Oil, water and law don’t mix: environmental liability for offshore oil and gas operations in the UK

Part 2: Regulatory law, the Environmental Liability Directive and OPOL

Greg Gordon Senior Lecturer in Law, Co-director, Aberdeen University Centre for Energy Law

Introduction*

This article addresses the extent to which an oil spill from an offshore installation operating on the United Kingdom Continental Shelf (UKCS) might give rise to environmental liability in the UK. Environmental liability has been defined broadly so as to encompass both civil and criminal liability. The first part of this article considered the extent to which environmental liability would be imposed by the law of tort/delict and by the petroleum licence. In this, the second part of the article, consideration will be given to the extent to which liability is imposed by domestic regulatory law, the Environmental Liability Directive (in both its current form and as it will stand when amended by the recently-adopted Directive on Offshore Safety and Environmental Liability) and OPOL.

The article will conclude that while many of the key elements of a functional system of environmental liability are presently in place, the current law is nevertheless attended by considerable uncertainty and contains a number of worrying gaps. The author’s conclusion is that, with some simple and readily-achievable adjustment, the system can be made adequately to protect private interests. However, if the public interest in the remediation of the environment is to be adequately protected, more ambitious reform is required.

Regulatory law in the UK

Offshore environmental law is comprised of a complex patchwork of disparate provisions. Many of these have no bearing upon environmental liability. However, three sets of regulatory provisions bear at least to some extent upon matters of environmental liability. The Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998 are relevant because they require operators to produce (and, if necessary, implement) Oil Pollution Emergency Plans (OPEP); DECC has published guidance which refers to these plans in a manner suggesting that they may impose an obligation upon the operator to pay third party compensation.

The Offshore Installations (Emergency Pollution Control) Regulations 2002, although essentially emergency response provisions, merit consideration because they empower the Secretary of State to direct or undertake pollution control operations which (like the implementation of its OPEP) may involve the operator of a polluting installation in very considerable expense. The Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations are relevant because they provide for the possibility of criminal liability (in the form of a potentially unlimited fine) to arise as a result of discharges or releases of oil from offshore installations.

Each of these sets of regulations will be further discussed below.

The Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998

These regulations, by which the government implements a number of its obligations under the ILO’s International Convention on Oil Pollution Preparedness, Response and Co-operation, apply to all offshore installations located within the UK’s territorial waters or upon the UKCS.

The operator of an ‘offshore installation’, an expression defined so as to include pipelines as well as oil loading and unloading facilities, is placed under an obligation to produce an Oil Pollution Emergency Plan. The OPEP must be submitted to DECC for approval and must be

* Part I of this article was published in (2013) 25 ELM Issue 1 and is available in full on http://www.lawtext.com/lawtextweb/default.jsp?PageID=2.


2 An event which, like Deepwater Horizon, caused both oil pollution and endangered human safety could of course in addition be the subject of prosecution under relevant health and safety laws or, in extreme circumstances, the Corporate Manslaughter and Corporate Homicide Act 2007. For a discussion of health and safety regulation on the UKCS see eg J Paterson ‘Health and safety at work offshore’ in Gordon, Paterson and Usenmez (n 1) 187–230. For a discussion of the position as to corporate manslaughter and corporate homicide on the UKCS see P Gray, R Jamieson ‘The Corporate Manslaughter and Corporate Homicide Act 2007’ (W Green & Sons Ltd Edinburgh 2008) 38–40.


4 Ibid reg 3(2). Regulation 3(1) provides that the regulations also apply to certain harbours and oil handling facilities, but this article will consider the regulations only in so far as relevant to offshore installations.

5 Ibid reg 2.

6 Ibid reg 4(3) read with reg 4(7). Harbours and oil handling facilities which are not pipelines submit instead to the Maritime and Coastguard Agency (MCA).
renewed every five years or within three months of the operator becoming aware of a major change which affects or could affect the validity or effectiveness of a plan to a material extent. 7

Detailed guidance notes, reviewed in the aftermath of the Deepwater Horizon disaster, specify that there should be a plan that an OPERP must contain. 8 Among other things, the plan must contain an inventory of the type and volume of hydrocarbons on an installation, anticipate possible causes of oil spills and include modelled worst-case scenarios which, for all operations relating to exploration, appraisal and development wells, is to be based upon the total quantity of reservoir hydrocarbons that could potentially be released if all containment barriers failed. The OPERP must set out the measures which it is proposed would be taken to track oil pollution and contain a response strategy. In a blow-out situation, this may include capping a well-head and drilling a relief well. 9 DECC may order the alteration of any plan which is incompatible with its National Contingency Plan or which it considers to be otherwise inappropriate for dealing with an oil pollution incident that may occur. 10

Operators are placed under a legal duty to implement the plan in the event that an oil pollution incident occurs. 11 Breaching this duty without reasonable cause is a criminal offence which is triable either way and which, following conviction on indictment, is punishable with an unlimited fine. 12

The regulations and the OPERP, taken together, can therefore be said to provide a sound legal basis for compelling an operator to respond so as to contain and mitigate the effects of an oil spill emanating from its installation. Such a response may involve the operator in considerable expense, particularly if a measure such as the drilling of a relief well is involved, and operators who fail to implement their plans may be prosecuted. However, and contrary to the impression given in DECC’s Guidelines on Financial Responsibility, 13 neither these regulations nor the OPERPs produced in terms of them impose any legal obligation whatsoever to compensate third parties for any pollution damage. Instead, they are directed towards the steps of a practical and operational nature that must be undertaken to contain, monitor and disperse a spill. That DECC should be mistaken on this point must be a matter of some concern.

The Offshore Installations (Emergency Pollution Control) Regulations 2002

As discussed above, the primary responsibility for responding to an oil spill emanating from an offshore installation lies with the operator of that installation. However, the Offshore Installations (Emergency Pollution Control) Regulations 2002 (the 2002 Regulations) 14 provide the Secretary of State (or, in practice, his representative, generally known as SOSREP) 15 with powers to intervene ‘for the purpose of preventing or reducing pollution or the risk of pollution’. 16 The regulations permit the Secretary of State to issue to the operator or manager of an offshore installation directions ‘to take, or refrain from taking, any action of any kind whatsoever’. If the Secretary of State considers that issuing directions is or has proven to be inadequate, he is empowered himself to take ‘any action of any kind whatsoever’ in relation to an offshore installation or its contents. 17

The regulations do not provide that the Secretary of State is entitled to be reimbursed for any costs incurred in making any such intervention. This is perhaps surprising, particularly given that the regulations impose a clear obligation imposed upon the Secretary of State to compensate the operator for any losses suffered as a result of an inept intervention on the Secretary of State’s part. 18 It is not clear why no such obligation has been imposed; perhaps it was thought that, given the other legal obligations to which the operator is subject, such provision was unnecessary. However, as we shall see in the Conclusion to this article, any such assumption may well be unsafe.

The Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005 (as amended)

The Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005, 19 which have

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7 ibid reg 4(53).
8 DECC ‘Guidance notes to operators of UK offshore oil and gas installations (including pipelines) on Oil Pollution Emergency Plan requirements’ (July 2012).
9 ibid 27.
10 Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998 (n 3) reg 4(6).
11 ibid reg 4(6).
12 ibid reg 7.
13 DECC ‘Guidance note to UK offshore oil and gas operators on the demonstration of financial responsibility before consent may be granted for exploration and appraisal wells on the UKCS’ (January 2013) 1.
15 For an account of the SOSREP’s function and powers see H Shaw Dealing with maritime emergencies in the United Kingdom: the role of the SOSREP in R Caddell, R Thomas (eds) Shipping, Law and Marine Environment in the 21st Century (Lawtext Publishing Witney 2013) 176–82.
16 Offshore Installations (Emergency Pollution Control) Regulations 2002 (n 14) reg 3(2).
17 The powers granted by these regulations are described by Tromans and Norris as ‘extensive’. See S Tromans, J Norris ‘What if Deepwater Horizon occurred west of Shetland’ (2010) IELR 220 at 223. It is, however, submitted that the regulations’ effectiveness is potentially undermined by a number of weaknesses in their drafting which, as not strictly relevant to the main thrust of the argument here, have been produced as an Appendix to this article.
18 Offshore Installations (Emergency Pollution Control) Regulations 2002 (n 14); Regulation 4(1) provides that compensation is payable by the Secretary of State to any person incurring expense or suffering damage as a result of a direction or intervention that: (a) was not reasonably necessary to prevent or reduce pollution or the risk of pollution; or (b) was such that the good it did or was likely to do was disproportionately less than the expense incurred, or damage suffered as a result.
subsequently been amended by the Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010 and the Offshore Petroleum Activities (Oil Pollution Prevention and Control) (Amendment) Regulations 2011, were introduced partly in order to implement the UK’s obligations under OSPAR and partly in order to streamline the processes for obtaining ministerial consent for the discharge of produced water.

Oil and Gas UK, the principal oil industry trade association, describes the regulations’ purpose as being to encourage operators ‘to continue to reduce the quantities of hydrocarbons discharged during the course of offshore operations’. A trading scheme for dispersed oil in produced water was established which stipulated allowances in respect of such discharges. This provided that, if the allowance was exceeded, a civil penalty would be incurred of £300 per kilogramme of dispersed oil discharged in excess of allowances surrendered, an interesting and unusual example of the use of a civil penalty in UKCS offshore operations.

However, this civil penalty is irrelevant to any discussion of environmental liability for a spill of oil for two reasons. First, as Tromans and Norris note, it applied not to discharges of oil as such, but only to dispersed oil in produced water; and, secondly, the trading scheme was in any event terminated by the government in 2008 following difficulties with the analytical method on which the allocation plan was based. Regulation has, however, continued since that time in the form of a more straightforward permitting scheme.

The regulations’ role in regulating dispersed oil in produced water seems to have led some commentators to view them as a set of operational controls directed solely towards that matter. However, the scope of the regulations was always broader than this. The 2005 Regulations provided that it was an offence, punishable on indictment by an unlimited fine, for oil to be discharged from an offshore installation otherwise than in accordance with the terms and conditions of a permit from the Secretary of State. Both the wording of the provision and the structure and nature of the statutory defences strongly suggest that this was intended to cover accidental discharge or spills just as readily as an intentional one.

The amended regulations make this intention even more clear. They divide emissions of oil from an offshore installation into two categories: ‘discharges’ and ‘releases’. Discharges are defined as intentional emissions of oil from an offshore installation: it is an offence to discharge oil from an offshore installation into ‘the relevant area’ otherwise than in accordance with the terms and conditions of a permit. Releases are any emission of oil from an offshore installation other than by way of discharge. There is no provision for the permitting of releases because they are, by definition, unanticipated and extraordinary events. It is an offence either to release oil into relevant waters or to permit a release to continue.

In the case of a prosecution for either a discharge or a release, there are two statutory defences. It is a defence for a person charged with either offence to prove either that the contravention arose as a result of something which could not reasonably have been prevented by him or that it was due to something done as a matter of urgency for the purpose of securing the safety of any person. Liability is otherwise strict.

The offences of discharging or releasing oil are (if prosecuted on indictment) punishable by an unlimited fine. Thus — always assuming that the prosecutor is able to secure a conviction — there is the potential for a very significant punishment to be imposed in the event of a significant leak. There is, however, no provision for the imposition of a civil penalty outside of the operation of any trading scheme and the regulations contain no

20 Energy Act 2008 (Consequential Modifications) (Offshore Environmental Protection) Order 2010 (SI 2010 (153)).
23 S Goldberg `A new framework for managing oil discharges in the offshore oil and gas industry’ (2005) 2 OGEI 1. ‘Produced water’ is water which has been produced as a by-product of hydrocarbon production and which contains oil in low concentration.
24 Oil and Gas UK Produced Water Discharge and Rejection (July 2013) http://www.oilandgasukenvironmentallegislation.co.uk/Contents/topic_files/offshore/Produced_Water.htm.
25 Tromans and Norris (n 17) 224.
26 Ibid.
28 Details of the scheme are available in the ‘Consent’ section of OGLK Produced Water Discharge and Rejection http://www.oilandgasukenvironmentallegislation.co.uk/Contents/topic_files/offshore/Produced_Water.htm#consent.
29 See eg Havemann in Gordon, Paterson and Usemee (n 1) 260. As already seen, on OGUK’s website, the regulations are discussed under the heading ‘Produced water discharge and reinjection’.
30 2005 Regulations reg 3(1) read together with regs 16((1)(a)) and 16((5).
31 DECC Guidance on the 2011 Regulations states that the 2005 Regulations already covered oil spills and leaks. See also Tromans and Norris (n 17) 223.
32 This expression has been defined, since reg 4 of the 2011 Regulations entered into force on 29 March 2011, as an installation or pipeline which is used for the purposes of, or in connection with, any activity in respect of which the Secretary of State exercises functions under the Petroleum Act 1998. This definition avoids at least some of the uncertainty which attends the 2002 Regulations, discussed in the Appendix to this article.
33 2011 Regulations reg 4((a).
34 Ibid reg 4((i).
35 2005 Regulations reg 3(1) read with reg 16((1)(a).
36 2011 Regulations reg 4((h).
37 Ibid reg 6 read with reg 21((a)((i).
38 The latter defence is unavailable if the court is satisfied either that the thing done ‘was not a reasonable step to take in the circumstances’ or that it was necessary as a matter of urgency for the preservation of life, but the necessity was due to the fault of the defendant.
39 Other offences also exist, for instance wilfully obstructing an inspector or failing to implement an enforcement or prohibition notice. For a full listing see the 2005 Regulations reg 16 as amended by the 2011 Regulations reg 21.
40 In this connection see the discussion of the statutory defences immediately below.
41 Although the trading scheme which previously operated was abandoned in 2008, the amended regulations continue to empower the minister to make such a scheme. Thus the legislative framework exists to restart a scheme should political will exist and the difficulties which led to the abandonment of the previous scheme be overcome.
norms to guide the court on the level of fine that is appropriate. Thus the sentence imposed would seem to involve the court making a complex assessment based upon the turnover and profitability of the wrongdoer, its previous record, the degree of culpability disclosed by the facts of the offence and the scale of damage caused. It would seem unlikely that a breach of the 2011 Regulations would lead to liability on anything like the scale seen in the Deepwater Horizon prosecution. However, it would seem that there is the potential, where a large company has behaved in an egregious manner and serious environmental damage has been caused, for a fine to be measured in millions of pounds.

The practical significance of the statutory defences – in particular, the defence that the discharge or release could not reasonably have been prevented – should not be under-estimated. In PF (Aberdeen) v Taqa Bratani, the operator of the North Cormorant platform successfully defended a charge of discharging oil in excess of the terms of its permit on the basis that the breach arose as a result of something which could not reasonably have been prevented. The leak occurred when a valve on the North Cormorant failed to close properly. A relatively modest quantity of oil leaked over a period of two days before the problem was detected and the line shut in.

The court accepted that the equipment involved in the discharge had been checked shortly prior to the incident and found to be in good working order and that the maintenance procedures in place on the platform were sound in theory and properly implemented in practice. The court held that in these circumstances the statutory defence had been made out and acquitted the accused. The decision was made by a sheriff sitting alone and is therefore of persuasive authority only. It is not without its logic: in the absence of any prior indication that the equipment was likely to fail, it is not immediately apparent what further steps the accused could have taken to prevent the discharge. However, if the defence is to be upheld in these circumstances it will significantly undermine the practical utility of the offence.

The Environmental Liability Directive

The directive in its current form

The Environmental Liability Directive has been described as ‘a public law compensation scheme’ which provides for a system that requires public authorities to ensure that the polluter restores the damaged environment. Generally speaking, liability is fault based, but for substances classified as inherently dangerous (such as oil), liability is strict.

The directive, which has been transposed into UK law by a number of regulations, imposes a set of obligations upon operators who cause damage to protected species and natural habitats, water damage, and damage to land. Such operators must take steps to prevent and remedy damage. When damage is caused it must be remedied and, depending on the circumstances, primary, complementary and compensatory remediation may be involved.

Primary remediation is ‘any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition’. Complementary remediation is appropriate when it proves to be impossible to restore natural resources or services to their baseline condition through primary remediation. Complementary remediation involves the provision to the public of a similar level of natural resources and/or services as would have been provided if the damaged site had been returned to its baseline condition. Finally, compensatory remediation is ‘any action taken to compensate for interim losses of natural resources and/or services’ in the intervening period between the occurrence of the damage and the implementation of primary remediation.

The directive might, at first sight, seem to offer a promising basis for imposing an expanded form of liability upon the oil industry; one which reaches outside of the areas protected by the traditional private law remedies discussed in Part I of this article and which avoids the problem of fault. In reality, however, the directive imposes few meaningful obligations upon the industry, for several reasons. First, the various different forms of remediation are all substantially anthropocentric. They focus upon mankind’s use of the natural environment, not upon the natural environment as a thing to be protected in its own right. Thus the directive is of limited application in areas (including much of the North Sea) which mankind does not utilise for leisure purposes.

A series of definitional issues are perhaps even more fundamental. ‘Waters’ is defined in the directive as meaning ‘all waters covered by [the Water Framework Directive]’. The various definitions found in the Water Framework Directive are generally concerned with onshore waters. They extend no further offshore than ‘coastal waters’, which is to say, a one nautical mile

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43 The court also recognised that those operating offshore installations must prioritise risks and that whilst protection of the environment is important, crew safety must always be prioritised, although this factor does not appear to have been determinative on the facts of the present case.


46 Tromans and Norris (n 17) 224.

47 Environmental Damage (Prevention and Remediation) Regulations 2009 (SI 2009/153); Environmental Liability (Scotland) Regulations 2009 (SSI 2009/246); Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009 (SR 2009/252), as amended; Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009 (SI 2009/995 (W 81)).


49 Environmental Liability Directive art 2.5.
strip of water extending from the baseline from which territorial waters are measured.\(^50\)

This definition forms the basis for that used in most of the transposing regulations,\(^51\) although the Scottish Regulations instead define ‘waters’ in terms of the Water Environment and Water Services (Scotland) Act 2003.\(^52\) As a result, the Scottish Regulations extend somewhat further, to three nautical miles. Either way, the definition does not include the waters which overlie the continental shelf outside the particular territorial limit that they impose; and, given the geographic location of the overwhelming majority of production platforms and associated infrastructure, it is waters outside the territorial limit that are most likely to be adversely affected by any spill. In any event, water is only ‘damaged’ in terms of the directive and its transposing legislation when it suffers ‘any damage that significantly adversely affects’ its ecological, chemical and/or quantitative status and/or ecological potential.\(^53\) This is a relatively high threshold.

Moreover, the directive defines land damage as ‘land contamination that creates a significant risk of human health being adversely affected ...’.\(^54\) The human-focused nature of this test has been criticised by leading commentators,\(^55\) and it is most unlikely that anything other than a very large-scale spill could pass this very onerous test. Finally, while the obligation to prevent and remediate damage to protected species and natural habitats is applied to the full extent of the UKCS,\(^56\) such liability will only be incurred when it has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. Thus, even the death of bird or other marine life does not constitute ‘damage’ unless it occurs to a protected species and/or it causes significant adverse effects on reaching or maintaining the favourable conservation status.

The forthcoming regime following the 2013 Directive

Deepwater Horizon led the EU to take an intense interest in the regulation of safety and environmental matters in the offshore oil and gas sector. Among other responses, the Commission produced a legislative proposal which, after considerable debate and amendment,\(^57\) was adopted as a directive on 12 June 2013 (the 2013 Directive).\(^58\) Member States are under an obligation to transpose the directive into law by 19 July 2015,\(^59\) although transitional provisions exist which mean that (even assuming timeous transposition) operators of existing installations will not have to comply with the directive until 19 July 2018.\(^60\) The 2013 Directive is concerned with offshore safety, environmental liability and a range of other matters. This article will consider only the provisions relating to the remediation of environmental liability.

Article 7 of the 2013 Directive provides:

Without prejudice to the existing scope of liability relating to the prevention and remediation of environmental damage pursuant to [the Environmental Liability Directive], Member States shall ensure that the licensee is financially liable for the prevention and remediation of environmental damage as defined in that directive, caused by offshore oil and gas operations carried out by, or on behalf of, the licensee or the operator.

It is worth noting that this obligation will fall upon the licensee (or as is more likely upon the UKCS, licensees: oil and gas operations are generally carried out by joint ventures consisting of several licensees\(^61\)). Imposing this duty upon licensees, rather than on the operator, means that all of the parties who stand to gain from an oil development stand to share in this potential liability. It therefore decreases the risk that, in the event of damage occurring, no-one will be in a position to pay; a risk that is further decreased by the state’s obligation to ensure that the licensees have adequate provision in place to cover all potential liabilities.\(^62\)

The 2013 Directive does not merely refer to the Environmental Liability Directive, but amends it, in Article 38, which provides that the current definition of water damage is to be replaced as follows:

(b) ‘water damage’, which is any damage that significantly adversely affects:

(i) the ecological, chemical or quantitative status or the ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that directive applies; or

(ii) the environmental status of the marine waters concerned, as defined in Directive 2008/56/EC,\(^63\) in so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC.

The drafting of the amending provision is not as clear or precise as one would wish. In addition to the 2013

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\(^{50}\) Water Framework Directive art 2.7.

\(^{51}\) See eg Environmental Damage (Prevention and Remediation) Regulations 2009 reg 6.

\(^{52}\) Environmental Liability (Scotland) Regulations 2009 reg 2(l).

\(^{53}\) Environmental Liability Directive art 2.1(b). The concept of ‘damage’ is itself defined so as to require a measurable adverse change: art 2.2.

\(^{54}\) Environmental Liability Directive art 2.1(a).

\(^{55}\) Winter and others (n 45) 173.

\(^{56}\) Environmental Damage (Prevention and Remediation) Regulations 2009 reg 6.

\(^{57}\) For a discussion see G Gordon ‘The Deepwater Horizon disaster: the regulatory response in the UK and Europe’ in Caddell and Thomas (n 15) 183-210.


\(^{59}\) Ibid art 41.

\(^{60}\) Ibid art 42.

\(^{61}\) The definition of ‘licensee’ in the directive embraces the plural: see art 2(l).

\(^{62}\) 2013 Directive art 4.3.

\(^{63}\) Directive 2008/56/EC defines this term so as to include both coastal waters and waters, the seabed and subsoil of the area where a Member State exercises jurisdictional rights under the United Nations Convention on the Law of the Sea, an area which for the first time encompasses the waters where the overwhelming majority of oil and gas operations take place on the UKCS.
Directives itself, four other directives need to be consulted in the attempt to make sense of it.\textsuperscript{64} Even once this exercise has been undertaken, some difficulties would seem to remain.\textsuperscript{65} However, if one reads Article 38 in conjunction with recital 58 of the 2013 Directive,\textsuperscript{66} it seems reasonably clear that the purpose of Article 38 of the 2013 Directive is: (a) to make a minor amendment to the definition of ‘water damage’ in the Environmental Liability Directive, and export the ELD regime offshore; and (b) to plug a perceived gap in the Water Policy Framework regime, by ensuring that an oil spill which causes any degradation in the environmental status of marine waters is considered to be ‘water damage’.

Even if one assumed that the 2013 Directive has been successful in that objective,\textsuperscript{67} the regime that it imposes is tightly circumscribed. The definition of water damage continues to be quite restrictive. The release of oil, even in ‘heat’ form, will not of itself trigger liability for water damage: a significantly adverse effect upon the environmental status of the marine waters concerned must be demonstrated. Death of marine life will still not necessarily constitute ‘damage’: this will continue to depend upon factors including the status of the species involved. Similarly, the oiling of the coastline does not automatically constitute land or habitat damage. To be ‘land damage’, human health must be imperilled, and it will only amount to habitat damage if protected coastal features are significantly polluted. Finally, the anthropocentric nature of the directive, which is manifested in for example the definition of land damage and in the definition of complementary and compensatory remediation, also imposes significant limitations in the context of offshore operations occurring well out to sea.

Self-regulation: the OPOL scheme

The nature of the scheme

OPOL is an oil pollution compensation scheme, entered into by means of contract\textsuperscript{68} between oil companies and administered (in accordance with that agreement, including an incorporated set of rules\textsuperscript{69}) by a company limited by guarantee.\textsuperscript{70} All parties to OPOL are subject to an obligation\textsuperscript{71} – capped at an overall maximum of £250 million per incident – to reimburse public authorities for remedial measures taken following a discharge of oil from offshore facilities and to compensate any person who has suffered pollution damage. The detail of these obligations and the question of whether the obligation is a legal one, or one binding in honour only, will be discussed below.

OPOL has been described as being ‘voluntary’\textsuperscript{72} in nature. In the sense that no-one can be forced to join the scheme, this is correct. As discussed above, however, the UK Government requires anyone who wishes to be approved as an operator to be a member of OPOL; for operating companies who wish to be active on the UKCS, therefore, membership is not ‘voluntary’ in any meaningful sense. The government does not require non-operating oil companies\textsuperscript{73} to join the scheme, and will usually only do so if they plan to become operators in the near future. It should not be thought, however, that non-operators are therefore able to saddle the operators with all liability and escape scot free. The commercial reality is that, irrespective of the fact that OPOL imposes initial liability upon the operator, the joint operating agreements under which most oil and gas exploration and production activities are carried out will generally contain provisions which apportion liability inter alia for pollution damage amongst the various members of the joint venture.\textsuperscript{74}

OPOL became effective within the UKCS in May 1975, shortly before production began from the first field to produce oil within the UKCS, Argyll. It was initially conceived as an interim measure pending the entry into force of the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources. The convention was adopted in London on 1 May 1977. However, it was never ratified, with the Conservative government elected in 1979 preferring to persevere with OPOL rather than the convention.\textsuperscript{75} Since then, the territorial extent of OPOL has been extended beyond the UKCS, with other states within the North Sea and Atlantic margin areas finding the scheme a convenient way of obtaining a degree of financial security relative to potential environmental damage caused by oil and gas activities on their respective continental shelves.\textsuperscript{76}


\textsuperscript{65} While art 38 amends the definition of ‘water damage’ in the Environmental Liability Directive, it does not seek to alter the definition of ‘waters’ in the same directive. The ELD defines waters as ‘all waters covered by Directive 2000/60/EC, which, as already discussed, takes us out no further than the outer edge of coastal waters, ie one nautical mile from the baseline. This tends to suggest that the first leg of the new definition (which makes no express reference to marine waters at all) is not intended to extend beyond coastal waters, although if that is the case one might legitimately wonder what the point of the provision is at all. It is also worth noting that, although the amendment to the definition of ‘water pollution’ is made in the context of an instrument concerned with offshore oil spills, it is of general application. It is not clear if that is an intended or unintended consequence.

\textsuperscript{66} This recital states: ‘The definition of water damage in Directive 2004/35/EC should be amended to ensure that the liability of licensees under that directive applies to marine waters of Member States as defined in Directive 2008/56/EC’.

\textsuperscript{67} It may be that any attempt to found on transposing legislation which is not better drafted than the directive may face legal challenge.


\textsuperscript{70} See OPOL’s memorandum and articles of association http://www.opol.org.uk/.

\textsuperscript{71} OPOL Agreement cl IV.

\textsuperscript{72} See http://www.opol.org.uk/index.htm (OPOL homepage).

\textsuperscript{73} Companies who do not operate assets but who are involved in the industry essentially as financiers of operations in exchange for a share of produced oil proportionate to their level of investment.

\textsuperscript{74} For a discussion see S Styles ‘Joint operating agreements’ in Gordon, Paterson and Unneben (n 1) paras 12.7–12.10 and paras 12.20–12.27.

\textsuperscript{75} OPOL homepage.

\textsuperscript{76} OPOL Agreement cl I 4. The Baltic and Mediterranean seas are expressly excluded: see cl 18.
Other changes have been made over time, including, as discussed below,77 to the limits of liability under the scheme. However, the essential nature of OPOL remains unchanged. It is not a convention, a fund or even a claims-handling service,78 but a contractual arrangement made between operating oil companies. This creates a significant problem from the standpoint of third party claimants – a category which, as also discussed below, includes both public authorities pursuing reimbursement for remedial measures and any person seeking compensation for pollution damage.79 The contract is written under English law. Prior to the advent of the Contracts (Rights of Third Parties) Act 1999, draftsmen struggled to give actionable rights to third parties in English law.80 Parties wishing to provide enforceable third party rights have been greatly assisted in that process by the 1999 Act, which provides a convenient means for so doing. However, the Act is permissive in form, not mandatory. Parties may exclude its operation.81

Although it was originally drafted well before the 1999 Act, the OPOL Agreement has been amended since the Act came into force. Very surprisingly, given both the purpose of the scheme and the industry’s willingness, in other contexts, to countenance actionable third party rights,82 the agreement expressly excludes the operation of the Contracts (Rights of Third Parties) Act 1999,83 a choice which would seem to deprive many potential claimants of a legally enforceable right to found on OPOL’s provisions.

A third party right to arbitrate?

There are, of course, a number of dispute resolution schemes in operation throughout the world which, without conferring rights justiciable in court, nevertheless provide access to justice. These are particularly prevalent in the consumer sector and many are, in practical terms, at least as valuable as the right to seek to enforce a strict legal obligation within the mainstream justice system.84 If OPOL does not provide third parties with a legal right that can be vindicated in court, then does it at least provide claimants with a reliable alternative route for securing payment of a valid claim?

81 Contracts (Rights of Third Parties) Act 1999 s 1(2).
82 For a discussion of third party rights in English law see G Treitel `Third parties' in H Beale and others Chitty on Contract (31st edn Sweet and Maxwell London 2012) ch 1B. Not all jurisdictions take so restrictive a view of third party rights. Scots law, for instance, has long allowed for legally enforceable third party rights: see eg Morton’s Trustees v The Aged Christian Friend Society of Scotland (1899) 2 F 82; H MacQueen ‘Third party rights in contract: jus quaesitum tertio’ in K Reid, R Zimmermann A History of Private Law in Scotland: Volume 2 Obligations (Sweet and Maxwell London 2000).
83 OPOL Agreement cl VI.
84 Aged Christian Friend Society of Scotland v The Installation of the Offshore Pollution Liability Association Limited, the OPOL company is not responsible for the installation said to have caused the loss: OPOL Agreement cl V.
85 OPOL Agreement cl IX. This provides for arbitration seated in London using the Rules of Arbitration of the International Chamber of Commerce as the exclusive means of resolving disputes.
87 This argument presupposes that the substantive law governing the contract treats customs and usages as something separate from the contract. The current author can think of no lex specialis which would apply here, but if one exists, it could overcome that presupposition.
88 OPOL Guidance 4.
89 For a valuable and comprehensive discussion of such schemes see C Hodges, I BenÎhr and N Creutzfeldt-Banda Consumer ADR in Europe (Hart Publishing Oxford 2012).

The OPOL Agreement contains an arbitration clause.85 This is drawn in apparently broad terms, applying as it does to ‘all disputes arising out of or in connection with this Contract’. However, the doctrine of privy of contract would seem to dictate that such wording must be held to be limited only to disputes between parties to the contract,86 thus the apparently expansive wording in the contract itself therefore cannot provide any assistance to third party claimants.

The arbitration clause further provides that the arbitrator shall be bound by the provisions of the contract, ‘and shall not have any power or authority to vary or increase the provisions of the Contract or any rights or obligations thereunder’. As we have already seen, the agreement contains a clear provision to the effect that the Contracts (Rights of Third Parties) Act 1999 does not apply. It would therefore seem to be highly unlikely that an arbitrator would feel empowered to use any factor external to the contract – such as the customs and usages of the trade – to extend the availability of the arbitration clause to third party claimants.87

If the arbitration clause in the contract cannot be utilised by a third party, is there any other way in which a third party might be able to obtain a right to arbitrate? The most obvious place to look for this would seem to be the guidelines for claimants. The guidelines state that:

In the event of a dispute between a claimant and the operator as to the application or interpretation of the Agreement, either the claimant or the operator can submit the matter to arbitration in London in accordance with the rules of the International Chamber of Commerce.88

It is possible that this provision could be considered to be a standing offer to arbitrate, which could then be accepted by the submission of the claim. However, the absence of a pro forma claim form which expressly accepts the offer to arbitrate might hinder attempts to develop such an argument: if the written claim submitted by the claimant does not express a wish to arbitrate, will it be sufficient to meet the offer?

A further difficulty lies in the fact that while the guidance is issued in the name of the Offshore Pollution Liability Association Limited, the OPOL company is not the party to whom claims must be directed. The guidance instructs claimants to direct their claim to the operator of the installation from where the oil was released, and informs them that the operator is solely responsible for settling their claim.89 In any event, if, for some reason,
an arbitrator were to form the view that a claim should be settled by the OPOL company, it should be noted that the OPOL company, as a mere administrator of the scheme, is a company limited by a guarantee of £5 per member and holds relatively insubstantial assets.90

Might the association be acting as an agent, making an offer to arbitrate for and on behalf of its constituent members? Even if an arbitrator were to accept such an argument, one fundamental problem would still seem to remain. The guidance states: ‘this document is only a brief summary of the key elements of the OPOL Agreement and Rules and as such must be qualified by the further details contained in the OPOL Agreement and Rules’.91

This must be taken both to repeat the exclusion of any rights under the Contracts (Rights of Third Parties) Act 1999 and the provision limiting the powers of the arbitrator solely to the terms of the agreement.

Overall, the logical but unpalatable conclusion would seem to be that – so far as third party claimants are concerned – OPOL is a discretionary scheme enforceable in honour only. Given the centrality of OPOL to the oil industry’s obligations to repay public authorities for remediation measures and to compensate both such authorities and private persons for pollution damage, this is a very unappealing prospect. On a more positive note, however, given the availability of the Contracts (Rights of Third Parties) Act 1999, there would seem to be no fundamental barrier standing in the way of amending OPOL in such a way as to grant a third party the right to arbitrate, should its membership so wish.

**OPOL: further detail**

Notwithstanding the above-mentioned concerns about the legal enforceability of the OPOL scheme from the standpoint of third parties, it is still important to examine the detail of the scheme, for several reasons. First, it is possible an arbitrator may disagree with the above analysis. Secondly, the analysis set out above relates only to third party claimants; it is, however, quite possible that oil released by one party to OPOL may cause pollution damage to the property of another party to the agreement. Where this is so, such a claimant, as a party to the agreement, would seem to have a clear right to arbitrate. Thirdly, OPOL might address the perceived problem by amending the agreement in order to provide third party claimants with a clear right to arbitrate. Finally, given the strong public reaction and intense media and political scrutiny that tends to accompany a major pollution event, the possibility that, even if the rights of third party claimants are legally precarious, the operator might be willing to treat such claims as if they were well founded should not be overlooked.

**Evidence of financial responsibility**

Upon joining the scheme, each party must establish, maintain92 and provide satisfactory evidence93 of its ‘financial responsibility’ to fulfil its obligation to reimburse and compensate. The financial responsibility requirement may be fulfilled by means of insurance, guarantee or self-insurance. The rules set out various criteria that each of these means must achieve in order to be acceptable.94 Each party has an ongoing obligation to maintain its financial responsibility for so long as it remains part of OPOL,95 and may be called upon to exhibit evidence that such arrangements are still in force.96

**The obligations to repay remediation expenses and to compensate for pollution damage**

OPOL establishes an arrangement whereby the parties to the contract agree that they will reimburse public authorities for the cost of remedial measures and compensate any person who sustains pollution damage.97 The obligations to reimburse and compensate are strict but are qualified (in that there exist a range of circumstances where no obligation arises98) and subject to an upper limitation of liability, currently set at a maximum of £250 million per incident.99 The obligations relate only to discharges of oil from offshore facilities, a term that is given a broad and comprehensive definition.100 Oil spills from ships are excluded, but these are dealt with by other instruments having the force of international law.101

Looking in more detail at the obligations to reimburse and compensate, it should be noted, first, that only public authorities may be reimbursed for ‘remedial measures’, a term defined102 as meaning ‘reasonable’103 measures to ‘prevent, mitigate or eliminate pollution . . . or to remove or neutralize the oil involved’.104 Thus the owner of a

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91 OPOL Guidance I.
private beach or salmon farm who takes steps such as procuring and stringing out floating barriers to try to protect his property will not be entitled to reimbursement. This is a result which might be thought arbitrary and harsh: arbitrary, because a person who makes no such attempt and suffers damage to his property by way of contamination apparently will have a claim; and harsh because, as noted above, the definition of ‘remediation measures’ already requires such measures to be reasonable.

Turning now to the obligation to compensate any person who sustains pollution damage, ‘person’ is expansively defined so as to include bodies corporate and private or public bodies, including states.105 Thus a state which both incurs the expense of undertaking remedial measures and suffers pollution damage may claim in a dual capacity: ‘Pollution damage’ is defined by the agreement as ‘direct loss or damage . . . by contamination’.106 What is meant by ‘direct loss’ is not further defined within the agreement itself, and the guidance for claimants is not especially illuminating on this point. Beyond paraphrasing the definition in the agreement, the guidance provides three examples of ‘claims to be considered as admissible’,107 all of which seem to be examples of ‘remedial measures’ rather than ‘pollution damage’, and adds only that claims must be ‘reasonable, quantifiable and justifiable’.108

This leaves the meaning of ‘direct loss or damage . . . by contamination’ rather opaque. There is very considerable uncertainty about the intrinsic meaning (if any) of the phrase ‘direct loss or damage’ in English law. Does ‘direct loss’ map onto the category of ‘normal loss’, which McGregor on Damages identifies and differentiates from ‘consequential loss’?109 Does it instead correspond to the different test of the first rule in Hadley v Baxendale?110 If so, to what extent has that test been altered by the House of Lords’ decision in Transfield v Mercator?111 That case plainly seeks to rein in liability under the first rule by placing some kind of limitation upon the sort of losses that will qualify. However, the ratio of the case is obscure, and the precise effect that it has had upon the first rule is hard to gauge.112

The guarantee

As has already been noted, the obligations to reimburse and compensate initially fall solely upon the operator of the facility that released the oil.113 In the event of default by that operator, there is an expectation that the other parties to the agreement will settle valid claims. In such a case, the OPOL Rules provide that, following investigation: the Directors shall determine whether, and to what extent, Members may be required to contribute any payment with respect to the claim.114 Clause III.2 provides that the collection of such contributions and payment of claimants will in such circumstances be administered by the OPOL company. Leaving any potential issue of enforceability aside, this would seem to provide considerable comfort for persons having a claim which has been accepted as good but which has been defaulted upon. However, it does not seem to provide any assistance to claimants who find that their claim is disputed: for instance, those who find that the particular type of loss which they have suffered is not accepted as being ‘direct’.

Conclusion: putting the pieces together

Liability under tort/delict was discussed in Part I of this article. In summary, the overall pattern in this area of law is that while certain interests are well protected (property damage is protected by multiple torts; personal injury is also well protected), the position of other interests is more precarious. Derivative economic loss is protected adequately but somewhat unevenly; some pure economic losses would seem to be recoverable in nuisance but not otherwise. Tort/delict would seem to have a role to play in imposing liability for environmental damage to ownerless things.

Moreover, outside of the tort/delict of negligence, there are at least significant theoretical differences between Scots and English law, particularly in the context of Rylands v Fletcher liability and public nuisance. However, given the difficulties that would seem to exist in utilising Rylands v Fletcher in the offshore context, even in the English section of the UKCS, the practical consequences of those differences should not be overstated. Moreover, Rylands v Fletcher tort/delict – as one would expect – requires the establishment of fault on the part of the defendant and proof of causation. In the right circumstances, tort/delict will provide a meaningful remedy. Outside of those circumstances, it will provide nothing. It is a singer with a powerful voice but a narrow range.

A similar conclusion could be reached in relation to petroleum licences, also discussed in Part I of this article. The licence imposes a number of relevant obligations upon the licensee. Specifically, there is a duty to control the flow of petroleum and avoid its escape, and a breach of this causing loss to the Secretary of State would be actionable. But this obligation is not strict; the duty is to

replace the offshore facility do not qualify, and therefore cannot be counted towards the liability cap. This is an important exclusion, as such work can be extremely costly. If the operator were permitted to include it, then it could very quickly impinge upon or even exceed the upper limit of liability.

105 OPOL Agreement cl I.12.
106 ibid cl I.13.
107 OPOL Guidance 2. The three specific examples given are clean up operations onshore or at sea, property damage and disposal costs of collected material.
108 ibid.
112 In this connection see the judgment of the Singapore Court of Appeal in MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd [2010] SGCA 36. See also G Gordon/Hadley v Baxendale revisited: Transfield Shipping Inc v Mercator Shipping Inc (2009) 13 Edin LR 125.
113 See the discussion above at n 84 and associated text.
114 OPOL Rules r 4.3.
take all steps practicable', and if a spill occurs in circumstances where there has been no breach, the licensee cannot be faulted and the licence cannot provide a remedy.

Turning now to matters discussed in Part 2 of the article, we come first to the contribution made by domestic regulatory law. The Oil Pollution Preparedness Regulations 1998 impose a legal duty upon the operator to produce and if necessary implement its Oil Pollution Emergency Plan (OPEP). Clearly, the regulations and the OPEP play a very valuable role in the pollution prevention and response. However, neither the regulations nor the OPEP provide a legal basis for founding a claim for third party compensation, and the fact that DECC has mistakenly stated that they do is a source of concern. The holding of such a mistaken belief could potentially provide false comfort as to the level of protection afforded by the law.

The Emergency Pollution Control Regulations 2002, in providing SOSREP with the power to guide and if necessary intervene in the emergency response following an accident, also play a significant role in the regulatory system. However, as noted above, these regulations do not permit the Secretary of State to be reimbursed for his intervention, far less impose a broader obligation to pay for environmental damage. Finally in this regard, we come to the Oil Pollution Prevention and Control Regulations. These regulations, which have been much improved by the 2011 amendments, do not impose any civil liability or fixed quasi-criminal penalties for spills. They do provide a sound footing for the imposition of criminal sanctions, at least in circumstances where genuinely blameworthy conduct on the part of an operator results in an oil spill from an offshore installation (defined so as to include pipelines). It may seem peculiar to write off the requirement for 'blameworthiness' when the offences of discharging or releasing oil are nominally of criminal sanctions, with the fact that many or most claimants – state and private – would be strangers to the contract, creates significant challenges for the operation of the scheme.

However, it is submitted that this is made appropriate by the interaction between these offences and the statutory defence that the spill could not reasonably have been prevented. If the Taqa Bratani case is typical of how this defence is to operate, then it significantly undercuts the liability prima facie imposed by the offences. Viewing matters from the perspective of the oil company, it is welcome news if situations such as eg the spontaneous failure of properly-tested equipment will not give rise to criminal liability. Such a result does, however, run contrary to the polluter pays principle and if a spill occurs in circumstances where environmentally harmful activity is the cause of a spill. Under the 1999 Act, it may be possible to impose liability on third parties who have suffered pollution damage as a result of an oil spill, and to private parties who have suffered pollution damage. It is a scheme of strict liability subject to the apparent absurdity of a private party compensation scheme offering significant benefits both to the state that has expended money in clean up operations and/or suffered pollution damage as a result of an oil spill and to private parties who have suffered pollution damage. It is a scheme of strict liability subject to the apparent absurdity of a private party compensation scheme offering significant benefits both to the state that has expended money in clean up operations and/or suffered pollution damage as a result of an oil spill and to private parties who have suffered pollution damage. It is a scheme of strict liability subject to the apparently generous cap of £250 million per incident and underpinned both by meaningful financial responsibility provisions and a mutual guarantee in the event of default. It is also a scheme into which both the industry and DECC have invested significant political capital. If it were to be put to the test by a major oil spill causing significant pollution, there could be little doubt that there would be considerable political interest in ensuring that the scheme was seen to be working well. However, the fact remains that the essentially contractual nature of OPOL, together with the fact that many or most claimants – state and private – would be strangers to the contract, creates significant challenges for the operation of the scheme.

These challenges are only enhanced by OPOL's decision to exclude the operation of the Contracts (Rights of Third Parties) Act 1999 and to include provisions within the contractual documentation and the guidance for claimants that would seem to hamper third parties' right to arbitrate. Addressing these issues would not make OPOL a perfect instrument. Some problems would remain: for instance, the apparent absurdity of a private person being unable to claim for reasonable pollution prevention measures, and the question of precisely which heads of claim are encompassed by the expression 'direct loss or damage'.

Although not insignificant, these issues are of a different order of magnitude to the question of whether third parties have an enforceable right to claim. If the problem of the third party claimant with a precarious right to arbitrate can be successfully resolved – something that would not require a change in the law, but only the agreement of OPOL's members – then OPOL could fairly be said to provide a secure basis for an at least minimally acceptable compensation scheme. That, taken together with the availability of criminal sanctions in situations where environmental damage was caused in circumstances disclosing genuine blameworthiness, and the possibility, in the event of very serious environmental degradation, of imposing liability through the amended...
provisions of the Environmental Liability Directive, would provide us with at least the bare bones of a functional system. We should not, however, delude ourselves about the narrow ambitions and limitations of the law as it currently stands.

Appendix

Commentary on the Offshore Installations (Emergency Pollution Control) Regulations 2002

As has already been noted in the main body of this article, the Secretary of State (who in practice will act through his representative, SOSREP) may for the purpose of preventing or reducing pollution or the risk of pollution, issue to the operator or manager of an offshore installation directions ‘to take, or refrain from taking, any action of any kind whatsoever’. If the Secretary of State considers that issuing directions is or has proven to be inadequate, he is empowered himself to take ‘any action of any kind whatsoever’ in relation to ‘an offshore installation or its contents’. On the face of it, the language used to express these powers is broad. However, when consideration is given to the qualifying wording which is also present, and the manner in which some key terms are defined, it becomes apparent that the powers are not as all-encompassing as might first appear.

Although the power to direct and intervene is wide, it is triggered only when an ‘accident’ occurs. ‘Accident’ is defined as meaning ‘any occurrence causing material damage or a threat of material damage to an offshore installation’. In some respects, this is an expansive definition, permitting intervention to occur from the point when a threat of material damage to an offshore installation becomes apparent, and therefore allowing intervention to occur before we might, in everyday parlance, think ‘an accident’ had occurred. On the basis that early intervention may lead to decisive action which would prevent an accident or mitigate its consequences, this is to be welcomed. In other respects, however, the definition is highly restrictive. For example, the need for ‘material damage’ (or the threat thereof) to an offshore installation is highly constraining. It is possible to imagine a set of circumstances where the environment could be damaged without such a threat arising.

Consider the situation where as a result of a latent defect a critical piece of subsea equipment or infrastructure starts to leak oil or gas. Even before one considers whether the piece of equipment or infrastructure meets the definition of an ‘offshore installation’, it would seem that the above scenario cannot of itself constitute an ‘accident’ as the item of equipment has not been ‘damaged’ by external forces or events but has merely succumbed to an inherent weakness in its design or manufacture. Such an event might in time become an occurrence causing material damage or a threat of material damage to an offshore installation by its attendant circumstances. An incident which led to the release of a significant quantity of gas in close proximity to a production platform would qualify as an accident for the purposes of the regulations. The ability to intervene is therefore not triggered by pollution or the threat of pollution alone, but by pollution (or the threat thereof) in conjunction with a safety risk to an offshore installation.

This brings us to the second problem: the definition of the phrase ‘offshore installation’. Generally, legislative provisions utilising this or similar phrases seek to define what is meant by the expression. Such definitions are often lengthy and technical. However, these regulations leave the term undefined. This is problematic. There will be no uncertainty about the status of a fixed production platform’s superstructure, topsides, helipad or accommodation module: these are all part of the integrated whole of the platform, and a fixed production platform is probably to be considered the paradigm offshore installation. Floating or otherwise movable structures, such as semi-submersible production platforms and jack-up rigs, would generally also be considered offshore installations and, it is submitted, should be so considered for the purposes of these regulations too, but it is to be regretted that the regulations did not expressly clarify this.

There are more problematic issues still. What about items of equipment that are not closely integrated into the structure of a rig or platform but which perform a crucial role in containing and controlling hydrocarbons? Is the riser that connects a drilling rig to the subsea wellhead part of an offshore installation? When in storage, the riser is comprised of nothing more than a large number of pipes in a rack, waiting to be threaded together. In that state, it would seem more natural to describe it as part of the contents of an offshore installation, not part of the installation itself. While a case can be made for arguing that the pipes should be considered to be part of the offshore installation (at least while actually in use as a riser) the matter is not free from doubt. And what if the accident happens to the Christmas tree? That item will be affixed to the sea bed and may be several hundred metres remote from a platform. During operations, it

116 2002 Regulations reg 3(2).
117 The powers granted by these regulations have been described as extensive: Tromans and Norris (n 17) at 223.
118 Consider eg the facts in BHP Petroleum Ltd and Others v British Steel plc & Anor [2000] 2 All ER (Comm) 133. Here, the wrong grade of steel was used in a pipeline. The steel used was sufficiently porous to allow natural gas to escape into the Irish Sea. This is not a case of a pipeline being damaged, but a case of a defective pipeline.
119 See further the discussion on ‘offshore installation’ immediately below.
120 See eg Petroleum Act 1998 s 44, which defines ‘offshore installation’ for the purposes of Part IV of that Act. Part IV regulates the decommissioning of offshore installations. See also the definition used in the very extensive definition of ‘offshore installation’ in the Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations and of ‘offshore facility’ (not ‘installation’) in the OPOL scheme, both discussed in the main body of this article, above.
121 The Christmas tree is not, in this context, a miscellany of bits of plastic which one drags out of the loft on 23 December and assembles into an unconvincing simulacrum of a Douglas Fir, but the set of valves, spools and fittings connected to the top of a well to direct and control the flow of formation fluids from the well: http://www.glossary.oilfield.slb.com/en/Terms.aspx?LookIn=term%20name&filter=christmas+tree.
will be linked to a platform by piping and can be con-
trolled from the platform. It nevertheless seems ten-
dentious to argue that it is part of the platform.
Perhaps it is unnecessary to focus on whether such an
item is sufficiently closely connected to another offshore
installation; perhaps it is an offshore installation in its
own right? It is, after all, both ‘offshore’ and ‘an installa-
tion’, in that it has been installed on the sea bed by divers
or remote operated vehicle. Given the proliferation, in the
mature province, of satellite fields involving subsea
completions and tie-backs, it does not make a great
deal of sense, in considering what is meant by an offshore
installation, to be too fixated upon a platform. The
paradigm has shifted. If lying offshore, being installed and
being there for purposes connected with the oil and gas
industry was all that was required to meet the definition
of ‘offshore installation’, pipelines would also seem to
qualify. The guidance on the regulations produced by
DECC seems to anticipate this result. It states that the
regulations ‘apply to all offshore installations and pipelines
in UK territorial waters or any area designated under the
Continental Shelf Act 1964’.122
However, in the Petroleum Act 1998, ‘offshore installa-
tion’ is defined so as expressly to exclude ‘pipelines’,123
while the Offshore Petroleum Activities (Oil Pollution
Prevention and Control) Regulations 2005 initially
adopted the 1998 Act’s definition of ‘offshore installation’
but, when it came to be noticed that this definition ex-
cluded ‘pipelines’, a new definition was adopted, expressly
including them.124 The inconsistency in usage illustrates
the danger inherent in blithely assuming that the ex-
pression ‘offshore installation’ carries a particular meaning.
Problems with terminology and definitions are per-
haps to be expected when one is dealing with the
regulation of a technically complex industry. They are,
however, still deeply problematic and have seriously
hampered attempts to legislate on other aspects of oil
and gas operations.125 No concluded view is expressed
here on precisely what the definition of ‘offshore instal-
lation’ should be taken to be for the purposes of the 2002
Regulations: the point is simply that the lack of clarity is
apt to lead to disagreement and confusion, something
that is highly undesirable in the context of legislation
which, by its very nature, is intended to be used in an
emergency situation.
A final comment should be made on these regulations.
They provide the Secretary of State with the power to
take action in relation to ‘the offshore installation or its
contents’. Not all offshore installations are designed to
contain oil or gas and there are circumstances — such as
in Deepwater Horizon itself — where oil and gas may
escape at the wellhead, without ever having been the
‘contents’ of an offshore installation. It might at first sight
appear that this creates a problem for the scheme set
out in the regulations: if oil has not been contained
within an offshore installation, does it fall into a
regulatory black hole where the Secretary of State is
powerless to intervene?
Happily, any such fears would be unfounded. The pur-
pose of the regulations is not to enumerate the Secretary
of State’s powers in their totality, but to provide the
Secretary of State with such additional powers of inter-
vention as he may require adequately to respond to an
accident causing pollution. Seizing control of, or even
sinking or destroying,126 an offshore installation are inter-
ferences with property rights powers which are greatly in
excess of the rights to exercise control over offshore
operations conferred upon the Secretary of State by a
petroleum licence; they therefore need to be set out in
legislation. However, the Secretary of State needs no
permission from its licensees to take action to disperse
or collect oil which is polluting the waters overlying the
Continental Shelf. Thus, in this respect at least, the
drafting of the regulations creates no difficulties.

122 DECC Guidance Notes to Operators of UK Offshore Oil and Gas
Installations on the Offshore Installations (Emergency Pollution
Control) Regulations 2002 (April 2009). Pipelines are not, however,
defined or indeed referred to anywhere within the regulations.
123 Petroleum Act 1998 s 44.
124 Offshore Petroleum Activities (Oil Pollution Prevention and Control)
(Amendment) Regulations 2011 (n 21) reg 4.
125 Consider the definitional difficulties which have arisen in the context
of the regulation of third party access to offshore infrastructure; see
U Vass Access to Infrastructure’ in G Gordon, J Paterson Oil and Gas
Law: Current Practice and Emerging Trends (Dundee University Press
Dundee 2007) paras 5.4–5.7.
126 These actions are specifically permitted by reg 3(4)(b).