Performance Budget*, U.S. DEP'T OF JUST. 19 (2012), <http://www.justice.gov/jmd/2013justification/pdf/fy13-enrd-justification.pdf>.

⁶¹ CMTS Environmental Stewardship Discussion Group, *supra* note 53.

⁶² International convention for the Prevention of Pollution from ships (MARPOL) is the main international convention that covers prevention of pollution from ships, both accidental and intentional. *International convention for the Prevention of Pollution from ships (MARPOL)*, IMO (2011), [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-\(marpol\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx).

⁶³ 33 C.F.R. §155.38 (a)-(f) (2009).

⁶⁴ 33 C.F.R. §151.25 (a)-(m) (2007).

international waters; however, they can prosecute (crewmembers and ship owners) for lying to investigators, falsifying paperwork, or using illegal diversion devices.⁶⁵

MARPOL Annex I addresses the inconsistency of prior ship inspections by the U.S. Coast Guard and other U.S. agencies.⁶⁶ All inspections are supposed to assess three things: oily water separator (OWS), oil content monitor (OCM), and oil record book (ORB).⁶⁷ These three things are relatively easy to falsify for a large company and it is very easy to use illegal devices such as magic pipes.⁶⁸

Due to the difficulty of illegal ocean dumping detection, the Department of Justice has promoted the use of whistleblowers.⁶⁹ Essentially, crewmembers take pictures or gather other substantial evidence to prove the illegal dumping is occurring in exchange for a monetary reward.⁷⁰ The monetary awards are substantial—typically six figures.⁷¹

According to a report by the Environment and Natural Resources Division of the U.S. Justice Department, the method of monetary reward for whistle blowing (supported by the Vessel Pollution case results)⁷² has been successful.⁷³ The Vessel Pollution Program has

⁶⁵ GARD AS: MARPOL, *Oily water separator bypass in the US- The tables are turned*, GARD NEWS, Feb. 2008, at 189, available at <http://www.scribd.com/doc/60290253/Marpol-Annex-1>.

⁶⁶ GARD AS: MARPOL, *MARPOL Annex I- Concentrated inspection campaign and US Coast Guard Policy Letter*, 28 (2008), available at <http://www.scribd.com/doc/60290253/Marpol-Annex-1>.

⁶⁷ 33 C.F.R. §151 (2002).

⁶⁸ Green, *supra* note 56.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² “The Vessel Pollution Program is an ongoing, concentrated effort to detect, deter, and prosecute those who illegally discharge pollutants from ships into the oceans, coastal waters and inland waterways.” *Environment and Natural Resources Division Performance Budget*, U.S. DEP’T OF JUST., 18 (2012), <http://www.justice.gov/jmd/2013justification/pdf/fy13-enrd-justification.pdf>.

⁷³ *Id.* at 18–19.

imposed \$200 million in criminal fines and sentenced a combined aggregate of over seventeen years of prison terms over the past ten years.⁷⁴

Although the promotion of whistleblowers has been successful, it has taken much criticism from ship owners. Ship owners have protested the encouragement of whistle blowers to agencies because the ship owners feel they cannot compete with the large rewards that are offered for information concerning illegal ocean dumping activity.⁷⁵ Ship owners have policies and procedures in place for infractions that occur on their ships but feel that the federal monetary rewards are counter intuitive because crewmembers go directly to the authorities rather than following ship procedure.⁷⁶

V. Conclusion

Despite the strict laws and regulations on ocean dumping, illegal dumping occurs both knowingly and unknowingly frequently, often resulting in contamination of coastal waters that marine life, humans, and commerce rely upon heavily. While some successful programs rely on ship side whistleblowers to prevent and catch illegal dumping, the method is contentious and ocean dumping is still pervasive.

⁷⁴ *Id.* at 18.

⁷⁵ Green, *supra* note 56.

⁷⁶ *Id.*