

Brazil – pollution



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- No right to limit liability for environmental damage.
- Criminal liability in Brazil for environmental damage can be attributed to individuals as well as corporate entities.
- Unofficial statistics for fines levied in respect of oil spills over the past seven years shows an increase of approximately 105% per year.

Brazil is known for its complex regulatory framework. As such, there is great uncertainty and unpredictability surrounding its pollution liability system. This article looks at the role of the authorities in the event of a pollution incident and the increasing level of fines applied following a spill.



The legislation that applies to pollution incidents in Brazil comprises a number of different laws and regulations. The main statute, the Lei do Oleo (Federal Law 9966/2000) was enacted in 2000 (and its Regulatory Decree in 2002) following the spill of 1.3m litres of fuel oil from a leaking pipeline at the Duque de Caixas refinery operated by Petrobras at Guanabara Bay in Rio de Janeiro. This incident caused widespread pollution damage to an environmentally sensitive area and brought about major reform to Brazil's pollution liability regime.

Authorities

Various state and federal government agencies may be involved following a pollution incident and they have varying levels of competence. Three federal authorities are responsible for dealing with pollution incidents caused by ships, platforms and pipelines, namely, Diretoria de Portos e Costas or Federal Port Authority (DPC), Instituto Brasileiro do Meio Ambiente e Recursos Renováveis or Environmental Federal Agency (IBAMA) and National Petroleum Agency (ANP). Although these

authorities act independently of each other, they are subject to a strict rule of co-operation. The DPC is responsible in principle for investigating pollution incidents and the imposition of fines as a matter of administrative law. However, the Brazilian courts have recognised that all three federal authorities have the right to intervene following a pollution incident in order to impose fines. This may lead to a degree of uncertainty regarding the level of fines that may be imposed.

In the event of an incident

The Lei do Oleo and its Regulatory Decree imposes a strict duty on the field operator or any party interested or involved in the operation of the field to report pollution incidents to the authorities. We advise members to immediately report any pollution incident to the three federal authorities referred to above, in order to mitigate the risk of a fine. Any delay in notifying them can be treated as an aggravating factor, which may increase the level of a fine.

The authorities in Brazil at both federal and regional level perform regular audits and inspections to check that operators comply with the required standards, with the aim of preventing oil spills.

Every pollution incident reported by an operator will be recorded in order to facilitate investigation and to try to deter future accidents.

The victim of a pollution incident (e.g. fishermen) can bring a claim for compensation under civil law for pollution damage (Federal law 7.347/1985). The wrongdoer is liable to pay compensation on a strict liability basis. Members should note that there is no right to limit their liability for environmental damage under Brazilian law.¹

Fines

Criminal liability in Brazil for environmental damage can be attributed to individuals as well as corporate entities. Following conviction for 'crimes against the environment', fines as well as other penalties (e.g. imprisonment and community service) can be imposed.

As explained above, there is some uncertainty as to which federal authority is responsible for investigating and imposing a penalty following a pollution incident, as a matter of administrative law.² Fines imposed by IBAMA can be very high, not helped by the fact that no specific formula is used by it to calculate the amount. Whereas fines imposed by the DPC and ANP tend to be more modest.

An increase in the number of fines has been noted during the past five to six years. For example, reviewing DPC's 'unofficial' statistics for fines levied in respect of oil spills over the past seven years shows an increase of approximately 105% per annum. The majority of these fines were imposed on fixed platforms.

It must be stressed that the increase in the number and value of fines levied may be affected by the following factors:

- greater awareness by the Brazilian authorities of offshore units and platform operators;
- wider educational campaigns;
- increased media involvement, following pollution incidents such as the *Deepwater Horizon* incident; and
- the number of operators located offshore Brazil has increased considerably in the last few years, which has led to a greater risk of incident.

¹ Although Brazil is a signatory to the Convention on Civil Liability for Oil Pollution Damage (CLC 69), there is no right to limit in respect of environmental damage.

² Federal Law 9.605/98 and the Brazilian Criminal Code.