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The Port of Oakland Decision: California Oil Spill Legislation Gets Watered Down

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THE *PORT OF OAKLAND* DECISION: CALIFORNIA OIL SPILL LEGISLATION GETS WATERED DOWN

While public concern about the destructive effects of oil pollution has grown, the frequency of oil spills on coastal waters has nevertheless accelerated at an alarming rate.[1] Prompted by this environmental crisis, the California legislature has enacted a number of statutes to address this problem of oil pollution. One such statute is Water Code section 13350.[2] An oil spill in the Oakland Estuary precipitated an action by the California Attorney General pursuant to subsection (a)(3) of section 13350. Responding to a petition for a writ of mandate, the California Supreme Court, in *People ex rel. Younger v. Superior Court* [hereinafter referred to as *Port of Oakland*],[3] interpreted this statute for the first time. The court's decision focused on three distinct issues presented by subsection 13350(a)(3): (1) possible municipal tort immunity; (2) the appropriate standard of liability; and (3) the amount of recoverable damages.

This Comment will analyze the *Port of Oakland* decision and evaluate its impact on the promotion of environmental protection in California. In particular, this Comment will closely examine the rationale used by the court to support its conclusions and, more

1. As discussed in a recent commentary:

> The grounding of the Torrey Canyon in 1967, the breakup of the Ocean Eagle in Puerto Rican waters in 1968, and the Santa Barbara offshore oil leak in 1969 caused oil pollution to become recognized as a serious national and worldwide problem. An estimated 10,000 spills of oil and other hazardous materials annually pollute the navigable waters of the United States. Although damages from other hazardous substances can be just as significant and diverse as those caused by oil pollution, the volume of oil transported and used makes it the most important single pollutant of this type.

1 F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 3.01, at 3-15 (1975).

2. CAL. WATER CODE § 13350 (West Supp. 1977). Hereinafter, unless otherwise indicated, all textual reference to statutory sections refer to the California Water Code.

3. 16 Cal. 3d 30, 544 P. 2d 1322, 127 Cal. Rptr. 122 (1976).

importantly, will examine crucial factors not considered by the judicial opinion. The effect of the court's silence regarding critical public policy considerations, combined with its failure to follow several standard rules of statutory construction, has seriously undermined the deterrent impact of subsection 13350(a)(3) to the point where it has become, in essence, nugatory.

I. BACKGROUND OF CALIFORNIA WATER POLLUTION LEGISLATION

As noted by the *Port of Oakland* court, the effect of oil pollution on the environment is incalculable but surely devastating. In 1976, the United States consumed approximately 825,304,606 tons of oil, as compared to 770,146,305 tons in 1975.[4] As consumption of oil has increased, the risk of oil spills has grown commensurately. It has been estimated that between four and ten million metric tons of oil enter the oceans each year.[5] The impact of this oil is felt predominantly in ecologically sensitive areas of the sea, such as the California coast.[6] In the San Francisco Bay Area alone, there are an average of over 300 oil and hazardous substance spills

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4. Letter from Thomas J. Hall, Energy Resource Specialist, Federal Energy Administration (Sept. 22, 1977). The data used in the letter is contained in the OFFICE OF ENERGY INFORMATION AND ANALYSIS, FEDERAL ENERGY ADMINISTRATION, MONTHLY ENERGY REVIEW 2-10 (July 1977) (letter and REVIEW on file in the *Golden Gate University Law Review* Office).

5. Oil enters the world's waters in a variety of ways. *See* Bergman, *No Fault Liability for Oil Pollution Damage*, 5 J. MAR. LITIGATION & COM. 1, 2 (1974).

6. G. ARTUS, A SURVEY OF PREVENTION MEASURES AND CONTINGENCY PLANNING FOR OIL AND HAZARDOUS MATERIAL SPILLS IN THE SAN FRANCISCO BAY AREA 1 (1977).

> Oil is both intentionally and accidently spilled into the ocean waters of the world. Worldwide figures indicate that 85% of the oil which is discharged into the oceans has been the result of routine operations such as cargo tank cleaning, ballasting operations, cleaning tanker bilges, etc. The remaining 15% comes from other accidental sources (e.g., structural failure, groundings, collisions). Looking at these percentages, one might conclude that the most serious sources of oil pollution are the routine discharges. However, one must consider that these discharges are usually made far out at sea where the observable environmental effects are not as severe as those near shore. Most of the accidental vessel spills occur in harbors where a tanker may run aground or along the coast where two ships are likely to collide. Tanker accidents are relatively infrequent, but when they do occur the spill is usually large. Oil spilled near shore then washes onto beaches, into environmentally critical areas such as marshes and estuaries, and into boating marinas.

Id. (footnotes omitted).

reported each year.[7] The extensive damage caused by oil spills has been documented to some degree; nevertheless, scientific research has just begun to explore the full synergistic impact of spills, large and small, throughout the world's waters.[8] Similarly,

7. *Id.*

8. *See* Comment, *Oil Pollution of the Sea*, 10 HARV. INT'L L.J. 316 (1969):

> Some damage to marine life is obvious in the wake of a disaster such as the one which befell the "Torrey Canyon." Surface feeding fishes die when they swim into floating oil, and even slight, nonfatal contact may render their flesh inedible. Shellfish, among others, are also vulnerable to oil pollution. When the tanker "P. W. Thirtle" grounded off Newport, Rhode Island, 31,000 gallons of heavy black oil were discharged from her tanks in an effort to refloat the ship; the result of this was the virtual destruction of the entire oyster fishery of Narragansett Bay. The most serious consequences of oil pollution, however, may not be those which are immediately obvious. According to Dr. Erwin S. Iversen, a marine biologist:
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> "The greatest problem may be the toxic effects on the intertidal animals that serve as food for the more important fishes. . . . I don't think the effect is merely that of killing large populations of commercial fishes. Worse than that, it interrupts the so-called food chain."
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> There have been few specific studies of the effect that oil accumulation has on this food chain. One study, conducted by Dr. Paul Galtsoff of the United States Fish & Wildlife Service, found that the diatoms on which oysters feed will not grow where there is even a slight trace of oil on the water. The effect of oil on such microscopic marine plant life may be of great importance, because it is estimated that it takes as much as ten pounds of plant matter to produce one pound of fish.
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> Large scale oil pollution, such as that which occurred when the "Torrey Canyon" ran into Seven Stones Reef, results in huge losses of water birds. Aside from humane and aesthetic considerations, these birds play a vital role in the ecology of the seashore, a role which profoundly affects the fishing industry. The uncertainty as to the actual extent of the damage done to marine life by oil pollution makes it difficult to estimate the economic effect of such damage, but the importance of the fishing industry within the world's economy is not in doubt and is steadily increasing. Between 1958 and 1963, for example, there was a 42% rise in the world catch. Because of the increasing importance of seafood protein, future damage to marine life will have progressively greater economic consequences.
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> Perhaps the most noticeable damage caused by oil pollution is the fouling of recreational beaches and shorefront property. One-half million tons of oil are washed ashore each year, rendering beaches unfit for swimming and filling the air with unpleasant odors. Besides the annoyance that this causes a vacationing public seeking relief from urban life, economic

legal problems raised by oil spills have only begun to be addressed.[9]

> loss may be considerable. It is estimated for example, that a serious oil spill off Long Island during the summer months would cost resort and beach operators thirty million dollars. Oil spills also create navigational and fire hazards to harbors, ports and marinas.

Id. at 321-323 (footnotes omitted). This is becoming the standard quote describing the damage to coastal areas by oil. It was quoted in Askew v. American Waterways Operators, Inc., 411 U.S. 325, 333-34 n.5 (1973), which is the major case to date wherein the United States Supreme Court confronted the relationship between the federal statutes governing oil spills and state statutes regulating the same area. Justice Sullivan, in *Port of Oakland*, also included this passage as a description of the destructive qualities of oil. 16 Cal. 3d at 37-38 n.5, 544 P.2d at 1326-27 n.5, 127 Cal. Rptr. at 126-27 n.5.

9. When an oil spill of any significant size takes place, states usually work in conjunction with the federal government to clean up and abate the oil pollution. *See* 33 U.S.C. § 1321(c) (Supp. V 1975). The United States Coast Guard is frequently the organization in charge of the cleanup of an oil spill on the coast. Generally, a cleanup company is hired to effectuate the cleanup and costs for this operation are paid out of a $35,000,000 revolving fund. *See id.* § 1321(k). The Justice Department must then institute an action to replenish the fund if responsible parties can be located.

On the federal level, recovery of costs for oil spill cleanup operations is governed by the provisions of 33 U.S.C. § 1321. In brief, subsection 1321(f)(2) provides for strict liability for an onshore facility discharge of oil into the water with total penalties not to exceed $8,000,000. No strict liability is imposed, however, if an owner or operator of the onshore facility can prove that a discharge was caused solely by (1) an act of God, (2) an act of war, (3) negligence on the part of the United States government or (4) an act or omission of a third party. *Id.* § 1321(f)(2). If the government can prove that the discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner, then the owner is liable for the full amount of the cleanup costs in addition to the civil penalties imposed pursuant thereto. *Id.*

The exceptions to strict liability can be a crucial issue of dispute, as in *Port of Oakland*, where the spill was caused by an unknown person opening the valves of the oil tank. However, a recent court of claims decision held that the word "solely" in relationship to acts of third parties did not excuse the liability of the negligent act of ommission by the owners of an oil storage farm. City of Pawtucket v. United States, No. 304-75 (Ct. Cl. Sept. 30, 1976) (dismissal of petition). The facts in *Pawtucket* are analogous to the fact situation in *Port of Oakland*. The City of Pawtucket owned several oil storage tanks which were in a state of disrepair. Because of the lack of security and disrepair of the premises, vandals were able to break in and cause an oil spill. The City of Pawtucket sought reimbursement for cleanup costs pursuant to 33 U.S.C. section 1321(i)(1). The court found that the City's omissions constituted a cause of the spill; therefore, the vandal was not the sole cause. The court granted summary judgment to the defendants in the action and dismissed the City's petition.

In California, the state cannot afford to risk cleaning up a large spill. Under California statutes, the state has the burden of proving that the spill resulted from the intentional or negligent acts of the polluter in order to recoup the cost. CAL. HARB. & NAV. CODE § 151 (West Supp. 1977).

On the state level, oil spills are reported first to the Office of Emergency Services (OES) in Sacramento. The call may be made by the spiller, by someone who has discovered the spill or by the Coast Guard, who by law must be notified immediately if

The Dickey Act of 1949[10] was the first comprehensive water pollution legislation in California. However, the recognized ineffectiveness of the Act influenced the California legislature in 1969 to repeal it and to enact the Porter-Cologne Water Quality Control Act.[11] Not only did this new legislation retain the nine regional boards which had been created by the Dickey Act as the principal state agencies responsible for the coordination and control of water quality,[12] but it increased the authority of the state board,

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there is any spill in navigable waters. The information received by the OES is then channeled to the appropriate agencies. There have been some problems with this notification system because of time lags between agencies which decrease the effectiveness of investigation. G. ARTUS, *supra* note 6, at 24-25. Because of past breakdowns in communications, efforts have recently intensified to coordinate concerned agencies. *See, e.g.*, California Regional Water Quality Control Board, Memorandum of Understanding Between State Water Resources Control Board and Department of Fish and Game Concerning Oil Spills (Sept. 26, 1973) (on file in the *Golden Gate University Law Review* Office).

10. Former Water Code division seven, "Water Pollution," was added by 1949 Cal. Stats. 2782. The Dickey Water Pollution Act of 1949 included Water Code sections 13000-13806.

11. The Porter-Cologne Act amended division seven of the California Water Code, and is codified in California Water Code sections 13000-13806. The Act received the attention of commentators almost immediately. *See, e.g.*, Robie, *Water Pollution: An Affirmative Response by the California Legislature*, 1 PAC. L.J. 2 (1970). Robie, a member of the California State Water Resources Control Board and a former consultant to the California Assembly Committee on Water, made several comparisons in his article between definitions in the Porter-Cologne Act and in the repealed Dickey Act:

> The new definition deletes the reference to "adverse" in order to eliminate the need to show harm or damage and instead it relies entirely upon the reasonableness of the action of the regional boards and the State Board to protect beneficial uses . . . .
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> . . . The Dickey Act definition of contamination required an actual hazard. The elimination of the word "actual" from the definition means that the state need not show an existing hazard but can act when a hazard is threatening.
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> . . . .
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> The Dickey Act definition of nuisance was considered to be practically unenforceable because of its requirement of proof of the vague element of "unreasonable practices" and resulting damages.

Id. at 7-8 (footnote omitted).

12. *See* CAL. WATER CODE §§ 13001, 13200 (West 1971). Additionally, the Porter-Cologne Act provides for a number of pollution abatement enforcement situations. *See id.* §§ 13260-13265. These sections regulate waste discharge requirements. Basically, discharging of waste into the state waters is considered a privilege, not a right. *Id.* § 13263(g). Thus, a person discharging waste or proposing to do so must submit a report to the regional board for approval. *Id.* § 13260. The board then considers all relevant factors (*e.g.*, environmental impact) to determine the particulars of allowable discharge, if any. *Id.* § 13263. The Attorney General, at the request of the regional board, shall petition a superior court to issue a temporary restraining order, preliminary injunction,

as well.[13]

The original version of subsection 13350(a)(1) of the Porter-Cologne Act imposed civil liability for the intentional or negligent violation of cease and desist orders.[14] This subdivision was sub-

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permanent injunction or combination thereof against violators of these discharge requirements. *Id.* § 13262. Moreover, CAL. WATER CODE § 13304 (West Supp. 1977) provides in pertinent part:

> Any person who discharges waste into the waters of this state in violation of any waste discharge requirement or other order issued by a regional board or the state board, or who intentionally or negligently causes or permits any waste to be discharged or deposited . . . into the waters of this state . . . shall upon order of the regional board clean up the waste . . . or, in the case of threatened pollution or nuisance, take other necessary remedial action.

If the government does the cleanup and abatement, the discharger is liable for the costs incurred. *Id.*

A state may administer its own permit program (and thereby assume permit control previously administered by the federal government) for discharges into navigable waters if the program receives approval from the administrator of the Environmental Protection Agency. A state standard is not considered satisfactory unless it is shown that there is adequate state authority "[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7) (Supp. V 1975).

When the California Legislature enacted chapter 5.5 of division 7 of the Water Code (sections 13350-13389), California became the first state to receive the administrator's approval for operation of a permit system and thereby qualified for federal funding under the National Pollutant Discharge Elimination System (NPDES) program. The effectiveness of California's enforcement of antipollution law will influence federal funding.

13. The authority of the state board was increased to establish guidelines for the regional boards to follow, to aid the state board in reviewing regional board actions and to take appropriate action itself to prevent pollution or nuisance associated with treatment or disposal of waste. *See* G. Craig, California Water Law in Perspective, *published in* CAL. WATER CODE LXXXIV (West 1971); *see also* CAL. WATER CODE §§ 13140-13147, 13164, 13320 (West 1971).

14. Prior to its amendment in 1971, CAL. WATER CODE § 13350 (West 1971) provided:

> (a) Any person who intentionally or negligently violates any cease and desist order hereafter issued, reissued, or amended by a regional board or the state board may be liable civilly in a sum of not to exceed six thousand dollars ($6,000) for each day in which such violation occurs.
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> (b) The Attorney General, upon request of the regional or state board, shall petition the superior court to impose, assess and recover such sums. In determining such amount, the court shall take into consideration all relevant circumstances, including but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs and corrective action, if any, taken by the discharger.
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> (c) The provisions of Articles 3 (commencing with Section 13330) and 6 (commencing with Section 13360) of this chapter

stantially amended in 1971 to include subsection (a)(2), which dealt with intentional or negligent violations of waste discharge regulations, and subsection (a)(3), which affected liability for the deposit of oil in state waters.[15] The 1971 amendment also included the requirement in subsection 13350(b) which required, prior to trial court review, a hearing before a regional or state board with due notice to all affected persons.[16] Subsection 13350(d) was also added to provide that the remedies stated in section 13350 were in addition to, and not in supersession of, any other remedies, civil or criminal.[17] The provisions of 13350(a)(3),

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shall apply to proceedings to impose, assess and recover an amount pursuant to this article.

15. *See* 1971 Cal. Legis. Serv. 1322, ch. 668, § 1. Section 13350 now reads:

(a) Any person who (1) intentionally or negligently violates any cease and desist order hereafter issued, reissued, or amended by a regional board or the state board, or (2) in violation of any waste discharge requirement or other order issued, reissued, or amended by a regional board or the state board, intentionally or negligently discharges waste or causes or permits waste to be deposited where it is discharged into the waters of the state and creates a condition of pollution or nuisance, or (3) causes or permits any oil or any residuary product of petroleum to be deposited in or on any of the waters of the state, except in accordance with waste discharge requirements or other provisions of this division, may be liable civilly in a sum of not to exceed six thousand dollars ($6,000) for each day in which such violation or deposit occurs.

(b) The Attorney General, upon request of a regional board or the state board shall petition the superior court to impose, assess, and recover such sums. Except in the case of violation of a cease and desist order, a regional board or the state board shall make such request only after a hearing, with due notice of the hearing given to all affected persons. In determining such amount, the court shall take into consideration all relevant circumstances, including but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs and corrective action, if any, taken by the discharger.

(c) The provisions of Articles 3 (commencing with Section 13330) and 6 (commencing with Section 13360) of this chapter shall apply to proceedings to impose, assess and recover an amount pursuant to this article.

(d) Remedies under this section are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal.

CAL. WATER CODE § 13350 (West Supp. 1977).

16. *Id.* § 13350(b). For the text of subsection (b) see note 15 *supra*.

17. *Id.* § 13350(d). For the text of subsection (d), see note 15 *supra*. Additionally, damages recovered under section 13350 are paid into the State Water Pollution Cleanup and Abatement Account. *See id.* § 13441(c). This account is then disbursed according to

regarding liability for oil spills, provided the basis for the State of California's claim against the Port of Oakland.

Other statutes regulating oil pollution in California are not contained exclusively within the Water Code. For example, section 293 of the Harbors and Navigation Code[18] pertains to oil spills from commercial vessels, and section 151[19] provides for the imposition of cleanup costs for oil spills. In addition, Fish and Game Code section 12010[20] imposes criminal penalties for allowing oil to enter any state waters. Legislation is currently pending which would bring the key oil spill provisions within the Public Resources Code through the proposed California Oil Spill Compensation Act.[21]

II. THE *PORT OF OAKLAND* DECISION

Pursuant to subsection 13350(b), the California Regional Water Quality Control Board conducted hearings to determine the cause and effects of an oil spill which occurred in January, 1973. The Board determined that approximately 125,000 gallons of oil had been discharged into the Oakland Estuary from oil storage tanks on property owned by the Board of Port Commissioners of the City of Oakland.[22] The tanks and the oil stored therein were

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section 13442, which provides that "[u]pon application . . . the state board may order moneys to be paid from the account to the agency to assist it in cleaning up the waste or abating its effects on waters of the state."

18. CAL. HARB. & NAV. CODE § 293 (West Supp. 1977).

19. *Id.* § 151.

20. CAL. FISH & GAME CODE § 12010 (West 1958) states in pertinent part: "The minimum punishment for a violation of [section 5650] of this code is a fine of one hundred dollars ($100) or imprisonment in the county jail for 25 days . . . ." *Id.* § 5650 states in pertinent part:

> It is unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this State any of the following:
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> (a) Any petroleum, acid, coal or oil tar, lampblack, aniline asphalt, bitumen, or residuary product of petroleum, or carbonaceous material or substance.
>
> (b) Any refuse, liquid or solid, from any refinery, gas house, tannery, distillery, chemical works, mill or factory of any kind.

See People v. Union Oil Co., 268 Cal. App. 2d 566, 74 Cal. Rptr. 78 (1969), wherein a complaint charging that an oil company had deposited petroleum products into state waters in violation of section 5650 stated a public offense subject to criminal prosecution under the Code.

21. *See* S.B. 536 (1977), proposing CAL. PUB. RES. CODE §§ 3800-3912.

22. *See* 16 Cal. 3d at 34, 544 P.2d at 1324, 127 Cal. Rptr. at 124.

jointly owned by an individual and a collection of oil companies.[23] Due to the difficulty of the cleanup operations, the oil remained on the water for thirteen days and caused extensive damage to the water environment.[24] The Board concluded that the causes of the spill had been: (1) the opening of the valves on the oil tanks and connecting pipes by unknown persons; and (2) the failure of the oil tank owners and the Port of Oakland to maintain a retaining wall around the tanks which would have prevented the oil from reaching the Estuary. Moreover, the Board found that adequate security measures had not been taken to prevent unauthorized persons from entering the premises.[25] Upon the Board's request, the California Attorney General, relying on subsection 13350(a)(3), brought a civil suit against the Port of Oakland and the oil tank owners in June, 1973.[26]

23. Subsequent to the *Port of Oakland* decision, the trial court found that these corporations were the alter ego of the individual. *See* People *ex rel.* Cal. Regional Water Control Bd. v. Board of Port Comm'rs, Civ. No. 437023, slip op. at 2 (Alameda County Super. Ct. Oct. 14, 1976) (memorandum decision).

24. The oil was finally removed by Clean Bay, Inc., a petroleum company sponsored cleanup organization. Clean Bay, Inc., was established after the Standard Oil tanker collision in 1971. It is funded by its members, comprised of 14 oil, chemical and pipeline companies. Their response team for spills is made up of approximately 500 employees of the member companies. G. ARTUS, *supra* note 6, at 27.

The United States Coast Guard, which authorized the cleanup operation, bore the expense, which amounted to $1,200,000. The work involved 25 supervisors and 400 laborers who expended 31,180 working hours. Furthermore, 165 birds died, or 54% of all those found to have been affected. 2 INT'L BIRD RESCUE NEWSLETTER (Jan. 1973). The destruction of the birds was valued at an estimated $38,000 and "damage to other kinds of wildlife, including marine fauna was incalculable." People *ex rel.* Cal. Regional Water Control Bd. v. Board of Port Comm'rs, Civ. No. 437023, slip op. at 5 (Alameda County Super. Ct. Oct. 14, 1976) (memorandum decision).

25. Subsequent to the *Port of Oakland* decision, the trial court accepted the following facts: (1) Inspection by the Oakland Police Department had established that oil had been released from the opening of valves by unknown persons; (2) there had been no locks on the valves, and a breach in the retaining wall surrounding the tanks, measuring about 20 to 30 feet in length, was observed; (3) it was found that the valves could have been opened readily and had never been locked; (4) there had been two prior instances of vandalism at this particular installation; (5) the retaining wall had been opened up two years prior to the spill but had never been restored (had this wall been intact, it would have had a capacity of 203,000 gallons); (6) the fence along the bordering avenue had a gap of 20 to 30 feet, there had been no guards on the premises and access to the tanks had been open and unimpeded; (7) the only barrier maintained to cover the gap in the retaining wall had been an eighteen-inch berm, consisting mainly of sand; and (8) the storage tanks had contained highly combustible materials at the time of the spill with flash points well below 200 degrees Farenheit, which was in violation of a local ordinance. *Id.*

26. A federal complaint had been filed by the United States Attorney in the United States District Court for the Northern District of California on December 16, 1975. The complaint alleged violations of sections 311(f)(2) and 311(g) of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1321(f)(2), 1321(g) (Supp. V 1975),

In pretrial proceedings, the trial court granted the Port of Oakland's motion for judgment on the pleadings based on Government Code section 818,[27] which exempts public entities from punitive damages. The trial court found that the Port of Oakland was immune from liability and then issued an order dismissing it from the action. The court further ruled that before liability could be imposed on the oil tank owners, the Attorney General would have to prove at trial that the owners had intentionally or negligently caused or permitted the spill. The pretrial order also stated that any damages recoverable under subsection 13350(a)(3) would be assessed only for each day the oil was actually discharged rather than for each day the oil remained on the water. Upon petition for a writ of mandate by the Attorney General, the California Supreme Court directed the trial court to vacate its order dismissing the Port of Oakland from the action and affirmed the remainder of the lower court's pretrial order.[28]

A. Municipal Tort Immunity

Government Code section 818 provides that "a public entity is not liable for damages . . . imposed primarily for the sake of

and, in the alternative, asserted a claim based on common law negligence, to recover the costs incurred by the federal government in removing and cleaning up the oil discharged in the *Port of Oakland* spill. *See* United States v. City of Oakland, No. C-75-2684-HB (N.D. Cal., filed Dec. 16, 1975). This complaint was later amended on April 30, 1976, to include two additional causes of action: (1) that the named defendants violated City of Oakland Fire Ordinance section 2170 which requires a dike or drainage for the area surrounding a tank or a group of tanks; and (2) that defendants City of Oakland and Board of Port Commissioners violated California Government Code section 835 for failure to remedy a dangerous condition. A motion for summary judgment was filed by the United States Attorney on August 31, 1977.

27. Cal. Gov't Code § 818 (West 1966).

28. *See* 16 Cal. 3d at 34, 544 P.2d at 1324, 127 Cal. Rptr. at 124. After the *Port of Oakland* decision was issued, the Port of Oakland and the Attorney General agreed to a settlement of $14,000. At the trial to litigate factual issues concerning the remaining defendants, the court found that their negligence made them liable for four days of oil spillage. Total damages were assessed at $24,000. People *ex rel.* Cal. Regional Water Control Bd. v. Board of Port Comm'rs, Civ. No. 437023, slip op. at 6 (Alameda County Super. Ct. Oct. 14, 1976). The individual tank owner (and alter ego of the oil companies) filed for bankruptcy in federal court. The Attorney General then filed a complaint under the Bankruptcy Act, 11 U.S.C. § 93(j) (1970). The bankruptcy court held that because of the punitive aspect of California Water Code section 13350(a)(3), the individual was still liable for the damages assessed against him because the debt was not dischargeable. *See In re* Marcus, No. 4-76-2591 HN (N.D. Cal. Feb. 18, 1977). The district court upheld this ruling but relied on the theory that environmental damage was not within the definition of "pecuniary loss" as used in section 93(j) and therefore was not dischargeable. *See In re* Marcus, No. C-77-776 RHS (N.D. Cal. 1977). This analysis by the court implies that liability for environmental damage per se is not a dischargeable debt.

example and by way of punishing the defendant."[29] Writing for a unanimous court, Justice Sullivan rejected the Port of Oakland's argument for tort immunity.[30] The court noted that the Attorney General had conceded that this statute was intended to "deter oil spills in state waters and, by making it costly to be held responsible for them, to impress upon the public the necessity of taking every precaution against their occurrence."[31] Therefore, the *Port of Oakland* court agreed with the defendant's contention that subsection 13350(a)(3) is punitive in nature. However, the court also concluded that the statute is not solely punitive, but rather punitive in nature while compensatory in result. The court found that the damage caused by an oil spill is by its very nature unquantifiable.[32] Noting that the money collected pursuant to subsection 13350(a)(3) is paid into the State Water Pollution Cleanup and Abatement Account,[33] the court stated that these funds "operate to more fully compensate the people of this state and are not beyond an amount equivalent to the harm done."[34] Consequently, the damages imposed under subsection 13350(a)(3) are not solely punitive within the meaning of Government Code section 818.

Potential imposition of liability on public entities is a boon to environmental protection since municipalities are major polluters

29. CAL. GOV'T CODE § 818 (West 1966).

30. The *Port of Oakland* court distinguished the only other case which had previously interpreted subsection 13350(a)(3), California Regional Water Quality Control Bd. v. Department of the Navy, 371 F. Supp. 82 (N.D. Cal. 1973), because of the different tort immunity standards under federal and California law. *See* 16 Cal. 3d. at 37, 544 P.2d at 1325-26, 127 Cal. Rptr. at 125-26. The district court in *Department of the Navy* had held that the Navy was immune under federal law for liability for an oil spill.

Department of the Navy is more doubtful in light of the recent Ninth Circuit Court of Appeals decision, California v. Environmental Protection Agency, 511 F.2d 963 (9th Cir. 1975), in which the court strongly favored state regulation of federal facilities under the 1972 amendments to the Federal Water Pollution Control Act.

31. 16 Cal. 3d at 37, 544 P.2d at 1325, 127 Cal. Rptr. at 125.

32. The Supreme Court of Florida recently held that tables established by Florida's Department of Pollution Control, pursuant to statute, for determining the value of fish killed by pollution are proper and relevant to the question of damages and may be introduced as evidence and rebutted. The trier of fact is required to accept such values as factual presumptions unless credible evidence to the contrary is introduced. Department of Pollution Control v. International Paper Co., 329 So. 2d 5, 8 (Fla. 1976). This was the first time a state court has accepted a method of valuing one aspect of the unquantifiable damages of water pollution. Because a price tag cannot usually be placed on nonbusiness related damage, the unquantifiable destruction is too often left without compensation. It is crucial that legislatures and courts develop methods of assessing this damage. The Florida Supreme Court has taken the first step in that direction.

33. *See* CAL. WATER CODE §§ 13440-13442 (West 1971).

34. 16 Cal. 3d at 38-39, 544 P.2d at 1327-28, 127 Cal. Rptr. at 127-28.

in California.[35] However, the analysis used by the *Port of Oakland* court leaves unclear whether its holding is limited to a factual situation, such as that in *Port of Oakland*, wherein the environmental destruction unquestionably exceeds the amount of damages assessed under subsection 13350(a)(3). It is conceivable that a public entity may contend that damages imposed for a minor spill go "beyond an amount equivalent to the harm done"[36] and are therefore solely punitive within the meaning of Government Code section 818.[37] Unfortunately, the merit of this argument is unclear after *Port of Oakland*. The *Port of Oakland* court could have better ensured that the water environment would be protected[38] by clarifying the extent of its holding or by choosing a rationale not subject to ambiguity.[39]

35. Robie, *State Viewpoint*, 7 NAT. RESOURCES LAW. 231, 236 (1974).

36. 16 Cal. 3d at 39, 544 P.2d at 1327, 127 Cal. Rptr. at 127.

37. The *Port of Oakland* court did not mention subsection 13350(b) in its opinion, which would have rendered the punitive-compensatory distinction unnecessary. This subsection provides for the balancing of relevant factors in assessing damages. Because the subdivision is not discussed, it is not clear what impact it would have in a situation where the potential moneys to be assessed were more than the actual damages. For the text of subsection 13350(b) see note 15 *supra*.

38. By using the "punitive in nature, compensatory in result" analysis, the court was able to switch its emphasis from one aspect of its interpretation to the other, depending on which furthered the particular holding. In discussing tort immunity, the emphasis was on the compensatory result of subsection 13350(a)(3). But in its analysis of the extent of damages, the court came full circle and focused on the punitive nature of the subsection. For further analysis of this "flexible" approach see the text accompanying notes 68-79 *infra*.

39. There were three alternative theories on which the court could have relied to reach the same conclusion. First, the court could have followed the guidelines of section 1359 of the Code of Civil Procedure, which states that when a general and a particular provision are inconsistent, the particular one is controlling. *See* CAL. CIV. PROC. CODE § 1359 (West 1955). Government Code section 818 is a general statute protecting municipalities from punitive damages. The Porter-Cologne Act's definition of "person," as used in subsection 13350(a)(3), is a provision that establishes an exception to the general rule. Since the legislature specified in that section that "person" includes municipalities, government entities such as the Port of Oakland should not be protected by Government Code section 818. This is further supported by the legislative committee comment that accompanied the original section 13350 (enacted six years after section 818).

> In subsection (a), the phrase "Any person . . . may be liable civilly . . . in a sum . . . for each day in which any violation occurs" is interpreted to apply uniformly regardless of whether a municipality, for example, has a single outfall or multiple outfalls that are in violation of any cease and desist order. In either event, any sum assessed is intended to be limited by the daily sum specified in subsection (a).

CAL. WATER CODE § 13350, Comment by Legislative Committee, at 677 (West 1971). This clearly indicates that the legislature intended this Water Code section to apply to municipalities.

Second, the court could have considered its previous decisions relating to nuisance

B. STANDARD OF LIABILITY: PROBLEMS FACED BY THE COURT

Having resolved the tort immunity issue, the *Port of Oakland* court next considered the standard of liability to be applied under subsection 13350(a)(3).[40] The court faced several significant obstacles in its effort to interpret this subsection. In addition to the fact that the California oil spill statutes are scattered among various codes rather than consolidated within a single act,[41] there is the problem that most of these statutes have never been construed by an appellate court. Consequently, these statutes are presently subject to dispute and most assuredly will find their way to a

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law. The California Supreme Court rejected the public entities claim of immunity under Government Code section 815 in a noise pollution case. *See* Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972). Government Code section 815, like Government Code section 818, is part of the Tort Claims Act. It provides in pertinent part that a "public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." The court relied on the general definition of nuisance in Civil Code section 3479:

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

CAL. CIV. CODE § 3479 (West 1970). The court held that if noise pollution falls within Civil Code section 3479, then Government Code section 815 is inapplicable. The ruling was followed in Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974). Additionally, the court in CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974), stated that "[c]urrent legislation for environmental and ecological protection constitutes but 'a sensitizing and refinement of nuisance law.' " *Id.* at 319, 118 Cal. Rptr. at 324, *quoting* CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA ZONING PRACTICE 28-29 (Supp. 1973). The *Port of Oakland* court could have also refused to subject the unquantifiable damages for oil pollution to Government Code section 818. The damage caused to water would appear to constitute a nuisance as prescribed by Civil Code section 3479.

A third argument concerns the right of the state to enforce its laws against a lesser agency such as a municipality. Government Code section 818 was enacted to protect public entities from punitive suits by private persons. The plaintiff in any suit brought under section 13350 is the state. "There is no theory upon which a mere agency of the State has a right to litigate the right of the state to enforce, through any agency it pleases, . . . rules and regulations for the preservation of the health and comfort of all people of the State." Department of Pub. Health v. Board of Supervisors, 171 Cal. App. 2d 99, 105-06, 339 P.2d 884, 888 (1959). Since the Port of Oakland is a lesser public entity of the State of California, acting as a lessor in a commercial venture being sued by the state, it should not be held to be within the protection of section 818.

40. For the text of subsection 13350(a)(3) see note 15 *supra*.

41. The California statutes relevant to oil spills include: CAL. HARB. & NAV. CODE § 293 (West Supp. 1977); CAL. WATER CODE §§ 13000, 13169 (West 1971), 13350, 13385 (West Supp. 1977); CAL. FISH & GAME CODE § 5650 (West 1958).

higher court in the near future.[42] Another obstacle barring a clear interpretation of subsection 13350(a)(3) is that California does not publish written transcripts of legislative sessions or committee hearings. As a result of this absence of legislative history, numerous rules of statutory construction have been developed to create presumptions and direction for statutory interpretations. *Port of Oakland* relied on two general rules of construction to ascertain the legislative intent in this case: first, that the courts should give effect to a statute according to the ordinary meaning of the language employed; and second, that a statute should be construed with reference to the entire statutory scheme of which it forms a part in such a manner that harmony may be achieved among the parts.[43] Unfortunately, the court misapplied these rules of statutory construction and failed to consider other relevant rules in

42. In a companion case to *Port of Oakland*, the court upheld the denial of summary judgment rejecting tort immunity for the City of San Francisco under Water Code section 13385. San Francisco Civil Serv. Ass'n v. Superior Court, 16 Cal. 3d 46, 127 Cal. Rptr. 131, 544 P.2d 1331 (1976). The court found that section 13385, like subsection 13350(a)(3), was a civil penalty provision enacted to compensate the state for the unquantifiable harm caused by the discharge of raw sewage into waters of the state without any pretreatment. Section 13385 of the Water Code provides in pertinent part:

> Any person who discharges pollutants, except as permitted by waste discharge requirements, or who violates any cease and desist order . . . shall be subject to civil penalty not to exceed ten thousand dollars ($10,000) for each day in which such discharge, violation, or refusal occurs . . . .

CAL. WATER CODE § 13385 (West Supp. 1977). Subsequent to the California Supreme Court decision, the trial court held that section 13385 requires a strict liability standard, and the $10,000 per day penalty was considered to be liquidated damages. The court also held that the statute established a presumption of $10,000 damages, therefore allocating the burden of proof to the discharger to demonstrate that the damage done was less than that amount. The jury awarded a $500,000 judgment against the City and County of San Francisco. People *ex rel.* San Francisco Regional Quality Control Bd. v. City and County of San Francisco, No. 7205C (Marin County Super. Ct. 1977).

A number of additional questions are apparent on the face of the statute and are potential sources of litigation for the future: (1) whether ships leaking oil from their engines are within the class of vessels engaged in the commercial transportation of petroleum under Harbors and Navigation Code section 151; (2) whether the penalty provision of Harbors and Navigation Code section 151 is applicable to a vessel already covered by section 293 of the same code; (3) whether parties in a joint operation are severally liable under section 13350; (4) whether cleanup and abatement costs under Harbors and Navigation Code section 151 include costs for matters such as supervisorial personnel reimbursement, and chasing and caring for injured birds; and (5) whether petroleum products are "pollutants" under Water Code section 13385. A recent federal court of appeals held that gasoline was a pollutant under the provisions of section 502 of the Federal Water Pollution Control Act, 33 U.S.C. § 1362 (6) (Supp. V 1975). *See* United States v. Hamel, 551 F.2d 107 (6th Cir. 1977).

43. 16 Cal. 2d at 40, 544 P.2d at 1328, 127 Cal. Rptr. at 128, *citing* Merrill v. Department of Motor Vehicles, 71 Cal. 2d 907, 918, 458 P.2d 33, 39-40, 80 Cal. Rptr. 89, 95-96 (1969).

interpreting subsection 13350(a)(3). The following discussion will focus on the court's application of these rules to its analysis of section 13350's internal structure, the absence of explicit language imposing strict liability and the relationship to other pertinent code sections.

Internal Structure

The original subsection 13350(a), pertaining to violations of cease and desist orders, imposed liability for intentional or negligent acts.[44] In the amended statute,[45] the legislature repeated the intent or negligence standards in subsection (a)(2) regarding liability for violations of waste discharge regulations but did not similarly modify the provisions of subsection (a)(3), which imposed liability on anyone who "causes or permits" an oil spill. Focusing more upon the structure of the relevant provisions than upon the meaning of each provision in isolation, the court found significance in the enumeration of the three subsections of 13350(a). Absent this enumeration (which is how the bill was written in the Legislative Counsel's digest),[46] the adverbs "intentionally or negligently" of subsection 13350(a)(2) would modify "cause or permit" of subsection 13350(a)(3). The *Port of Oakland* court rejected the Attorney General's contention that the legislature had deliberately chosen not to repeat these adverbs in order to create a standard of strict liability. Instead, the court stated that the insertion of the numeral "3" to create a subsection was meant to indicate a change in subject matter, and not to effect a different standard of liability. This construction of (a)(3) presumes that the legislature failed to recognize that the structure of the entire subdivision required repetition of the adverbs "intentionally or negligently" to denote with clarity the intended standard of liability.

The *Port of Oakland* court's conclusion that the legislature failed to appreciate the need for clarification is in conflict with established rules of statutory construction. Generally, when a change takes place in statutory language, a presumption arises that a change in result was intended by the legislature. Addition-

44. For the original text see note 14 *supra*.

45. For the text of the amended statute see note 15 *supra*.

46. The *Port of Oakland* court attempted to explain away any real significance in the structure of subsection 13350(a) by referring to the Legislative Counsel Digest. While it is true that the Digest does not enumerate the different subsections, it is also not an accurate statement of the law. The Digest is, in reality, a paraphrase, often being a mere abbreviated version or explanation of the enactment.

ally, statutes should not be construed in such a way as to render nugatory an important proposition.[47] Therefore, if the legislature had merely intended to delineate different subject matters, it could have accomplished this by using "intentionally or negligently" to introduce the three subsections. On the contrary, the legislature chose to denote this standard for waste but not for oil.

Considering the importance of oil spill legislation and the differences between waste control and oil spill prevention, it would appear that strict liability for oil spills may have been intended by the legislature.[48] Before waste can be discharged into state waters, a permit must be obtained, and all regulations and procedures must be approved by the Regional Water Quality Control Board.[49] The regulatory scheme is supervised to enforce compliance with the permit requirements.[50] Therefore, when a deviation from the scheme occurs, a prima facie violation is established.

In contrast to waste, which is regulated, all oil spills are illegal under Fish and Game Code section 5650,[51] and an oil polluter is

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47. *See* Clements v. T.R. Bechtel Co., 43 Cal. 2d 227, 228, 273 P.2d 5, 6 (1954); Lundquist v. Lundstrom, 94 Cal. App. 109, 112, 270 P. 696, 697 (1928). *See also* People v. Valentine, 28 Cal. 2d 121, 169 P.2d 271 (1946).

48. This distinction between waste and oil was articulated by California State Senator Peter Behr (Rep., Marin County), author of the amendment to subsection 13350(a)(3), in his discussion with the Senate Water Resources Committee which reviewed the bill. Senator Behr noted these differences between the regulation of waste and oil as the reason for his intent to have subsection 13350(a)(3) establish a strict liability standard. Petition for Rehearing, Exhibit A, People *ex rel.* Younger v. Superior Court, 16 Cal.3d 30, 544 P.2d 1322, 127 Cal. Rptr. 122 (1976) (*rehearing den.* March 3, 1976). Mr. Behr also explained to the committee that strict liability was necessary "[b]ecause most oil spills happen at times when only the person responsible knows the reason of the spill and accordingly it would be extremely difficult for the state to prove such spill was intentional or negligent." *Id.* In Exhibit B of the petition for rehearing, the second affidavit was written by Luther Gullick, who observed that after the repeated requests to insert "intentional or negligent," Senator Behr stated that "he would rather lose the bill than have a bill without teeth in it." *Id.*, Exhibit B.

49. CAL. WATER CODE § 13260 (West 1971).

50. *Id.* §§ 13263, 13267.

51. For the relevant text of California Fish and Game Code section 5650 see note 20 *supra*. By definition, the regulated discharge of oil constitutes waste. CAL. WATER CODE § 13050(d) (West 1971) defines waste to include

> sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature, including such waste placed within containers of whatever nature prior to, and for purposes of, disposal.

As waste, oil would then be subject to all regulatory schemes.

subject to criminal prosecution. When an oil spill occurs, the only witnesses are usually oil company personnel, who often have the only information concerning the cause of the spill. An intent or negligence standard may be appropriate for a regulated and supervised activity, such as waste disposal, because the cause of a violation can easily be determined. However, the lack of any regulation or supervision of oil spills makes a determination of intent or negligence extremely difficult.

In light of these distinctions between waste and oil, the court's conclusion that the legislature used faulty grammar and did not intend strict liability is untenable. The *Port of Oakland* court's interpretation of section 13350 reflects the narrow range of factors that the court was willing to evaluate. In addition to misapplying rules of statutory construction and assuming that the legislature used faulty grammar, the court also failed to consider a general rule for interpreting remedial statutes. California courts have stated:

> [A] remedial statute must be liberally construed, so as to effectuate its object and purposes. Although due regard will be given the language used, such an act will be construed, when its meaning is doubtful, so as to suppress the mischief at which it is directed, and to advance or extend the remedy provided, and bring within the scope of the law every case which comes clearly within its spirit and policy.[52]

Section 13350 is, by its title ("Civil Monetary Remedies") and its effect (compensatory), a remedial statute.[53] If the above rule had been applied in *Port of Oakland*, the court would have interpreted subsection 13350(a)(3) to require a strict liability standard which could then meet the broadest range of oil spill problems that might arise. However, by selecting the standard of intent or negligence, the *Port of Oakland* court substantially restricted the effectiveness of the statute.

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52. Lande v. Jurisich, 59 Cal. App. 2d 613, 616-17, 139 P.2d 657, 659 (1943), *citing In re* Makings, 200 Cal. 474, 478, 353 P. 918, 920 (1927). *See In re* Patterson, 155 Cal. 626, 102 P. 941 (1909).

53. Remedial statutes have been defined as enactments "which afford a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries, and statutes intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the state." C. SANDS, 3 STATUTES AND STATUTORY CONSTRUCTION § 60.02, at 31 (4th ed. 1974).

Absence of Explicit Language Imposing Strict Liability

The court found persuasive the Port of Oakland's reasoning that the legislature knew how to impose liability without fault had it so desired. The court noted that the legislature had enacted Harbors and Navigation Code section 293[54] and subsection 13350(a)(3) in the same session. Harbors and Navigation Code section 293, which concerns oil spills from vessels engaged in the commercial transport of petroleum or fuel oil, expressly states that the appropriate standard is absolute liability without fault.

The court's comparison of subsection 13350(a)(3) with Harbors and Navigation Code section 293 has some merit. Even though the bills were authored by different persons and were brought through different committees,[55] it is reasonable to presume the legislature had knowledge of both statutes at the time of their enactment.[56] This implicit knowledge and the clear enumeration of a strict liability standard in the Harbors and Navigation Code section led the *Port of Oakland* court to reason that the legislature was capable of explicitly requiring strict liability had it so intended. The court failed to recognize that while the legislature did not explicitly require strict liability, neither did it clearly establish an intent or negligence standard.

The court's analysis implies that explicit language is required in order to impose strict liability. This approach has been rejected

54. CAL. HARB & NAV. CODE § 293 (West Supp. 1977) states:

> Where damage arises out of, or is caused directly and proximately by, the acts of an owner or operator, without the interposition of any external or independent agency which was not or could not be forseen, any owner or operator of any vessel engaged in the commercial transportation of petroleum or fuel oil shall be absolutely liable without regard to fault for any property damage incurred by the state or by any county, city or district, or by any person, within the state, and for any damage or injury to the natural resources of the state, including, but not limited to, marine and wildlife resources, caused by the discharge or leakage of petroleum or fuel oil from such vessel into or upon the navigable waters of the state.

55. California Harbors and Navigation Code section 293 was adopted in 1971. *See* 1971 Cal. Stats. 3811. It was brought through the Environmental Quality Committee, while subsection 13350(a)(3) was brought through the Water Resources Committee.

56. The general rule is that legislators are presumed to be aware of existing statutes. *See* Buelke v. Levenstadt, 190 Cal. 684, 689, 214 P. 42, 44 (1923); Harris v. Alcoholic Beverage Control Appeals Bd., 197 Cal. App. 2d 759, 767, 18 Cal. Rptr. 151, 156 (1961). A logical inference from this is that legislators are also aware that related statutes are being enacted during the same session.

by federal courts that have interpreted analogous water pollution statutes. The current trend in the federal courts, although not controlling in California, is to " 'forbid a narrow, cramped reading' of water pollution legislation."[57] In construing statutory language strikingly similar to subsection 13350(a)(3),[58] the First Circuit Court of Appeals interpreted a statute to prescribe strict liability. The court held that it was "disinclined to invent defenses beyond those necessary to insure a defendant constitutional due process" and further stated that it specifically rejected "the existence of any generalized 'due care' defense that would allow a polluter to avoid conviction on the ground that he took precautions conforming to industry-wide or commonly accepted standards."[59] Thus, the reasoning of the federal court differs sharply from the *Port of Oakland* court's requirement of an explicit strict liability standard.

The Statutory Harmony Rule

The *Port of Oakland* court, in a comparison with Harbors and Navigation Code section 151, found that the imposition of strict liability in subsection 13350(a)(3) would create discord within the total statutory scheme. Harbors and Navigation Code section 151 provides that any person who intentionally or negligently causes

57. United States v. Holland, 373 F. Supp. 665, 671 (M.D. Fla. 1974), *citing* United States v. Ashland Oil & Transp. Co., 364 F. Supp. 349, 350 (W.D. Ky. 1973). *See also* United States v. Standard Oil Co., 384 U.S. 224, 226 (1966); United States v. Republic Steel Corp., 362 U.S. 482, 491 (1960).

58. Section 13 of the Rivers and Harbors Act of 1899 (also known as the Refuse Act), 33 U.S.C. § 407 (1970), provides in pertinent part:

> 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. . . .

59. United States v. White Fuel Corp., 498 F.2d 619, 623 (1st Cir. 1974).

or permits any oil to be deposited in the water shall be liable for all cleanup and abatement costs plus a penalty not to exceed $6,000.[60] The court feared that a strict liability standard in subsection 13350(a)(3) would create an anomalous situation where the faultless spiller of oil would be subjected to a greater civil penalty than the intentional polluter under section 151.[61] In making this comparison, the court summarily noted that polluters under subsection 13350(a)(3) would not be liable for the costs of actual damage caused,[62] which in the *Port of Oakland* oil spill amounted to $1,200,000.[63] The court found that a better approach would be to avoid a strict liability standard for all polluters except for the extraordinary class of oil tankers under Harbors and Navigation Code section 293.[64]

The conclusion drawn from the *Port of Oakland* court's comparative analysis of subsection 13350(a)(3) and Harbors and Navigation Code section 151 could be reached only by ignoring subsection (d) of section 13350. This subsection of the Water Code provides that "remedies under section 13350 are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal."[65] In view of this subsection, an alternative interpretation of subsection 13350(a)(3) was available to the court. If subsection 13350(a)(3) and section 151 of the Harbors and Navigation Code were construed as concurrent remedies, a faultless spiller of oil would be strictly liable for the unquantifiable damage caused, whereas an intentional or negligent spiller of oil would be subject to the damages provision of subsection 13350(a)(3), as well as the cleanup costs and a penalty under section 151 of the Harbors and Navigation Code. This would maximize protection of the water

60. CAL. HARB. & NAV. CODE § 151 (West Supp. 1977).

61. The anomalous situation feared by the *Port of Oakland* court would subject a faultless spiller of oil to a maximum penalty of $6,000 for each day in which a deposit occurs, whereas an intentional polluter would be penalized no more than $6,000 for each deposit. 16 Cal. 3d at 42, 544 P.2d at 1329, 127 Cal. Rptr. at 129.

62. The failure of the court to make more than passing mention of this factor is rather confusing in light of the significant burden created by imposition of cleanup costs and actual damages. In *Port of Oakland*, the cleanup costs alone amounted to $1,200,000, an amount greatly disproportionate to the damages recoverable pursuant to section 13350, yet clearly recoverable under section 151 of the Harbors and Navigation Code. For additional information concerning the cleanup costs and actual damages incurred in the *Port of Oakland* oil spill see note 24 *supra*.

63. People *ex rel.* Cal. Regional Water Quality Control Bd. v. Board of Port Comm'rs, No. 437023, slip op. at 5 (Alameda County Super. Ct. Oct. 14, 1976) (memorandum decision).

64. *See* 16 Cal. 3d at 42, 544 P.2d at 1329, 127 Cal. Rptr. at 129.

65. CAL. WATER CODE § 13350(d) (West Supp. 1977).

environment by providing a greater deterrent and increased funds to abate the deleterious effects of oil spills. The damages collected would seldom exceed the extensive destruction caused by oil spills. This interpretation would put oil companies on notice that they bear absolute responsibility for the risks inherent in their business enterprise. Such a heavy burden would economically compel technological development to protect the environment from the oil industry's increasing growth.

An additional problem is raised by the *Port of Oakland* court's failure to consider the impact of its interpretation of Harbors and Navigation Code section 293. The court concluded that the legislature intended to create two classes of oil polluters rather than two different standards of liability for waste control and oil pollution under subsection 13350(a). The artificiality of the court's classification is easily demonstrated. Oil is commonly transported by tankers delivering and obtaining oil from onshore facilities through connecting pipes. If a spill should occur along such a pipe during a transfer,[66] litigation would be required to determine who was responsible. If it were found that the oil was from a tanker, a strict liability standard would apply under Harbors and Navigation Code section 293. But if it were concluded that the oil came from an onshore facility, the *Port of Oakland* holding would dictate an intent or negligence standard under subsection 13350(a)(3). Unfortunately, oil causes the same disasterous results regardless of the source of spillage. Rather than clarifying existing statutes to facilitate enforcement, the *Port of Oakland* analysis seems to pose more questions concerning oil spill legislation that will need to be litigated.

Although no explicit legislative intent regarding section 13350 was available to the *Port of Oakland* court, this section is part of the broader Porter-Cologne Act within which foundational guidelines

66. A recent commentary pointed out that

> [b]y far the most common type of accidental spills [in the San Francisco Bay] are those which occur during the terminal operations and the bankering (fueling) of vessels. There are six major oil refineries in the Bay/Delta Region and many smaller companies, each storing petroleum and chemical products. Most are along the waterfront, and transfer their products from vessel to tanks, tank to tank, and along miles of pipelines; transfer operation spills are most often attributed to human error. In fact, a Federal Energy Administration Report has found that 72% of terminal spills with known causes are the result of personal error.

G. ARTUS, *supra* note 6, at 1 (footnote omitted).

for the statutes are set forth. The legislature, in Water Code section 13000,[67] declared that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality that is reasonable. Consideration is to be given to all demands being made and likely to be made in the future on those waters, as well as to economic, social, tangible and intangible factors.[68] Rather than considering the legislative intent of the entire act, the *Port of Oakland* court looked for evidence of the legislative intent in the syntax and structure of the statute and in its interrelationship with statutes in other codes.

C. Extent of Damages

Another dilemma presented to the *Port of Oakland* court by the damages provision of subsection 13350(a)(3) was whether an oil polluter within the purview of this statute would be assessed for each day in which the "act of depositing takes place" or for each day the deposits remain in the water.[68] This distinction is of great significance since most oil spills occur in the span of a single day, or at most two, whereas oil may remain in the water for several days or weeks.[69] In addressing this issue, the court relied on the same rules of statutory construction relating to language, internal structure and statutory harmony that it had applied earlier to the question of strict liability.

Statutory Language

After considering the various plausible definitions of the key words "deposit occurs" in the statute, *Port of Oakland* concluded that a purely linguistic analysis could not resolve the issue.[70]

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67. Cal. Water Code § 13000 (West 1971).

68. *Id.*

69. *See* 16 Cal. 3d at 43, 544 P.2d at 1330, 127 Cal. Rptr. at 130.

69. Since oil discharges are forbidden under California Fish & Game Code section 5650 and 33 U.S.C. § 1321(b)(1), action to stop the discharge and to commence cleanup operations begins soon after discovery of the spill. *See* note 8 *supra*. Unfortunately, the cleanup of an oil discharge is still a slow, laborious process, with the result that quick cleanups are rarely achieved.

70. Case law defines deposit only in relation to banking and other irrelevant concepts. "Occur," however, is discussed in several cases, although the courts are split as to its definition. In Fohl v. Metropolitan Life Ins. Co., 54 Cal. App. 2d 368, 129 P.2d 24 (1942), the court interpreted "occur" as used in reference to medical diseases to mean "to happen." *Id.* at 379, 129 P.2d at 29-30. In reference to a vacancy in government office, it most often means "to exist." *See, e.g.*, State v. Rhodes, 168 Ohio 165, 151 N.E.2d 716 (1958); Richardson v. Young, 122 Tenn. 471, 125 S.W. 664 (1910). Such conflicting historical definitions afford little guidance to the present analysis.

However, the court did not explore at this point the use of the word "deposit" in the liability portion of subsection 13350(a)(3). The relevant part of this statute provides: "Any person who . . . causes or permits any oil . . . *to be deposited in or on* any of the waters of the state . . . may be liable civilly in a sum of not to exceed six thousand dollars ($6,000) for each day in which such violation or deposit occurs."[71] The phrase "to be deposited in or on" by definition implies a static condition.[72] "In" and "on" are function words denoting positions in space.[73] Therefore, the "deposit" for which damages are assessed is not the act of discharge itself, as the court concluded, but rather implies the length of time the oil remains on the water. Additionally, although the actual discharge of oil causes extensive damages, the oil which remains has a greater impact on the environment. After the oil is discharged, it continues to flow, destroying the environment wherever it spreads.[74]

Internal Structure and Statutory Harmony

The court focused on three factors in applying the general rules of statutory construction discussed above to support its conclusion that subsection 13350(a)(3) pertains only to the first day a deposit occurs.[75] First, it interpreted the section to avoid what it considered an unjust result if subsection 13350(a)(3) were read to impose liability for each day oil remained on the water. Second, it construed section 151 of the Harbors and Navigation Code as providing an exclusive remedy for actual costs of abatement. Third, it concluded that subsection 13350(a)(3) must have been intended to apply to continuous polluters since section 151 already covers one day oil spills. Each of these arguments is without merit, as the following discussion will indicate.

In considering a possible unjust result if subsection 13350(a)(3) damages were assessed for each day the oil remained on the water, the court reasoned that this assessment would be "measured by a critical factor normally beyond the control of the

71. CAL. WATER CODE § 13350(a)(3) (West Supp. 1977) (emphasis added).

72. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1139, 1574 (unabridged ed. 1976).

73. *Id.*

74. Oil spreads quickly over vast areas. Fifteen tons of oil dropped in a calm sea can cover eight square miles in less than a week, and oil can be traced many hundreds of miles. Nanda, *The "Torrey Canyon" Disaster: Some Legal Aspects*, 44 DEN. L.J. 400, 403 (1967).

75. *See* 16 Cal. 3d at 43-44, 544 P.2d at 1330, 127 Cal. Rptr. at 130.

violator, namely the time in which the oil spill is or reasonably can be cleaned up."[76] The court concluded that this factor does not directly relate to the degree of culpability and, although the length of time a spill persists is a state concern, it is a problem adequately dealt with in section 151.

It appears that the court was postulating a situation in which two spillers of oil, each equally culpable, would be penalized differently merely because the deposits in one case were cleaned up immediately, while in the other case, the deposits were cleaned up after a considerable delay. This possible concern ignores subsection 13350(b), which sufficiently protects the helpless violator. This subsection directs the superior court assessing damages to consider "all relevant circumstances, including but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs and corrective action, if any, taken by the discharger."[77] Thus, polluter assistance in cleanup and abatement is one mitigating factor in measuring damages. A reasonable extension of subsection 13350(b) would indicate that if the polluter were forced by circumstances to sit idly by while the government cleans up the spill, this would also be considered. The time required for cleanup sets the outside limit on potential damages; it does not prescribe a fixed sum.

The court in *Port of Oakland* next determined that section 151 of the Harbors and Navigation Code adequately dealt with all cleanup and abatement costs and therefore subsection 13350(a)(3) must have been intended to address a different problem. The court concluded that subsection 13350(a)(3) was designed to penalize continuous acts of polluting for each day of actual discharge. A major shift took place in the *Port of Oakland* court's reasoning when it began this comparative analysis of subsection 13350(a)(3) and Harbors and Navigation Code section 151. The compensatory aspect of subsection 13350(a)(3) had previously been emphasized, but, for the remainder of the opinion, *Port of Oakland* concerned itself only with what it considered the punitive aspect of the provision. The court's focus changed to the degree of culpability in relationship to the extent of damages. Thus, subsection 13350(a)(3) emerged as a penalty for chronic or continuous polluters rather than as a statute intended to compensate for un-

76. *Id.*

77. CAL. WATER CODE § 13350(b) (West Supp. 1977).

quantifiable damages, as stressed earlier in the court's opinion. Punitive in nature had become punitive in result.

The court's analysis seems to indicate that subsection 13350(a)(3) and section 151 of the Harbors and Navigation Code are to be construed as mutually exclusive rather than concurrent remedies, although the language used by the court is unclear. The court found support for this interpretation in the fact that section 151 already provides a direct and adequate remedy for the cost of oil spill cleanup and imposes a maximum $6,000 civil penalty for the act of depositing oil. The *Port of Oakland* court concluded that by enacting the damages clause of subsection 13350(a)(3) the legislature intended to increase the civil penalty for the same act to a maximum of $6,000 per day. Therefore, if the maximum damages recoverable under either section is $6,000 per day of deposit, then the penalty provision of Harbors and Navigation Code section 151 would be applicable only for a one-day spill. For a spill lasting two days or more, subsection 13350(a)(3) would be the appropriate statute, and Harbors and Navigation Code section 151 would be superfluous.

The court again ignored subsection 13350(d), which provides that remedies under subsection 13350(a) are in addition to all other remedies. If the statutes were construed as concurrent, a two-day spill would result in a maximum of $18,000 damages ($6,000 for each day under subsection 13350(a) and a $6,000 penalty under section 151), rather than the $12,000 ($6,000 under either statute for the first day, and $6,000 under 13350(a) for the second day) indicated by the *Port of Oakland* analysis. Construing these remedies as mutually exclusive significantly undermines their potential deterrent effect.

The *Port of Oakland* court construed subsection 13350(a)(3) to be applicable to chronic or continuous polluters, those who spill oil day after day. Since Harbors and Navigation Code section 151 imposes a $6,000 penalty for each deposit of oil, a polluter who spills oil repeatedly (creating new deposits day after day) would be liable for each spill under this section. Hence, if Harbors and Navigation Code section 151 and subsection 13350(a)(3) have the same standard of liability, as stated by the court in *Port of Oakland*, subsection 13350(a)(3) is unnecessary for maximum recovery from this class of chronic polluters. Due to the *Port of Oakland* court's implied exclusive remedies, the only impact of subsection 13350(a)(3) would be on polluters who continuously allow oil to

spill. However, there are potentially stricter criminal sanctions against polluters of this category.

Fish and Game Code section 5650 provides that "[i]t is unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this State any of the following: (a) Any petroleum . . . or residuary product of petroleum . . . ."[78] The minimum penalty for a violation of this statute is a fine of $100 or imprisonment in the county jail for twenty-five days.[79] When a spill is discovered, the Fish and Game Department goes immediately to the scene to stop it. Thus, a spill continuing to flow would usually be a matter of chance, and only in rare situations would there exist a "continuous" polluter to whom subsection 13350(a)(3) would be applicable.

By restricting the amount of recovery to such a low maximum figure and by limiting it to chronic or continuous polluters, *Port of Oakland* retards the deterrent effect of this statute. The unfortunate consequence of the holding is that a polluter could intentionally or negligently spill hundreds of gallons of oil into the water in one day, do nothing to mitigate the length of time the oil remained on the water and be assessed a maximum of $6,000 damages. Such an interpretation has reduced the statute to sheer tokenism.

III. PUBLIC POLICY

Except for passing remarks describing the destruction caused by oil spills,[80] the court's reasoning is devoid of any exploration of the policy considerations crucial to an analysis of environmental protection laws. The task of interpreting an ambiguous statute should be illuminated by factors beyond the actual face of that statute:

> In construing a statute, the court should ascertain the intent of the legislature so as to effectuate the purpose of the law. The courts must look to the context of the law, and where uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation. The court should

78. CAL. FISH & GAME CODE § 5650 (West 1958). For more of the relevant text of section 5650 see note 20 *supra*.

79. *Id.* § 12010. For the relevant text of section 12010 see note 20 *supra*.

80. *See* 16 Cal. 3d. at 37-38, 544 P.2d at 1326-27, 127 Cal. Rptr. at 126-27.

> take into account matters such as context, the object in view, the evils to be remedied, the history of the times, and of legislation upon the same subject, public policy, and contemporaneous construction.[81]

The California Supreme Court, in *Friends of Mammoth v. Board of Supervisors*,[82] went beyond the literal but ambiguous statutory language to discover the interpretation which would best effectuate environmental interests.[83] The court in *Mammoth* recognized the ecology ethic set forth in the United States Supreme Court decision of *Sierra Club v. Morton*:[84] "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."[85] In considering conflicting interpretations of legislative intent in *Mammoth*, the court decided that the statute in question should be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of statutory language.[86]

If *Port of Oakland* had interpreted subsection 13350(a)(3) after considering the context, the object in view, the evils to be remedied and the history of the times, it either would have reached a different conclusion or would have at least clarified its own analysis. The *Port of Oakland* opinion has left future tribunals with few guidelines to follow in the new and rapidly developing area of environmental protection law. In light of the court's failure to explore all the dimensions of the oil pollution problem, it is difficult to justify its conclusion that "[b]y imposing an additional penalty for each day that the person continues to deposit the oil in

81. Alford v. Pierno, 27 Cal. App. 682, 688, 104 Cal. Rptr. 110, 114 (1972) (citations omitted).

82. 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972).

83. In *Mammoth*, the court had to determine whether the California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West 1977), applied to private activities for which a permit is required so as to mandate the filing of an environmental impact report pursuant to Public Resources Code section 21151. The court concluded that private activities did come within the scope of the code section. In the court's determination of whether the legislative intent had been effectuated in the particular fact situation of *Mammoth*, the court looked to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1970), for the definition of the word "project" on which their holding turned.

84. 405 U.S. 727 (1972).

85. *Id.* at 734.

86. *See* 8 Cal. 3d at 259, 502 P.2d at 1057, 104 Cal. Rptr. at 768.

the waters, the Legislature provides an effective deterrent to continuous or chronic violations."[87] Rather than providing a deterrent, the *Port of Oakland* court has created an extremely heavy burden for agencies seeking to establish responsibility for oil spills. Not only must liability be proven before two tribunals (the regional board and the court), but significant evidentiary problems must be overcome in order to sustain an action for negligence.

A. The Negligence Standard: A Formidable Barrier

As a result of the *Port of Oakland* decision, the Regional Water Quality Control Board conducts adversarial hearings to determine if there appears to be intent or negligence involved in an oil spill before recommending action by the Attorney General.[88] If a polluter fails to convince the Board of his or her due care, the Attorney General still has the burden of proving intent or negligence to a superior court before liability may be imposed under subsection 13350(a)(3).[89]

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87. 16 Cal. 3d at 44, 544 P.2d at 1331, 127 Cal. Rptr. at 131.

88. This hearing board includes nine members, most of whom are not likely to be lawyers. Instead, the board includes:

> (1) One person associated with water supply, conservation and production. (2) One person associated with irrigated agriculture. (3) One person associated with industrial water use. (4) One person associated with municipal government. (5) One person associated with county government. (6) One person from a responsible nongovernmental organization associated with recreation, fish, or wild life. (7) Three persons not specifically associated with any of the foregoing categories, two of whom shall have special competence in areas related to water quality problems.

Cal. Water Code § 13201(a) (West 1971).

89. In an internal memo of the Regional Water Quality Control Board, San Francisco Bay Region (February 23, 1977) (file ref: 2344.00), it was noted that

> [s]ince the California Supreme Court's holding in the [*Port of Oakland*] case . . ., in order to seek penalties the spill must be negligently or intentionally caused, Regional Board hearings have become more lengthy and technical. This has resulted in an increased burden on the Board members, hesitancy on the part of the staff regarding appropriate spills for Board consideration, and generally less judicial actions on spill related incidents.

In an executive officer summary report of a meeting held on April 19, 1977, of the California Regional Water Quality Control Board, San Francisco Bay Region, administrative procedures were proposed to streamline oil spill enforcement activities in light of *Port of Oakland's* impact on regional board hearings. The new spill procedures would classify a spill as either subject or not subject to negotiation. Those subject to negotiation would include single occurrences of small spills. The result of the negotiation

Res ipsa loquitur[90] can be applied to allegedly negligent oil spills, but its usefulness is limited because the Attorney General is required to show that: (1) the accident was of a kind which ordinarily does not occur absent someone's negligence; and (2) the polluter was in exclusive control of the operations causing the spill at the time of the incident.[91] Even if the Attorney General meets this burden of proof, only a permissible inference of negligence is created.

Proof of negligence against a polluter requires extremely technical and scientific data. This information may be obtained only after lengthy and costly discovery from the defendant oil corporations that conduct the research in this field. Consequently, if the potential damages to be recovered were limited, the anticipated costs of bringing a suit would weigh heavily against the economic feasibility of instituting such an action.

To establish the existence of negligence, the Attorney General must prove that the polluter acted in violation of the community standard of care. However, this produces a situation advantageous to the oil industry, since this standard has not yet been judicially or legislatively defined. Thus, the standard must be determined by the common practices of the oil industry, and it will consequently reflect the prevalent concern for industrial growth over safety. Additionally, whatever "standard" might be said to exist must necessarily be in a state of constant flux, reflecting rapid technological growth. The appropriate standard of care for the small storage tank farms of today is not necessarily the appropriate standard for the deepwater ports of tomorrow. By rejecting absolute liability for the destructive impact of oil spills,

would then be brought to the board for action, thereby reducing the time of the board hearing. Non-negotiable spills would include those which: (1) are intentionally caused; (2) are unusually large; (3) cause extensive damage to beneficial uses; or (4) are significant, repeated occurrences. These spills would be brought to the board for a hearing without prior negotiation.

90. The doctrine of res ipsa loquitur creates a presumption affecting the burden of producing evidence. It requires the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a contrary finding, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. *See* CAL. EVID. CODE § 604 (West 1966). In a fact situation which gives rise to a res ipsa loquitur presumption, an inference can be drawn that some negligent conduct on the part of the defendant was the proximate cause of the occurrence. *See* CAL. EVID. CODE § 646(c)(1)-(2) (West Supp. 1977).

91. Newing v. Cheatham, 15 Cal. 3d 351, 359, 540 P.2d 33, 39, 124 Cal. Rptr. 193, 198-99 (1975). *But see* Bedford v. Re, 9 Cal. 3d 593, 510 P.2d 724, 108 Cal. Rptr. 364 (1973), for a more expansive interpretation of exclusivity of control.

Port of Oakland has placed the burden on the state to establish the parameters of the applicable standard of care before negligence can be proven.

B. Strict Liability: The Appropriate Standard

One factor underlying a decision to impose strict liability is whether the oil industry, rather than the public, is in a better position to bear the economic risks inherent in oil operations.[92]

> The hallmark of strict liability is . . . that it is imposed on lawful, not reprehensible activities. The activities that qualify are those which entail extraordinary risk to others, either in the seriousness or the frequency of the harm threatened. Permission to conduct such an activity is in effect made conditional on its absorbing the cost of the accidents it causes, as an appropriate item of its overhead costs.[93]

Without strict liability, the public would benefit from litigation against a polluter only if the damages assessed were at least sufficient to cover the litigation costs. If strict liability were applied, oil corporations would need to protect themselves through adequate insurance coverage as determined by the estimated costs of future spills. A significant consideration for the potential polluters would be whether it would be more economical to develop technology to minimize oil pollution or to pay the higher insurance rates and civil damages assessed. Assuming that the cost of insurance would be passed on to consumers, the increased costs of oil might reduce consumption and oil company profits. If this were the case, it follows that a valuable result of the imposition of strict liability would be to pressure oil corporations to develop adequate technology to prevent or minimize oil spills. Thus, strict liability would extend the environmental benefits beyond compensatory damages; it would force oil companies to address the source of the problem.

The destructive effects of oil and the necessity for a strict liability standard were recognized by the California Supreme

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92. *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring); *see also* Prosser, Law of Torts 495 (4th ed. 1971).

93. J. Fleming, The Law of Torts § 73 (4th ed. 1971).

Court as early as 1928 in *Green v. General Petroleum Corp.*[94] In *Green*, the defendant had engaged in drilling a well for the discovery and production of oil. Even though the defendant had exercised due care and caution, the well erupted, shooting oil, gas, mud and rocks into the air and onto the plaintiff's property, greatly damaging both the dwelling and personal property of the plaintiff. In analyzing the case, the court held:

> Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done . . . . It ought to be, and we are of the view that it is the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of the object or instrumentality that may have caused the injury.[95]

An analysis similar to that of the *Green* court appeared in the Restatement (First) of Tort's theory of ultra-hazardous activities.[96] Subsequently, the Restatement (Second) of Torts expanded that theory but used the term "abnormally dangerous" instead of "ultra-hazardous."[97] If an activity is abnormally dangerous, a strict liability standard of fault is called for. To determine if an activity is abnormally dangerous, thereby requiring a strict liability standard of fault, the Second Restatement sets forth six factors to be considered and balanced. Four of these factors are intertwined: (1) whether the activity involves a high degree of risk

94. 205 Cal. 328, 270 P. 952 (1928).
95. *Id.* at 333, 270 P. at 955.
96. RESTATEMENT (FIRST) OF TORTS §§ 519, 520 (1938).
97. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1965).

of some harm to the person, land or chattels of others; (2) whether the gravity of the harm which may result from it is likely to be great; (3) whether the risk cannot be eliminated by the exercise of reasonable care; and (4) the value of the activity to the community.[98]

The value of oil to our society and the countereffects of ecological destruction are well known.[99] Technology for cleanup and abatement of oil spills has, unfortunately, not kept pace with the growth of the oil industry. Even if an oil company were to use the utmost care and the most advanced scientific techniques in order to prevent spills, it is clear that spills would continue to occur.[100] Furthermore, there is the additional problem of removing spilled oil from the water before it causes extensive damage.[101] Reasonable care on the part of the oil industry does not preclude future spills nor eradicate their destructive effects. Without continued pressure from the legislature and the courts, oil companies will continue to develop larger tankers, deepwater ports and more expansive storage farms, rather than concentrating on safety measures for the immediate future.

The fifth factor considered in the Restatement analysis is whether the activity is inappropriate to the place where it is conducted.[102] Tankers have proven to be the most efficient method of transporting large quantities of oil, and, consequently, most oil spills that directly affect the state occur along the coast, either from the tankers themselves or from tank farms. Because of its practical advantages, transportation of oil along the coast might be considered "appropriate." However, the "appropriateness of the place" concept has also been viewed as involving considerations of the danger to the communities located near the activity. Blasting, a frequently noted example, may be appropriate in

98. *Id.* § 520(a), (b), (c), (f).

99. *See* note 8 *supra*, which details some of the destructive effects of oil spills.

100. Bergman, *supra* note 5, at 1-8. Bergman notes several factors which, if left unchecked, would lead to an increase in oil spills in the future: the lack of current technological capability to succeed with counter measures against oil spills; the dramatic growth of tankers in both size and numbers; the rise in stakes of a collision or tanker accident as a result of this growth; planned transportation of oil in the future through the hazardous route of the Bering Straits, which raises the possibility of a major oil spill in the Arctic; increased development of offshore oil drilling; and continued intentional dumping of slop water and ballast on the high seas despite statutes prohibiting such activities. *Id.*

101. *Id.* at 4-5.

102. RESTATEMENT (SECOND) OF TORTS § 520(e) (1965).

one area to build private and public works; yet, in another area where it endangers communities, it becomes inappropriate.[103] Oil, unlike selective blasting, does not discriminate in its environmental path. It poses a danger to the state as a whole, as well as to each individual community. One spill can spread to cover a wide area, and its long-term effects can change the water environment. Allthough transportation by water may be the most practical means of moving oil, it is still inappropriate to the water environment due to its destructive impact.

The final factor considered in the Restatement is a test for "common usage."[104] Something used by a significant portion of the population, such as the automobile or the airplane, is deemed to be of "common usage" and therefore not within the narrow scope of the abnormally dangerous theory. Thus, consideration of whether the activity in question is carried on by a sufficiently large percentage of the population is required.[105] Analogous to the problem of oil storage is the transportation and use of high explosives.[106] While explosives benefit many people, their use is not considered a matter of "common usage" since the activity is carried on by only a few people. This is also true of the oil industry where a large part of the population depends on oil, yet very few persons engage in its transport.

Balancing all the factors set forth by the Restatement (Second) of Torts' theory of abnormally dangerous activities, it is clear that oil transportation and storage come within its ambit. Society depends on the many beneficial uses of oil, but the price paid for that dependency is great in terms of ecological impact. The likelihood of continued spills and the extent of their harm is great. Present technology is incapable of significantly mitigating this problem, and, until new technology is developed, transportation and storage of oil will remain an abnormally dangerous activity.

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103. *See* Houghton v. Loma Prieta Lumber Co., 152 Cal. 500, 504-05, 93 P. 82, 83-84 (1907); Alonso v. Hills, 95 Cal. App. 2d 778, 783, 214 P.2d 50, 54-55 (1950); McKenna v. Pacific Electric Co., 104 Cal. App. 538, 542, 286 P. 445, 446 (1930).

104. RESTATEMENT (SECOND) OF TORTS § 520(d) (1965).

105. The question of concern is not how many people benefit from the activity, but rather how many people are involved in the activity itself. In Lutheringer v. Moore, 21 Cal. 2d 489, 190 P.2d 1 (1948), the California Supreme Court stated that even though gas is used commonly by cockroach exterminators, these exterminators are few in number and are engaged in a specialized activity. *Id.* at 500, 190 P.2d at 8. It is not carried on generally by the public as part of everyday life. Therefore, the activity is not one of common usage.

106. *See* RESTATEMENT (SECOND) OF TORTS § 520, comment 3 (1965).

Thus, imposition of strict liability is called for, and this should depend not on whether an oil company intentionally caused a spill, but rather on the company's initial choice to engage in an activity which presented an unusual hazard to society.

The holding in *Port of Oakland* is in opposition to the emerging trend of environmental protection analysis. For example, federal courts have imposed a standard of strict liability when interpreting ambiguous environmental legislation.[107] Additionally, the United States Supreme Court recently rejected a preemption argument when a state imposed a stricter standard than that of the federal government in the area of oil pollution.[108] The major concern of the federal government is that a state's water pollution standards meet the standards set forth in the amended Federal Water Pollution Control Act of 1972.[109]

A further indication of the trend in environmental protection is the recently enacted legislation in Washington[110] and Oregon[111] which prescribes a strict liability standard for oil spills from

107. *See, e.g.*, United States v. White Fuel Corp., 498 F.2d 619, 623 (1st Cir. 1974).

108. *See* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).

109. 33 U.S.C. §§ 1251-1376 (Supp. II 1972). *Id.* § 1251(a) provides in part:

> The objective of this chapter is to restore and maintian the chemical, physical and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
>
> (1) It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
>
> (2) It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.

See also United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).

110. WASH. REV. CODE § 90.48.320 (1974) provides:

> It shall be unlawful . . . for oil to enter the waters of the state from any ship or any fixed or mobile facility or installation located offshore or onshore, whether publicly or privately operated, regardless of the cause of the entry or fault of the person having control over the oil, or regardless of whether it be the result of intentional or negligent conduct, accident or other cause.

111. ORE. REV. STAT. § 468.785 (1975) provides in pertinent part:

> It shall be unlawful for oil to enter the waters of the state from any ship or any fixed or mobile facility or installation located offshore or onshore, whether publicly or privately operated, regardless of the cause of the entry or the fault of the person having control over the oil, or regardless of whether

tank farms. As a result of this legislation, oil companies can presently escape strict liability only by fleeing south to California. In effect, by narrowly interpreting its laws, California is providing an economically advantageous haven for environmental polluters. California is consequently threatening its citizens not only with incalculable legal and cleanup costs, but also with possible irreversible environmental damage.

The trend toward strict protection standards for the environment is also reflected in several law review articles[112] which analyze the production, transportation and storage of oil as an abnormally dangerous activity. These articles suggest that a strict liability standard provides the most acceptable way to balance the consumer's need for oil against the accompanying environmental risks. Regrettably, the *Port of Oakland* court has issued a decision which is clearly contrary to developments in other states, the federal courts and the noted trend in law review articles.

IV. CONCLUSION

The holding in *Port of Oakland* greatly advanced environmental protection by establishing that governmental entities that pollute cannot avoid responsibility for their activities. However, the court's decision rejecting strict liability as the standard of care for onshore oil polluters, coupled with its maximum allowance of only $6,000 in damages for each day of discharge, is a significant setback. Furthermore, future litigants of environmental legislation cannot be certain whether the California Supreme Court will ultimately adopt the broad environmental perspective of *Mammoth* or the narrow approach of *Port of Oakland*.[113] Because the

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the entry is the result of intentional or negligent conduct, accident or other cause.

Other coastal states have also enacted strict liability oil pollution statutes. *See* CONN. GEN. STAT. ANN. § 25-54 (West Supp. 1971); FLA. STAT. ANN. § 403.141 (West Supp. 1971); MD. NAT. RES. CODE ANN. § 8-1409 (1974); MASS. GEN. LAWS ANN. ch. 21, § 27(14) (West Supp. 1971); N.C. GEN. STAT. § 143-214.2 (1974).

112. *See* Bergman, *supra* note 5; Mendelson, *Maritime Liability for Oil Pollution—Domestic and Internation Law*, 38 GEO. WASH. L. REV. 1 (1969); Nanda, *supra* note 74; Walmsley, *Oil Pollution Problems Arising out of Exploitation of the Continental Shelf: The Santa Barbara Disaster*, 9 SAN DIEGO L. REV. 514 (1972); Note, *Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970*, 55 CORNELL L. REV. 973 (1970).

113. Justice Sullivan, who authored the *Port of Oakland* opinion, also wrote the lengthy dissent in *Mammoth* arguing that the majority had violated the rules of statutory construction. One might ask if the commitment to the environment expressed in

Port of Oakland court's narrow view is almost totally devoid of public policy considerations, there are few guidelines for the interpretation of oil spill statutes yet to be construed by the appellate courts. The court's analysis in *Port of Oakland* is confusing and appears to have been constructed in a vacuum. It harmonizes statutes without interpreting them and focuses on grammar, syntax and definitions while avoiding realistic assessment of the impact of its holding.

By forcing the state to prove negligence or intentional harm, an exceedingly onerous task, the court has effectively stymied the state in its regulation of onshore facility oil polluters. In the final analysis, subsection 13350(a)(3) has become nugatory. At a time when public concern for the effects of oil spills is great, California has few safeguards to protect the water environment through either deterrent or compensatory measures.

> *There are substitutes for oil and gas, but not substitutes for oceans. Citizens of Spaceship Earth should face the choice they are now making.*
>
> *William O. Douglas*[114]

Jan M. Lecklikner

Mammoth has now been replaced by a strict constructionist approach to statutory interpretation that was not correctly applied in *Port of Oakland*.

114. N. MOESTERT, SUPERSHIP, jacket cover (1975).