

Shake Up at DOJ Energy and Natural Resources Division

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In a Memorandum dated March 25, 2025, Deputy Attorney General Todd Bianche, announced a sweeping reorganization at the U.S. Department of Justice. This included a major reorganization of the DOJ's of Energy and Natural Resources Division ("ENRD"), such as termination of senior career attorneys, reassignment of others to the Office of Sanctuary Cities, consolidation of various sections within the ENRD and eliminating certain field offices. Some career managers have resigned rather than accept reassignment.

All pending litigation or settlements being handled by the ENRD have been paused. The pause is temporary, but for how long is unknown. This is regrettable, because in a major incident we are handling we were making some headway on a settlement, but negotiations have come to an abrupt halt.

The intention for the pause is unclear, but it appears to be to allow incoming ENRD attorneys and staff time to familiarize themselves on pending matters to allow for potential change in course, or on specific cases.

It is hard to predict what impact these measures may have on pending cases. It is not known how long the pause order may last or what will happen with pending settlement negotiations.

The pause order does not apply to the States, some of whom depend on the ENRD to take the lead on environmental cases.

It should also be understood this reorganization plan and pause order relating to the ENRD should not affect responses to oil spills or substantial threats of pollution. The ENRD does not take the lead on oil spill response. Typically, the U.S. Coast Guard takes the lead on incident response.

WHAT CONSTITUTES A SUBSTANTIAL THREAT OF A SPILL UNDER OPA 90?

On April 27, 2006, a large tank vessel strayed from her intended path towards an oil refinery on the SE coast of Puerto Rico. Shortly after midnight, she went aground on soft coral while awaiting the harbor pilot. She was a double hulled, an ice-strengthened ship and spilled no oil.

The Federal On- Scene Coordinator ("FOSC") declared that there was a "substantial threat of a discharge" of oil, which qualifies as an "incident" under OPA. This opens the wide array of damages available against the Responsible Party under OPA which may not otherwise be available to governmental or private claimants.

The next morning, the ship refloated with high tide. The FOSC directed her to proceed on her own power to anchorage. In port, a dive survey found "ONLY COSMETIC DAMAGE (PAINT SCRAPINGS)" on the hull.



At issue in pending litigation arising from this situation is who determines if a "substantial threat of a discharge" is presented, how is that determination made and can it be final and binding on a Responsible Party who has not been afforded due process, i.e. an opportunity to present evidence that the situation did not constitute a substantial threat.

A FOSC "must document the factors considered and the basis for the decision that a specific situation presented a substantial threat of discharge."

The FOSC did not even write down he thought there was a substantial threat. Although the magnitude of a spill, *if one occurred*, could be "MAJOR," the probability of a spill was "LOW. The district court excluded that analysis by conducting an arbitrary and capricious review of a supposed decision by the FOSC during the grounding, that it presented a "substantial threat."

The FOSC had critical responsibilities for marine safety, and no one questions the wisdom of his activities during the grounding. But even assuming he believed the ship risked spilling oil, that belief should not constitute a binding determination of OPA liability.

The Government claims that because the ship carried a full cargo of crude oil, the grounding presented a substantial threat. The shipowner interests contend that, regardless of the amount of oil on the ship, the threat of a spill in this situation was not "substantial" but rather, in the Coast Guard's own words, "low."

This issue is one of the subjects of a pending appeal by the shipowner interests in the Court of Appeals for the First Circuit. A decision is expected by summer 2025.