Land & Water Law Review

Volume 18 | Issue 2 Article 15

1983

Environmental Law - Strict Liability for Oil Spills in Wyoming - People v. Platte Pipe Line Company

James M. Ellerbe

CASE NOTES

ENVIRONMENTAL LAW—Strict Liability for Oil Spills in Wyoming. ***People v. Platte Pipe Line Company*****, 649 P.2d 208 (Wyo. 1982).**

On April 8, 1980, a pipeline owned and operated by the Platte Pipe Line Company (Platte Pipeline) ruptured and discharged an estimated 8,552 barrels of crude oil into the North Platte River in Converse County, Wyoming.[1] The discharge contaminated sixty-eight river miles and caused considerable damage to the river's ecosystem.[2] County, state and federal agencies monitored a cleanup effort conducted by Platte Pipeline[3] that lasted twenty-five days and recovered approximately ninety-five percent of the oil discharged.[4] By March 25, 1981 the Wyoming Game and Fish Department had expended $48,325 and the Wyoming Department of Environmental Quality (DEQ) had expended $4,290 as a result of the spill.[5]

On March 25, 1981, the Wyoming Attorney General filed a civil complaint against Platte Pipeline in the Eighth Judicial District Court of Wyoming, pursuant to the provisions of the Wyoming Environmental Quality Act of 1973 (EQA).[6] The complaint alleged, among other things, that Platte Pipeline had violated section 35-11-301 of the Wyoming Statutes because its pipeline had discharged pollution into state waters without a permit from DEQ.[7] The company was therefore allegedly liable for the civil penalties set out in section

1. People v. Platte Pipe Line co., 649 P.2d 208, 209 (Wyo. 1982).
2. Wildlife killed as a result of the spill included 1,752 muskrats, 4 beavers, 1 raccoon, 19 geese, 109 ducks, and 183 goose eggs. *Id.*
3. Platte Pipeline claimed to have spent $1,285,995.21 for repair of the pipeline, for clean-up and containment costs, and for third party damage claims. The company sued Mountain States Telephone & Telegraph (Mountain Bell) for negligence in conducting excavation that had allegedly damaged the pipeline some five years earlier. Complaint, 7th Jud. Dist. Court of Wyo., Docket No. 50129, pt. II, counts no. 6 and 8.
4. People v. Platte Pipe Line Co., 649 P.2d at 209 (Wyo. 1982).
5. *Id.*
6. *Id.* The Wyoming Environmental Quality Act (EQA) is codified at WYO. STAT. §§ 35-11-101 to -1104 (1977). WYO. STAT. § 35-11-901(q) (Supp. 1982) provides in relevant part: "All actions pursuant to this article shall be brought in the county in which the violation occurred or in Laramie county by the attorney general. . . ."
7. People v. Platte Pipe Line Co., 649 P.2d at 210 (Wyo. 1982). WYO. STAT. § 35-11-301 (1977) [hereinafter referred to as section 301] provides in relevant part:
   (a) No person, except when authorized by a permit issued pursuant to the provisions of this act, shall:
      (i) Cause, threaten or allow the discharge of any pollution or wastes into the waters of the state;
      (ii) Alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state. . . .

35-11-901(a) and (h) of the Wyoming Statutes.[8] Specifically, the State prayed for $10,000 for each day of the violation,[9] as well as an unspecified sum as compensation for the habitat and wildlife destroyed.[10] The complaint also alleged that Platte Pipeline had violated section 311 of the federal Clean Water Act (CWA),[11] and thus, that the State was entitled under section 311 (f)(4) and (5) to recover for costs incurred in the restoration of resources destroyed by the discharge.[12]

Subsequently, Platte Pipeline filed a motion to dismiss the case pursuant to Rules 12 and 19 of the Wyoming Rules of Civil Procedure.[13] The district court granted Platte Pipeline's motion under Rule 12 because the State's complaint had failed to state a claim upon which relief could be granted.[14]

On appeal, the Wyoming Supreme Court overruled the district court, finding that the State had made a valid claim for relief.[15] The court held that section 301 imposed strict liability

8. People v. Platte Pipe Line Co., 649 P.2d at 210 (Wyo. 1982). WYO. STAT. § 35-11-901 (Supp. 1982) [hereinafter referred to as section 901] provides in part:
   (a) Any person who violates . . . any provision of this act . . . is liable to . . . a penalty of not to exceed ten thousand dollars ($10,000.00) for each day during which violation continues. . . .
   (b) Except for surface coal mining operations, damages are to be asessed by the court.
   . . . .
   (h) Any person who violates this act, . . . and thereby causes the death of fish, aquatic life or game or bird life is . . . liable to pay to the state, an additional sum for the reasonable value of the fish, aquatic life, game or bird life destroyed. Any monies so recovered shall be placed in the general fund of Wyoming, state treasurer's office.
   (j) Any person who willfully and knowingly violates . . . any provision of this act shall be fined not more than twenty-five thousand dollars ($25,000.00) per day of violation, or imprisoned for not more than one (1) year, or both. If the conviction is for a violation committed after a first conviction of such person under this act, punishment shall be by a fine of not more than fifty-thousand dollars ($50,000.00) per day of violation or by imprisonment of not more than two (2) years, or both.
9. Prayer, 8th Judicial Dist. Court of Wyo., Docket No. 8564, count no. 2. The complaint alleged that the violation had continued for 25 days. Complaint, 8th Judicial Dist. Court of Wyo., Docket No. 8564, count no. 21.
10. Prayer, *supra* note 9, at count no. 3.
11. Complaint, *supra* note 9, at count no. 17. Section 311 of the CWA is codified at 33 U.S.C. § 1321 (1976). The complaint referred to the CWA by its old name, the Federal Water Pollution Control Act.
12. Prayer, *supra* note 9, at count no. 4.
13. People v. Platte Pipe Line Co., 649 P.2d at 210 (Wyo. 1982).
14. *Id.* WYO. R. CIV. P. 12(b)(6) requires that the plaintiff state a claim upon which relief can be granted by the court. "The Court thus agreed with Defendant's Motion to Dismiss which states that the Complaint failed to '. . . allege facts which are cognizable under the cited statutes. . . .' " Brief of Appellants at 10, People v. Platte Pipe Line Co., 649 P.2d 208 (Wyo. 1982). The district court believed that section 301 did not impose strict liability; therefore a showing of fault on the part of the defendant was required before section 301 could be considered violated. 649 P.2d at 210.
15. 649 P.2d at 214.

for any unpermitted discharge of pollution into waters of the state. Consequently, the operator of a pipeline that had discharged such pollution would be subject to the penalties of section 901 regardless of fault on its part.[16] The case was remanded to district court on August 5, 1982.[17]

The parties settled the case on December 1, 1982. Platte Pipeline agreed to pay the State the following sums:

1) $5,000 pursuant to the penalty provision of section 901(a).[18]
2) $15,249.30 pursuant to the wildlife compensation provision of section 901(h).[19]
3) $30,447.79 to the Wyoming Game and Fish Department and $1,037 to DEQ as reimbursement for the costs those agencies incurred in responding to the oil spill.[20]

BACKGROUND: FEDERAL AND STATE WATER POLLUTION LEGISLATION

Federal Legislation

The first federal statute to deal with water pollution was the Rivers and Harbors Act of 1899,[21] but the modern era of federal water pollution legislation can be said to have begun with the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA).[22] The FWPCAA adopted several goals and policies for the nation:

1) The elimination of all discharge of pollutants into the navigable waters of the nation by 1985.

16. *Id.*
17. *Id.* at 209.
18. Consent Decree, 8th Judicial Dist. Court of Wyo., Docket No. 8564, no. 9.
19. Consent Decree, *supra* note 18, at no. 8. The lost wildlife was evaluated on the basis of a "hunter-recreation day" or on the basis of pelt value, where applicable. *Id.* Section 901(h) is quoted above at note 8.
20. Consent Decree, *supra* note 18, at no. 7. The State had originally prayed for $48,325 for the Game and Fish Department and $4,290 for DEQ. Prayer, *supra* note 9, at count no. 4.
21. Rivers and Harbors Act of 1899, 30 Stat. 1121 (codified as amended in scattered sections of 33 U.S.C.). *See* J. B. Battle, Environmental Law: Part IV: The Clean Water Act 6 (Apr. 1982) (unpublished). For a short summary of the history of federal water pollution legislation, see Comment, *Spilling Oil May Be Hazardous To Your Wealth,* 19 NAT. RESOURCES J. 735, 736 (1979).
22. Pub. L. No. 92-500, 86 Stat. 816, codified at 33 U.S.C. §§ 1251-1376 (1976). In 1977, the FWPCAA was amended and renamed the Clean Water Act (CWA). Pub. L. No. 95-217, 91 Stat. 1566 (1977) [The FWPCAA will hereinafter be referred to in text by its new name, CWA, where appropriate].

2) An interim goal of water quality that protects fish, wildlife and recreational use, to be achieved by 1983.
3) Prohibition of the discharge of toxic pollutants in toxic amounts.
4) Federal financial assistance to construct publicly-owned waste treatment works.
5) A major research effort to develop the technology necessary to achieve these goals.
6) The preservation of the primary responsibility of the states to prevent, reduce and eliminate pollution.[23]

The FWPCAA established, among other things, the National Pollutant Discharge Elimination System (NPDES),[24] which is a permit system for water polluters. Anyone wishing to discharge any kind of pollution into the nation's waters must first obtain a permit to do so from the Administrator of the Environmental Protection Agency (EPA).[25] These permits are based on a comprehensive set of effluent standards issued by the Administrator,[26] and *any* discharge without a permit is unlawful.[27] This prohibition is fundamental to the entire FWPCAA.[28] Persons who willfully or negligently violate the provisions of the NPDES are subject to a criminal penalty of up to $25,000 per day of violation and/or imprisonment for up to one year.[29] Other violators are subject to a civil penalty of up to $10,000 per day of violation.[30] The language of section 301(a) of the FWPCAA,[31] together with the fact that separate penalties are imposed for negligent and non-negligent violators, indicates that the NPDES is based in strict liability.[32] The NPDES also contains a provision that allows each state to establish its own permit system, and if the state system is in compliance with federal standards it will replace the federal system in that state.[33]

23. 33 U.S.C. § 1251(a) and (b) (1976). *See generally* Battle, *supra* note 21, at 6-19.
24. 33 U.S.C. § 1342 (1976).
25. 33 U.S.C. § 1311 (1976).
26. 33 U.S.C. § 1312 (1976).
27. 33 U.S.C. § 1311 (1976).
28. American Frozen Food Inst. v. Train, 539 F.2d 107, 128 (D.C. Cir. 1976).
29. 33 U.S.C. § 1319(c)(1) (Supp. V 1981).
30. 33 U.S.C. § 1319(d) (Supp. V 1981).
31. Section 301(a) is codified at 33 U.S.C. § 1311(a) (1976), and provides in part: "Except as in compliance with this section . . . the discharge of any pollutant by any person shall be unlawful."
32. United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979).
33. 33 U.S.C. § 1342(b) (1976).

Another portion of the FWPCAA was designed to deal with oil spills in the nation's navigable waters. Section 311 of the FWPCAA[34] is entitled "Oil and Hazardous Substance Liability." The section declares it to be national policy that there be no discharges of oil or hazardous substances into the nation's navigable waters,[35] and any such discharge in harmful quantities is prohibited.[36] The section establishes two kinds of liability. First, there is a fine of up to $5,000 for each offense, to be assessed against the owner, operator, or person in charge of the facility from which the oil is discharged.[37]. There are no defenses[38] because the purpose is to clean up pollution, not to effect retribution.[39] Second, the responsible party is liable for up to $50,000,000 to the state or federal government for any expenses their agencies incur in clean-up operations (including expenses for the restoration or replacement of natural resources).[40]

The party is excused from liability under this provision, however, if it can prove that the discharge was caused by 1) an act of God, or 2) an act of war, or 3) negligence of the United States Government, or 4) an act or omission of a third party.[41] In anticipation of the fact that these defenses will be used and that the government will be paying for clean-up when the defenses are successful, a $35,000,000 fund is established for that purpose from general revenue and from any fines collected under the first penalty provision.[42]

Finally, section 311 of the FWPCAA explicitly disclaims any federal preemption of state laws that impose liability for the discharge of oil or hazardous substances.[43] Therefore, the states are free to impose any kind of penalty they choose in these matters, even though that penalty may exceed in amount

34. Section 311 is codified at 33 U.S.C. § 1321 (1976).
35. 33 U.S.C. § 1321(b)(1) (1976).
36. 33 U.S.C. § 1321(b)(3) (1976).
37. 33 U.S.C. § 1321(b)(6)(A) (Supp. V 1981).
38. "Section 1321(b)(6) provides no defense to the assessment of the civil penalty; indeed, it establishes an absolute liability standard which obviates the need for a finding of fault." United States v. Coastal States Crude Gathering Co., 643 F.2d 1125, 1127 (5th Cir. 1981).
39. Ward v. Coleman, 423 F. Supp. 1352, 1356 (D. Okla. 1976), *rev'd*, 598 F.2d 1187 (10th Cir. 1979), *rev'd sub nom.* United States v. Ward, 448 U.S. 242 (1980).
40. 33 U.S.C. § 1321(f)(3) and (4) (Supp. V 1981).
41. 33 U.S.C. § 1321(f)(1)-(3) (Supp. V 1981).
42. 33 U.S.C. § 1321(k) (Supp. V 1981).
43. 33 U.S.C. § 1321(o)(2) (1976).

the penalties imposed by section 311, and even though the polluter may be subject to double liability.[44]

State Legislation

In 1973, the Wyoming legislature enacted the Wyoming Environmental Quality Act (EQA)[45] in response to the FWPCAA and to growing environmental concern locally. The EQA was designed to control air, water and land pollution, and it reorganized Wyoming's statutory and administrative environmental protection systems.[46] The EQA opens with a broad declaration of legislative intent:

> [I]t is hereby declared to be the policy and purpose of this act to enable the State to prevent, reduce and eliminate pollution; . . . to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air, land and water. . . .[47]

Article three of the EQA is entitled "Water Quality" and is the first comprehensive water pollution control legislation to be enacted in Wyoming.[48] Section 301 contains the basic prohibition of the article: no person without a permit shall cause, threaten or allow the discharge of pollution into state waters; nor shall such person alter the various properties of these waters.[49] The penalties and compensatory provisions for violation of section 301 are found elsewhere in the EQA at section 901.[50] These provisions include 1) a penalty of up to $10,000 per day of violation,[51] up to $25,000 per day if the violation is willful,[52] 2) reimbursement to the state for the value of wildlife killed,[53] and 3) damages to be assessed by the court.[54] Section

44. *See* Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 620-21 (4th Cir. 1979).
45. 1973 WYO. SESS. LAWS Ch. 250, § 1 codified at WYO. STAT. § 35-11-101 to -1207 (1977 & Supp. 1982).
46. Comment, *Wyoming Environmental Quality Act of 1973: Introduction*, 9 LAND & WATER L. REV. 65 (1974).
47. WYO. STAT. § 35-11-102 (1977).
48. Comment, *Wyoming Environmental Quality Act of 1973: Section II. The Wyoming Water Quality Act And The Federal Water Pollution Control Act Amendments of 1972: A Comparison*, 9 LAND & WATER L. REV. 79 (1974).
49. WYO. STAT. § 35-11-301(a)(i) and (ii) (1977). The language is quoted above at note 7.
50. WYO. STAT. § 35-11-901 (Supp. 1982). The language is quoted above at note 8.
51. WYO. STAT. § 35-11-901(a) (Supp. 1982).
52. WYO. STAT. § 35-11-901(j) (Supp. 1982).
53. WYO. STAT. § 35-11-901(h) (Supp. 1982).
54. WYO. STAT. § 35-11-901(b) (Supp. 1982). One could not imagine a provision more vague and all-inclusive that this third one. This provision could possibly include clean-up costs or any other costs incurred by the State, but it is more likely that it only refers to damages provided for elsewhere in section 901.

302 defines the various duties of the Administrator of the Water Quality Division within DEQ. Article three specifies no water quality standards whatsoever; rather, the Administrator is directed to recommend to the Director of DEQ any regulation or standard he deems necessary to prevent pollution of the state's waters.[55]

Comparison of State and Federal Legislation

One of the Water Quality Administrator's duties is to establish and manage a state-wide permit system that will be in compliance with the NPDES[56] so that DEQ can administer the permit program rather than EPA. In this way the state retains control over pollution affecting its waters. It should be emphasized, however, that compliance with the NPDES is not the only purpose that article three seeks to accomplish. It was intended to be comprehensive pollution control legislation, not merely to create a replica of the federal permit system. For example, NPDES applies only to point sources of pollution,[57] but article three contains no such specific limit in its language. Therefore, the article seems to apply to all kinds of water pollution, both point source and non-point source.[58]

The vagueness of the language in article three creates inevitable problems in deciding whether the EQA covers certain kinds of water pollution that are outside the scope of NPDES but are within the CWA as a whole. Article three of the EQA was definitely a response to the CWA,[59] but it does not necessarily follow that the procedures and principles that appear in the various sections of the CWA were to serve as a model for article three. For example, the federal penalties for violation of a federal NPDES permit do not apply to the owner

55. WYO. STAT. § 35-11-302(a) (1977). Prevention of pollution of the State's waters is one of the purposes of the act. *See supra* text accompanying note 47.
56. WYO. STAT. § 35-11-302(a)(v) (1977).
57. 33 U.S.C. § 1311(e) (1976). *See also* Comment, *supra* note 48, at 80.
58. The CWA and the EQA contain identical definitions of the term "point source." " 'Point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation or vessel or other floating craft, from which pollutants are or may be discharged. . . ." WYO. STAT. § 35-11-103(a)(x) (1977). *See also* 33 U.S.C. § 1362(14) (1976).
59. The CWA was named the Federal Water Pollution Control Act Amendments of 1972 at the time the EQA was enacted. "There is no question that the impetus for the act and its structure was . . . the Federal Water Quality Act Amendments of 1972." Comment, *supra* note 48, at 79.

of a facility that has spilled oil into navigable waters.[60] The CWA has a special section that covers that kind of event,[61] and penalties imposed by the two sections are mutually exclusive.[62] Does this mean that the penalties imposed by the EQA for violation of its permit system likewise do not cover oil spills in Wyoming? The argument that article three, like the federal NPDES, covers only pollution discharges for which a permit could have been obtained, but was not, was cogently made by Platte Pipeline in the district court[63] and evidently accepted, in spite of the fact that such an interpretation would have left the EQA powerless to punish the worst conceivable kinds of pollution—those for which a permit would never be available.[64] When one considers the enormous difference between the federal and state acts in terms of structure and level of complexity, any argument by analogy is likely to be of limited value. Article three obviously emulates the CWA more in spirit than it does in organization. When problems of statutory construction of article three arise in the Wyoming courts, judges will do far better to consider the plain language of the text and the purposes that the act was meant to accomplish than to attempt some analogy with a particular section of the CWA.

A Case of First Impression

Wyoming case law interpreting the EQA in the ten years since its enactment is almost non-existent. In a 1976 case, the EQA was cited as an example of new administrative legislation that is the trend in Wyoming.[65] In another 1976 case, the court upheld a penalty assessed to a town for failure to obtain a permit before constructing a waste disposal site.[66] In 1980, the court upheld a similar penalty for failure to obtain a permit before installing a public water supply system.[67] The court did

60. *See* 33 U.S.C. § 1319 (Supp. V 1981).
61. 33 U.S.C. § 1321 (Supp. V 1981). See *supra* text accompanying notes 35-44 for a discussion of this section.
62. 33 U.S.C. § 1321(b)(6)(E) (Supp. V 1981).
63. Brief in Support of Defendant's Motion to Dismiss at 4-5, 8th Judicial Dist. Court of Wyo., Docket No. 8564.
64. Note, however, the *Platte* court's treatment of this point. *See infra* text accompanying note 73.
65. Board of Trustees v. Spiegel, 549 P.2d 1161, 1170 n.13 (Wyo. 1976).
66. Town of Torrington v. Environmental Quality Council, 557 P.2d 1143 (Wyo. 1976).
67. Nickelson v. People, 607 P.2d 904 (Wyo. 1980). The court held that the penalties provided by the EQA were civil, not criminal, and therefore the appellant's fifth amendment right against self-incrimination did not apply when he was assessed a penalty under the EQA. *Id.* at 909.

not specifically define the scope of article three in any of these cases, not did it determine the degree of culpability necessary to constitute a violation of section 301. As a result, Platte Pipeline was correct to make this statement in its brief on appeal: "This is a case of first impression. The Supreme Court has not had an opportunity to have before it a case in which the alleged violator has contested the Department's power to regulate oil spills."[68]

THE COURT'S DECISION

The Wyoming Supreme Court pointed out that it needed to decide only one question of statutory interpretation in order to adjudicate *Platte*: Does section 301 of the EQA impose liability upon the operator of a crude oil pipeline that has discharged pollution into state waters?[69] The court broke the question down into two narrower questions:

1) Does section 301 cover only those kinds of pollution for which a permit could have been obtained but was not, or does it cover unpermittable oil spills as well?[70]
2) Does section 301 impose strict liability upon the owners of polluting facilities or does it require some form of negligence or scienter? If strict liability is called for, the operator's negligence is irrelevant and would not have to be alleged by the State in order to state a claim for relief.[71]

The court's rationale was simple and direct. It answered the first question by deciding that a pipeline leaking oil into a river was a discharge of pollution into state waters within the meaning of section 301.[72] Platte Pipeline's argument equating article three with the federal NPDES and categorizing it as a limited permitting statute was dismissed by the court as "undiluted sophistry" because it ignored the Act's stated purpose of reducing and preventing pollution.[73] Such an argument would have rendered the Act ineffectual.

68. Brief of Appellee at 49, People v. Platte Pipe Line Co., 649 P.2d 208 (Wyo. 1982).
69. 649 P.2d at 209.
70. *Id.* at 211.
71. *Id.* at 213.
72. *Id.* at 214.
73. *Id.* at 211-12.

The court then concluded that section 301 was intended by the legislature to impose strict liability. The court gave three reasons for arriving at such a conclusion:

1) The statutory language of section 301 is unambiguous.[74] "The clear import of this language is that *if a person alters the water's quality without a permit, he then has violated the statute regardless of fault.*"[75]

2) When the EQA was passed in 1973, section 901 included subsection (e), which had excused the operator of polluting equipment from liability if the pollution was caused by a breakdown beyond his control.[76] In 1974, however, the legislature repealed subsection (e),[77] revealing a definite intent to hold operators responsible even for discharges of pollution beyond their control.[78]

3) The legislature had accepted by silence the provisions of chapter IV of the Water Quality Rules and Regulations promulgated by DEQ in May, 1978.[79] Chapter IV describes operator's liabilities in unequivocal terms: negligence is not required to be in violation of section 301.[80] The fact that the legislature had amended the EQA twice since the promulgation of chapter IV and had not overruled it was seen by the court as a sign that the legislature had no quarrel with its provisions.[81]

Accordingly, section 301 was declared to be a strict liability statute.[82] This result was compelled by legislative intent as

74. *See supra* note 7.
75. 649 P.2d at 213 (emphasis in original).
76. 1973 WYO. SESS. LAWS Ch. 250, § 35-487.49(e). Subsection (e) provides:
> Pollution which is a direct result of the malfunctioning of breakdown of any pollution source or related operating equipment beyond the control of the person owning or operating such source or equipment shall not be deemed in violation of this act, provided that prior to the initiation of any action hereunder by the administrators, the owner or operator advises the proper administrator of the circumstances and outlines an acceptable corrective program.

77. Subsection (e) was repealed by 1974 WYO. SESS. LAWS Ch. 14, § 2.
78. People v. Platte Pipe Line Co., 649 P.2d at 214 (Wyo. 1982).
79. *Id.*
80. *Id. See also* Wyoming Department of Environmental Quality, Water Quality Rules and Regulations, Ch. IV (1978). Chapter IV is entitled "Regulations For Discharge Of Oil And Hazardous Substances Into Waters Of The State Of Wyoming." The term "discharge" is defined in section 3 to include "spilling" and "leaking." Section 4 states that a discharge into waters of the State is a violation of this regulation and the penalty provisions of the Environmental Quality Act as amended may be imposed. Section 5 makes the person having control over the oil or hazardous substance responsible for reporting, clean-up and all liabilities and damages resulting from the discharge.
81. 649 P.2d at 214.
82. *Id.*

well as by a belief that it would be more fair to pass the cost of cleaning up an oil spill on to the consumers than to require the taxpayers of the state to bear the burden without regard to their actual oil consumption.[83]

The dissenting opinion stated that the strict liability issue was properly one for the legislature and not for the courts to decide, and the legislature had not elected to impose a strict liability standard in section 301.[84] The words "cause," "threaten," "allow" and "alter" that appear in section 301 were, in the dissent's opinion, words of volition and meant that either willful intent or negligence was required to be in violation of that section.[85] Furthermore, the dissent believed that article three was enacted only to put Wyoming in compliance with the federal NPDES, and therefore the unintended oil spill in the instant case was beyond its scope.[86] The majority's argument concerning the enactment and subsequent repeal of subsection (e)[87] was declared irrelevant because there was nothing in the trial record which suggested that a breakdown had actually occurred.[88] There was no mention of how the history of subsection (e) might bear on the question of legislative intent. Finally, the dissent discussed general intent in the context of criminal law. Since general intent is normally a required element of a crime, the dissent maintained that it ought to have been required to constitute a violation of section 301.[89]

ANALYSIS OF THE COURT'S DECISION: STRICT LIABILITY

The *Platte* court decided that section 301 is a strict liability statute. Unfortunately, however, the precise meaning of section 301 was left unexplained. A water polluter might still take advantage of the ambiguity remaining in section 301 and avoid liability altogether. This is because "strict liability" is an imprecise term, and the responsibility it imposes on the defen-

83. *Id.*
84. *Id.* at 215 (Rooney, J., dissenting).
85. *Id.* at 216 (Rooney, J., dissenting).
86. *Id.* at 216-17 (Rooney, J., dissenting).
87. *Id.* at 213-14. *See supra* notes 79-80 and accompanying text.
88. 649 P.2d at 218 (Rooney, J., dissenting).
89. *Id.* (Rooney, J., dissenting). The dissent's assertions with respect to criminal intent are undoubtedly correct, but are completely irrelevant in light of the Wyoming Supreme Court's holding in Nickelson v. People, 607 P.2d 904 (Wyo. 1980), that the penalty provisions of the EQA are civil in nature. *See supra* note 67.

dant can vary widely. At common-law, strict liability has always been subject to a number of defenses because the plaintiff, even though he need not prove the fault of the defendant, must still prove proximate cause. First, he must prove that his injury is sufficiently related to the escape of the defendant's instrumentality; second, he must show that the defendant (and not some external force) should be held responsible for that escape.[90]

Strict liability as a legal concept can be traced to the English case of *Fletcher v. Rylands*.[91] In that case, the defendant had impounded water for use at a mill. At that time, such a use of water was considered dangerous and "unnatural". The impounded water seeped through some abandoned mine workings whose presence on the defendant's land was unknown to him, and flooded the plaintiff's land. Even though the defendant was not at fault, the court held for the plaintiff, adopting the now-famous rule of that case:

> [One] who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences.[92]

One can see the limitation of proximate cause applied to the consequences of the water's escape, but it appeared that the responsibility for the escape itself would always lie with the property owner when he kept something "unnatural" on his

90. The "defenses" allowed in common-law strict liability are manifestations of plaintiff's inability to prove one of these elements of proximate cause. They include: 1) act of God, 2) unforeseeable and independent act of a third person, and 3) assumption of risk. Also, the whole concept of proximate cause is generally more restricted in strict liability than in negligence; plaintiff's damages must be of the kind that are said to lie within the risk to which the defendant has subjected the community. *See generally* PROSSER, LAW OF TORTS §79 (4th ed. 1971). *Cf.* Harper, *Liability Without Fault And Proximate Cause*, 30 MICH. L. REV. 1001, 1009 (1932) (the sequence of events must have been such that it is not unfair to hold the defendant liable therefor).

91. 1 L.R. Ex. 265 (1866), *aff'd sub nom.* Rylands v. Fletcher, 3 L.R.-E&I App. 330 (1868).

92. *Id.*, 1 L.R. Ex. at 280.

land. His responsibility for the escape could never be avoided completely by laying the blame on some external force, though there might be no liability in a particular case if the plaintiff's injury was not closely related to the escape of the owner's "unnatural" instrumentality.

The *Rylands* rule, however, did not remain this absolute. Nine years later, in another reservoir-flood case,[93] the court paid lip service to the principle of the defendant's absolute responsibility for an escape of the "unnatural" instrumentality: "I am by no means sure that if a man kept a tiger, and lightning broke the chain, and he got loose and did mischief, that the man who kept him would not be liable."[94] The case, however, was decided on a different rationale:

> It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbor, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out?[95]

The court went on to hold that because a rainfall of unprecedented magnitude had caused the flood, the defendant was not liable.[96] One sees here how the second element of proximate cause comes into play. According to this view, the plaintiff's injury is caused, not by the defendant's impoundment of water, but by the exceptionally heavy rainfall (act of God) or by the mischievous boy with the auger (third party intervention).[97] The problem of proximate cause has always been notoriously difficult, and courts have struggled with it for years.[98] On the surface the problem seems merely to be one of

93. Nichols v. Marsland, 10 L.R. Ex. 255 (1875).
94. *Id.* at 260.
95. *Id.* at 259.
96. *Id.* at 258-59.
97. For an American case where the court accepted this view even though strict liability for escape of impounded water was based not on *Rylands* but on a statute, see Ryan Gulch Reservoir v. Swartz, 234 P. 1059, 1062 (Colo. 1925).
98. For a description of the various aspects of the proximate cause problem, see PROSSER, *supra* note 90, §§ 41-45.

semantics, that is, whether the court accepts the plaintiff's definition of "cause" or the defendant's version.

On a more fundamental level, the problem of proximate cause is one of deciding whether or not to transfer the loss suffered, and this depends on the particular social and economic conditions of the time. When the industrial revolution began, industry needed protection from its neighbors if it was to survive. Now it is the neighbors who need protection from industry. The theory of proper allocation of resources requires that each enterprise in the economic system pay all the costs of producing the product it sells.[99] In other words, all production costs should be internalized within the particular industry. Air, land and water can no longer be considered free, and to the extent they are consumed by a particular industry they must be paid for. The added cost is just one more cost of production. These added costs are, to some extent, passed on to the consumer,[100] so the product's price in the end reflects the environmental as well as the pecuniary cost of its manufacture.

This economic principle is the foundation upon which many modern environmental statutes rest. If an industry violates the statutory prohibition and discharges pollution, it always has a obligation to pay for the lost resources. Payment is in the form of a penalty imposed by the government, and the government uses the money to clean up and repair the damage done. The penalties imposed by these statutes are clearly defined and limited, so the old limitations of proximate cause that protected the defendant by denying recovery when an improbable chain of events ended with injury to the plaintiff are no longer necessary. The purpose of these new statutes is to clean up pollution rather than to impose retribution on the polluter,[101] and in order to do this the statute imposes absolute strict liability on the owner of the offending facility. If any defenses are appropriate they are named in the statute itself; the old

99. *See* Calabresi, *Some Thoughts On Risk Distribution And The Law Of Torts*, 70 YALE L.J. 499, 514 (1961).

100. Whether an enterprise's increased production costs are passed on to the consumer or absorbed by the enterprise depends, in a competitive market, on the elasticity of demand for the product. SAMUELSON, ECONOMICS 389-90 (10th ed. 1976). To the extent that the enterprise's prices are regulated by the government, a fixed "reasonable rate of return on capital" (i.e., profit) is allowed the enterprise. Increased costs therefore tend to be more directly passed on to consumers. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 592 (1969).

101. *See* United States v. General Motors Corp., 403 F. Supp. 1151, 1162 (D. Conn. 1975).

common-law defenses are no longer applicable. This absolute strict liability is a statutory creation and is not the same legal concept as the traditional strict liability that has been part of the common-law since *Fletcher v. Rylands.*

The CWA is an example of a statute that creates absolute strict liability. When the statute says that *any* discharge of pollution without a permit is unlawful[102] it is *never* a defense to show that some external force caused the discharge.[103] Oil spills are covered by a different section of the CWA, but the principle is the same: absolute strict liability is the rule unless defenses are written into the statute.[104]

GUIDELINES FOR ASSESSING LIABILITY FOR OIL SPILLS IN WYOMING

The EQA is a modern environmental statute of the kind described above. The penalties due the State for violation of section 301 are clearly defined and limited,[105] so the common law limitations of proximate cause should not apply. Section 301 is a strict liability statute, and nowhere does the statute explicitly mention any defenses. If any defenses are to be read into the statute, they should be consistent with the statutory purposes and the economic principles upon which the statute is based.

Crude oil is a valuable commodity,[106] and the pipeline operator therefore has a natural incentive to keep the oil contained in his pipeline. Nevertheless, the EQA should provide a supplemental incentive to the operator to do everything possible to prevent oil spills and to limit the quantity of oil lost if they do occur. For this reason, the operator should be assigned automatic responsibility for undertaking clean-up operations (or costs if the State provides assistance) once the oil spill occurs. Also desirable is a discretionary penalty that may be nominal in amount if a court finds the pipeline operator to have acted responsibly, but substantial if the operator should be

102. *See supra* note 31.
103. SED, Inc. v. City of Dayton, 519 F. Supp. 979, 989 (S.D. Ohio 1981).
104. *See supra* text accompanying note 41.
105. *See supra* note 8.
106. The 8,552 barrels of crude oil lost in this spill had a market value of $140,602.66. Complaint, *supra* note 3, pt. III, at count no. 2.

punished. The pipeline operator who avoids maintenance and prevention costs because of bad faith or negligence should be punished, not because the state has any reason to exact retribution, but because it should be made clear to all that sloppy operations will not be tolerated in Wyoming. The argument that it is too expensive to operate a pipeline in a way that protects the water and wildlife resources of Wyoming is simply not realistic because it grotesquely distorts the priorities involved. The effect of a stiff penalty assessed against the operator whose behaviour deserves it would be to discourage others from behaving similarly, thereby eliminating the preventable oil spill.

To a certain extent oil spills are inevitable, and may occur despite the best efforts at prevention. In this respect they are natural catastrophes, and the question arises: Who should pay for these catastrophic events, the oil consumer or the Wyoming taxpayer? To the extent that consumers of the pipeline's oil live out-of-state, the two groups of people do not overlap and the group that benefits from the use of the oil should pay the costs of inevitable mishaps associated with its transportation.

Equitable considerations are important. The oil industry provides an essential service for the state and the nation, and deserves to be treated as fairly as any other group in Wyoming. If one contemplates the assessment of penalties on an absolute strict liability basis, one must be careful to ensure the penalties assessed are compensatory in nature unless punishment is deserved.[107] A policy of vindictiveness toward the oil industry in Wyoming is inappropriate.

SUGGESTIONS FOR THE EQA

There is no conceivable situation in which the modern pipeline operator ought to be relieved of its responsibility to clean up after itself, so any litigation over certain defenses that apply in the common-law strict liability situation would

107. *See* United States v. Marathon Pipe Line Co., 589 F.2d 1305, 1310 (7th Cir. 1978) (Bauer, Circuit Justice, concurring). Justice Bauer reasoned: "To punish a business engaged in enterprises essential to our national well-being for an unfortunate accident when the business is faultless, seems to be a self-defeating exercise of power. 'Strict liability' concepts normally refer to *compensation,* not punishment without fault" (emphasis in original).

merely be a waste of the court's time. For this reason, it ought to be made very clear that section 301 is to be based on absolute strict liability. The *Platte* decision hints that strict liability may already be the rule:

> We further believe it makes sense to impose upon the owner of a pipeline the monetary loss which results from an oil spill. It is, after all, a cost of transporting the oil. . . . As such, it can be passed on, to the extent proper, to those who consume the oil. . . . Such a system of spreading the cost of an oil spill is immensely more fair than requiring only the taxpayers of this state to bear the burden without regard to their actual oil consumption.[108]

If this point had been made in more imperative and unconditional terms, we would have the explicit declaration needed. Unfortunately, the language leaves room to argue that common-law defenses are still available in a section 301 action. These defenses should be abolished in this context, either by unequivocal judicial construction or by legislative amendment. The civil penalty set out in section 901(a)[109] becomes a very powerful tool once absolute liability is imposed, however, and trial judges should exercise discretion in deciding the amount to be assessed under this subsection. Even after absolute strict liability is the rule, the operator whose conduct is exemplary in cleaning up quickly and efficiently should be able to look forward to a minimal bill for the wildlife killed, no charge for state clean-up efforts (state assistance not being necessary), and a nominal penalty from the trial judge.

As presently written, the EQA has no explicit provision that allows the state to recover costs it incurs in cleaning up after an oil spill. If the operator is unable to clean up quickly and effectively, the state must step in because the job cannot go undone. Any money the state does expend in responding to the spill should be quickly reimbursed. As matters now stand, the state may recover these costs under the federal CWA[110] (assuming that none of the named defenses apply), but it is

108. 649 P.2d at 214.
109. *See supra* note 8.
110. 33 U.S.C. § 1321(f)(4) and (5) (Supp. V 1981).

doubtful whether a Wyoming district court has jurisdiction to hear such a claim arising under the federal statutes.[111] There is no reason why the state should have to bring two actions, one in state court and one in federal court, for the same event. The legislature should amend section 901 to specifically provide for recovery by the state of all costs its agencies incur in the restoration of natural habitat after an oil spill.

CONCLUSION

The Wyoming Supreme Court decided in *Platte* that the EQA imposes strict liability for any unpermitted discharge of water pollution. The decision was based on the language of the statute itself and on inferences of legislative intent. *Platte* is a big step in the right direction, but the strict liability policy declared therein needs to be refined.

If the EQA is to accomplish its vital purpose of protecting Wyoming's waters and wildlife from pollution, it is essential that the principles of liability for violation of its provisions be adequately defined and enforced. It should be made clear that section 301 is an absolute strict liability statute and that there are no defenses once an unpermitted discharge of pollution into state waters has occurred. The pipeline operator's responsibility to undertake clean-up operations should be automatic, but any penalty assessed against the operator should depend on its behaviour both before and after the spill. In this way unnecessary litigation could be avoided, the duty to undertake clean-up operations would be placed on the operator where it belongs, and the prevention of oil spills would be encouraged without the imposition of unjustifiable harsh penalties in the oil industry.

JAMES M. ELLERBE

111. 28 U.S.C. § 1355 (1976) provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any act of Congress."