MMS Present.

Oil Pollution

Act 1990 &

Regs, 2-15-94

Alaska State Legislature

HOUSE RESOURCES COMMITTEE

P.O. Box V
State Capitol
Juneau, Alaska 99811
(907) 465-3715

M E M O R A N D U M

TO: Members of the House Resources Committee

FROM: Representative Bill Williams, Chairman
House Resources Committee

DATE: February 14, 1994

Attached are draft comments from the Division of Governmental Coordination regarding proposed rulemaking by the Minerals Management Service concerning proof of financial responsibility.

This document should be helpful to you in preparing for the committee meeting with the MMS officials on February 15, 3:00 p.m. in the House Resources Committee room. Hopefully, this document will generate a lot of discussion and questions.

Draft State of Alaska Response
to Proposed Rulemaking by
the Minerals Management Service
Concerning Proof of Financial Responsibility

DRAFT

February 11, 1994

U.S. Department of the Interior
Minerals Management Service
Mail Stop 4700
381 Elden Street
Herndon, VA 22070-4817

Attention: Chief, Engineering and Standards Branch

The State of Alaska appreciates the opportunity to comment on the *Advance Notice of Proposed Rulemaking for OPA 90 Oil Spill Financial Responsibility Requirements for Offshore Facilities (Advance Notice)* published in the *Federal Register* on August 25, 1993. The efforts of Minerals Management Service (MMS) personnel who traveled to Alaska to discuss this issue last fall are also appreciated. We look forward to the February 1994 meeting which MMS will hold in Anchorage on this topic.

This response includes the concerns of State agencies as well as local coastal management districts in Alaska. Individual agencies and the coastal districts may also submit their comments on the *Advance Notice* directly to MMS.

The State of Alaska believes the proposed rulemaking far surpasses Congressional intent as expressed by OPA 90. By taking the broadest interpretation of legislative intent, the MMS intends to require any facility which uses oil or oil products in a wetland to provide proof of financial responsibility of $150 million. Enforcement of the proposed rulemaking would have a profound negative effect on the economy of Alaska and other states. Almost half of Alaska is considered wetlands by virtue of previous administrative rulemaking by the Army Corps of Engineers and other federal agencies. As a consequence of the broad expansion of federal regulation of these wetlands, the financial requirements of the proposed rulemaking would force private businesses and local and State government agencies to cease certain essential operations. Adoption of the proposed regulations would result in a chain-reaction of fiscal impacts which would upset the entire Alaska economy as well as the national economy.

In addition to economic impacts, the proposed rulemaking would inflict significant social impacts upon the people of Alaska. It would diminish the standard of living currently enjoyed by residents of rural areas, Native villages and urban areas. The availability of oil and refined products would decrease, thereby limiting transportation, electrical generation, and heating opportunities.

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While this response focuses on Alaska's concerns, the proposed rulemaking would have serious and far-reaching national ramifications as well. Considering the relative abundance of real and regulatory-created wetlands in Alaska, the proposed rulemaking would disproportionately affect Alaska's rural and urban communities both social and economically. The effect of implementation of the proposed rulemaking would be devastating in every community, creating havoc in such basic benefits as residential heating, electric power, and all forms of transportation including delivery of U.S. mail, food and health care.

The remainder of this letter provides specific comments on the proposed regulations. These comments address recommendations for further action by MMS and discuss Alaska's view on Congressional intent in the passage of OPA 90. The comments also address an alternative risk-based approach, discuss the likely inability to obtain coverage summarize potential economic effects, suggest the use of Alaska's financial responsibility requirements, and address uncertainty about the scope of the proposed regulations.

RECOMMENDED ACTION ON PROPOSED RULEMAKING

The proposed rulemaking would require proof of financial responsibility which would be impossible to obtain in most instances. Unless an entity is large enough to self insure, it would have to use another means to prove financial responsibility. Most small businesses would be treated equally with the largest corporations and could not afford to provide $150 million proof of financial responsibility. Organizations and companies which provide insurance, reinsurance, and other forms of coverage simply do not have the capacity to cover the number of entities which would be required to have coverage under the proposed rulemaking.

The State of Alaska seriously doubts that it was the intent of Congress to place such a burden on both government agencies and small businesses. Because of the wide-ranging negative ramifications of the proposed rulemaking, the State of Alaska respectfully requests that MMS narrowly construe its authorities in implementing OPA 90 until the issues outlined in this letter are resolved.

We urge MMS to reevaluate its interpretation of OPA 90 definitions as those definitions pertain to both MMS's authority and the scope of operations and facilities to be covered by its rulemaking. The State recommends MMS reconsider its overly broad interpretation of the terms "navigable waters" and "offshore facilities". In addition, since the OPA 90 financial responsibility section (Section 1016) applies only to responsible parties, the definition of "responsible party" should be carefully considered. This definition clearly limits the scope of facilities affected by Section 1016. The State believes Congress intended to require only deepwater ports and facilities located offshore to provide proof of financial responsibility on the scale contemplated by MMS's rulemaking. It is unlikely Congress intended expansion of MMS authority and responsibility to fresh water wetlands. Absent clear and convincing evidence that Congress intended a broader approach, MMS should construe its authority narrowly so as to minimize economic dislocation and hardship to the public. If MMS determines that legislative amendments are necessary to clarify its responsibilities, the State recommends the following changes be considered when seeking any legislative solution.

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- **Limit Coverage to Offshore Facilities:** The $150 million proof of financial responsibility requirement should be limited to those offshore oil exploration and production facilities traditionally regulated by MMS.

- **Use State Financial Responsibility Requirements:** The language in Section 1019 of OPA 90 should be changed to allow substitution of State financial responsibility requirements for federal requirements in State waters. The State of Alaska's financial responsibility requirements are some of the most comprehensive in the world.

- **Exempt Small Operations:** The proposed financial responsibility requirements do not discriminate among operations which pose different levels of spill risks. A provision should be made for *de minimis* exceptions. A logical threshold should be established to exempt responsible parties who pose minimal risk. In other words, the liability should be commensurate with the risk.

- **Develop a Risk-Based Approach:** The words "up to" should be inserted before "$150 million" in all appropriate sections of the legislation. Congress should establish a tiered system, like that in Alaska law, that prescribes lower financial responsibility amounts for smaller and lower risk operations. If State law is not relied on to govern operations in State waters, Congress must still recognize that not all operations represent the same risk that offshore crude oil exploration and production facilities do. The fixed amount of $150 million is especially inappropriate for small facilities and vessels carrying refined oil products. Spills from these operations evaporate and disperse much faster than crude spills, resulting in simpler response operations, and in most cases, far less damage. Further, some offshore wells can be expected to produce much smaller quantities of oil, and present less risk, than larger "finds". Therefore, a fixed amount of $150 million may not be appropriate for all offshore operations.

In the event OPA 90 is to be amended, the State of Alaska would appreciate the opportunity to comment further on specific language and section changes.

CONGRESSIONAL INTENT

Breadth of Coverage

It is inconceivable that Congress intended to expand MMS's jurisdiction to the extent proposed by the *Advance Notice*. Regarding OPA 90 proof of financial responsibility provisions, a common-sense interpretation of Congressional intent would better serve the country than the very broad interpretation advanced by MMS.

Like similar legislation in Alaska, OPA 90 was enacted in the aftermath of the *Exxon Valdez* oil spill. The State believes Congress intended the new financial responsibility requirements to apply to facilities traditionally considered offshore facilities and deepwater ports. Because the OPA 90 definition of "offshore facilities" specifically mentions territorial waters, it appears Congress did not intend to include onshore areas. If Congress had intended to include onshore areas in the definition of offshore facilities, it would not have created a separate definition for "onshore facilities". Instead, Congress would have chosen a term other than "offshore facilities" if it meant to include "onshore facilities" in the definition.

Notwithstanding the issue of Congressional intent in defining "onshore facilities" or "navigable waters", the definition of "responsible party" narrows the type of facilities covered by the financial responsibility requirements. The definition of "responsible party" differentiates between vessels, onshore facilities and offshore facilities. The part of the definition which addresses offshore facilities limits responsible parties to the

> **lessee** and **permittee** of the area in which the facility is located or the **holder of a right of use and easement** granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) . . . (emphasis added)

This definition appears to exclude motor vehicles, aircraft, and facilities which do not require leases or permits. In addition, the State believes Congress intended "applicable State law" to include only laws which address offshore oil and gas lease sales, exploration and production. A thorough discussion of the limits imposed by the term "responsible party" is not included in the *Advance Notice*.

If Congress had intended to require small businesses, State agencies and local governments to provide proof of financial responsibility, it seems logical that it would have required a sliding scale of financial responsibility commensurate with the risk associated with a potential oil spill. Did Congress knowingly intend to require a small fuel distributor or local governments in rural Alaska to provide proof of financial responsibility for $150 million when the financial risk of a potential spill would be far less?

We simply cannot believe Congress intended to place such a heavy burden on coastal communities and State agencies. Coastal communities often have multiple fuel storage sites, each of which would potentially trigger the $150 million proof of financial responsibility requirement proposed in MMS's rulemaking. It is difficult to believe that Congress intended such absurd results. At $150 million per site, communities, the small businesses within them, and regional school districts would be subject to obligations which they simply could not meet. Moreover, because of their limited risk, these types of facilities should never be categorized the same as offshore production platforms.

ENVIRONMENTAL PROTECTION

Assuming one of the basic purposes of OPA 90 is to protect the environment from oil spills, the limitations of financial responsibility requirements to meet this end should be recognized. While a Certificate of Financial Responsibility (COFR) may show that an operation has the capital to respond to an oil spill, it does not prevent an oil spill from occurring. The State of Alaska has placed priority on oil spill prevention. For example, the Alaska Department of Community and Regional Affairs and the Alaska Department of Environmental Conservation are working to assure that rural tank farms will not leak oil. Rather than focussing on financial responsibility requirements, the environment might be better protected if more federal funds were available to assure that oil spills will not occur.

RISK-BASED APPROACH

The $150 million OPA 90 requirement for proof of financial responsibility does not differentiate between serious and negligible risks. Considering only oil and gas exploration and development activities, specific kinds of oil-related activities pose significantly different risks. For example, vessels transporting oil contribute to almost half the oil discharged into marine waters. Excluding atmospheric, natural, municipal and runoff sources of oil, transportation-related spills account for 97 percent of oil entering marine waters. On the other hand, facilities associated with offshore production cause less than three percent of the oil input into marine waters[1].

A reasonable financial responsibility assessment should base its requirements on risks related to a possible oil spill. It should reflect the location of the facility, the amount of oil or refined product, and the type of product associated with the facility.

INABILITY TO OBTAIN COVERAGE

Two questions should be answered before implementing the proposed financial responsibility requirements. First, will those affected be able to obtain coverage? Second, for those who

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[1]Michael J. Kennish, Ph.D., *Ecology of Estuaries: Anthropogenic Effects*, Boca Raton: CRC Press, 1992, pp. 66-67.

could conceivably obtain coverage, would it be affordable? The State of Alaska believes that the answer to these questions is no for anyone other than a Fortune 500 company.

Obtaining $150 million in financial responsibility will be costly to even those companies in the upper Fortune 500 category. Because of their financial strength, such companies would be able to purchase what is known as excess layers of coverage once they have provided approximately $100 million in self insurance. It is likely that these companies would have to obtain the additional $50 million of coverage from several different sources. Companies would pass these costs to the public.

Companies outside of the Fortune 500 category would not likely be able to meet the proposed proof of financial responsibility requirements. The availability of coverage is directly linked to the health and solvency of insurers and their capacity to provide coverage. Capacity, in this sense, means the legal and financial ability to provide coverage. Market availability of coverage is also dependent on the willingness of the insurance industry to accept certain risks. Most insurers are disinclined to write this form of pollution liability coverage.

Alaska, like all states, limits the amount of risk an insurer can undertake (AS 21.12.010). This risk limitation is based on the amount of a company's capital and surplus. An insurer who is licensed to sell insurance for risks in Alaska can only issue a policy with less risk exposure than ten percent of its capital and surplus. As used here, capital and surplus refers to the amount of money available for the payment of claims and other obligations. In other words, before a company can cover one policy for $150 million, it must have at least $1.5 **billion** in capital and surplus. There are few property and casualty insurers licensed in the United States which have the necessary surplus to legally write the required coverage proposed by the MMS.

When one considers the State-imposed risk limitation along with the willingness of insurers to provide pollution coverage, the options to obtain coverage decrease significantly. The State of Alaska knows of only three insurance conglomerates that are willing to write this form of pollution liability coverage. Two of these groups do not have the required surplus to issue even one single policy for the full liability limits of $150 million as required by the proposed rulemaking.

In some circumstances where it is difficult to obtain insurance, states allow unlicensed companies to provide insurance. It is possible companies could obtain pieces of coverage through these unlicensed companies which would combine to provide the required $150 million proof. These sources are not subject to State regulatory oversight, and as such, are not subject to the same financial oversight as licensed companies.

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The reinsurance market is another alternative to provide the proposed financial responsibility coverage. Financial difficulties currently experienced by London-based reinsurance enterprises, however, make them unable to absorb additional risks of this magnitude.

Some oil-related companies which operate vessels obtain liability coverage from Protection and Indemnity Clubs (P&I Clubs) for their marine-related risks. These organizations provide coverage through a complex system. Usually, members must cover some of the costs of an oil spill, the group as a whole covers some of the costs, and reinsurance covers the remaining costs. It is unlikely, however, that P&I Clubs would have the ability or desire to cover onshore facilities affected by the proposed rulemaking.

Again, for even those companies which could obtain the proposed level of financial responsibility, there will be additional problems. Costs of providing this proof would likely be passed on to the consumer possibly placing commodities and services out of reach to most Alaskans and small businesses.

It should be noted that other means exist to assure adequate funding for oil spill clean up. For instance, the Oil Liability Trust Fund (26 U.S.C. 9509) is available for oil spill expenses authorized by Section 1012 of OPA 90. As well, many states have similar funds. Alaska's fund is known as the Oil and Hazardous Substance Release Response Fund (AS 46.08.010).

POTENTIAL ECONOMIC EFFECT

The potential economic consequences of the proposed rulemaking are overwhelming. Taken to an extreme, which appears to be the case in the *Advance Notice*, the proposed regulations would have wide-ranging effects. Activities in Alaska's wetlands, which comprise virtually half of the State, would require coverage of $150 million of financial responsibility. The result would be a decline in general commerce, a decrease in essential government services, increased hardships in rural areas including Native villages, and a swift blow to Alaska's vital oil and gas industry. Each of these topics is discussed in more detail below.

General Effect on Commerce

The proposed rulemaking would likely have a crippling effect on Alaska's economy sending it into a tailspin which could result in a severe depression. Because of its unique abundance and geographic distribution of its populated communities, most of Alaska's commerce occurs in wetlands. While physically some of these areas may not appear to be wetlands at first glance, they have been defined by regulation to be so. Consequently, the proposed regulations potentially affect distribution of home heating oil, bulk storage of fuel, gas stations, outfitter-guide operations, eco-tourism operators, floatplane companies, and the trucking industry.

If only applied to fuel distributors, the proposed regulations would have a mind-boggling effect. Most rural Alaska communities use diesel fuel to generate electric power. Even assuming it would be possible to obtain a $150 million proof of financial responsibility for distributions serving those communities, fuel prices would rise to an unreasonable level. Businesses which could afford to provide the required proof of financial responsibility would have to pass the costs to the consumer. Such a requirement would likely force rural fuel distributors and owners of storage facilities to cease operations.

The effect on the fishing industry would also be devastating. Vessels could no longer be legally fueled at refueling docks because the small companies operating these facilities would not be able to meet the financial responsibility requirements. As a result, the Alaska fishing industry would be forced to violate these regulations in order to remain in business.

Tourism, another important industry in Alaska, would decline because tourism-related companies which handle fuel would no longer be in business. It should be noted that most wilderness adventure businesses transport fuel for use in vehicles, boats, lanterns and camp stoves. Bush pilots also transport tourists and hunters along with fuel provisions to remote locations. Tour operators which store fuel for busses could also be forced out of business.

Also, the mining and timber industries would be adversely affected. Resource development companies must use fuel to carry out activities in wetland areas. Few of these companies could obtain proof of financial responsibility for $150 million.

Effect on Government Operations

Many local and State government agencies would be affected by the proposed rulemaking. The State Department of Transportation stores fuel in locations across the State for highway maintenance operations. Rural village governments store diesel fuel to generate power and provide heat. In addition, field personnel must carry fuel with them during extended trips to field locations. Virtually every one of these operations would be covered by the proposed rulemaking.

Effect on Rural Villages

The proposed rulemaking could close rural schools, compel rural communities to abandon electric power generation facilities, and force rural residents into further poverty. There are no practical alternatives to diesel-powered electrical generation to most Alaska villages due to the limited extent of electrical interties. Besides the economic effect, social implications would be significant. Reduced availability of fuel would substantially curtail subsistence activities.

Consider just the effect the rulemaking would have on the operators of the 325 tank farms located in rural Alaska. The total capacity of all of these tank farms is approximately 1.5 times the amount of oil spilled by *Exxon Valdez*, yet rural Alaska would be burdened with the task of providing nearly $48 billion of financial responsibility.

As an example of the effects the proposed rulemaking would have on rural Alaska, consider the Native village of Chevak, located in the Yukon-Kuskokwim delta. The population base of approximately 600 people is not enough to support the costs of obtaining proof of financial responsibility for facilities which handle or store oil or oil products. Consequently, the village's eight tank farms would have to close. Individual tank farms are operated by the village school, the local government, the electric utility, a Native corporation, and a private entity. The proposed rulemaking would limit or shut down operations at the school. The electric utility would no longer be able to generate power from diesel fuel. The airport would have to close, thereby limiting residents' contact with the rest of Alaska. Fuel would not be available to power vehicles. Residents would have to scavenge a limited supply of driftwood to fuel wood stoves. Subsistence activities would be curtailed because the villagers would no longer be able to obtain fuel to power outboard motors or snow machines.

The description of the effects of the proposed rulemaking on the residents of Chevak appears to be absurd, however, this scenario is a plausible outcome of implementing the rulemaking as MMS currently proposes. Effectively, the residents of this and other rural Alaska communities would be forced to accept a much reduced standard of living because of a senseless government standard. Implementing the proposed rulemaking would increase rural poverty, encourage depopulation of villages, and decrease health conditions and life expectancy of Alaska's rural population.

Effect on the Oil Industry

Requiring proof of financial responsibility of $150 million for responsible parties in the oil industry also will have negative effects, not only on Alaska but on the nation as well. While large oil companies may be able to meet this requirement, the smaller companies can not. The proposed regulations would force smaller companies to abandon operations in Alaska and throughout the lower 48 states. This result is entirely inconsistent with the Administration's stated goals of reducing imports, stimulating domestic production, reducing our balance of trade and generally stimulating the domestic economy.

For example, none of the companies providing drilling services on the North Slope are likely to be able to obtain $150 million of proof of financial responsibility. Similarly, geophysical survey companies which must store and transport fuel would be adversely affected. These companies transport fuel for use in completing remote seismic surveys. Likewise, the proposed rulemaking could lead to the shutdown of other oil field support contractors who work on the North Slope and in Alaska's Cook Inlet region. Without the support provided by these small companies, lessees would have to provide these services, the cost of which would affect decisions regarding abandonment and production of marginal oil fields.

The proposed rulemaking would provide yet another disincentive for offshore oil and gas exploration in an area already characterized by high costs and low returns. Alaska is experiencing a decline in offshore exploration activities. Generally, implementation of this rulemaking would simply hasten the exodus of domestic explorationists. A reduction in domestic oil exploration and production would result in a tremendous loss of employment, add a greater burden on government to provide social services to unemployed workers, lead to greater dependence on foreign oil, and compromise national security.

Implementation of the proposed rulemaking would result in a further loss of federal and State oil and gas revenues. A decrease in production would result in a corresponding decrease in royalty revenues. Considering remaining oil production, wellhead prices could rise due to increased costs to producers to provide the necessary proof of financial responsibility which would also reduce State and federal revenues.

USE OF ALASKA FINANCIAL RESPONSIBILITY REQUIREMENTS

Section 1019 of OPA 90 provides for state enforcement of financial responsibility requirements in State navigable waters. We encourage the substitution of current State of Alaska financial responsibility requirements for those operations located in or under State navigable waters.

The financial responsibility requirements in Alaska are some of the most comprehensive in the world. They take into account varying levels of risk associated with each category of operator and differentiate between crude and noncrude oil. In addition, operators storing less than 5,000 barrels of crude oil, or less than 10,000 barrels of noncrude oil are exempt from financial responsibility requirements. Only tankships would be required by State law to provide $150 million or greater proof of financial responsibility. Alaska law requires crude oil pipelines and offshore exploration and production facilities to provide proof of financial responsibility of $50 million.

It may also be appropriate to consider implementation of approved methods of providing proof of financial responsibility in Alaska waters as outlined in statute (AS 46.04.040) and in the Alaska Administrative Code (18 AAC 75.205 et. seq.). When developing its approved means of providing proof of financial responsibility, the State of Alaska worked with the oil and insurance industries and other interested parties to assure these provisions were reasonable, practical and effective.

UNCERTAINTY RELATING TO THE PROPOSED RULEMAKING

Uncertainty regarding who is covered by the proposed regulations is exemplified in MMS documents concerning the proposed rulemaking. For example, the undated news release from the Alaska OCS Region which accompanied the August 25, 1993 MMS news release states that the financial responsibility requirements could affect facilities which handle oil or oil products including **federal**, state, municipal and private facilities. During our meeting with MMS personnel from Washington D.C., we were informed that federal facilities would not be affected by the proposed rulemaking. When addressing who will be affected, both the *Advanced Notice* and comments made by MMS personnel suggest certain groups "may" be affected. It is difficult to provide meaningful comments on proposed regulations when it is uncertain who these regulations are intended to affect.

It appears that MMS is also uncertain regarding Congressional intent. When addressing intent, MMS personnel referenced the OPA 90 Conference Report, but it is unclear what other sources have been investigated to determine Congressional intent. It also appears that limitations imposed by the definition of "responsible party" have not been carefully considered. Because this proposed rulemaking could potentially cripple commerce within Alaska and other states, we urge MMS to adopt a more practical approach and reevaluate its preliminary determination on the jurisdictional requirements of OPA 90.

CONCLUSION

In summary, MMS's interpretation of OPA 90 financial responsibility requirements would profoundly affect Alaska and other states. The proposed rulemaking would be an unwarranted impediment to commerce and government operations. Additionally, implementation of the proposed rulemaking would not provide **reasonable** protection of the environment. Failure to provide exemptions, exclusions or modifications to the application of the proposed regulations would force many government agencies and private businesses into non-compliance.

Since a large part of Alaska is considered navigable waters (i.e., wetlands), under the proposed regulations small businesses and local governments would be required to provide $150 million proof of financial responsibility. Most facility operators, however, would not be able to obtain this level of financial responsibility. Noncompliance would subject them to astronomical fines and possible civil and criminal charges. Since most of these entities could not afford to pay the fines, the proposed financial responsibility requirements would force facility owners and government agencies to cease many vital services.

The State of Alaska respectfully requests MMS to restrict its rulemaking for the proof of financial responsibility portion of OPA 90 to those operations and activities traditionally within MMS's jurisdiction. We appreciate the opportunity afforced by MMS to comment and we look forward to the upcoming workshop in Anchorage.

Sincerely,

Paul C. Rusanowski, Ph.D.
Director

cc:

Commissioner Edgar Blatchford, DCRA
Mike Conway, DEC, Spill Prevention and Response, Director
Glenn Daily, Tanana Chiefs
Jim Eason, DNR, Division of Oil and Gas, Director
Raga Elim, Office of the Governor
Bob Foote
Linda Freed, Kodiak Borough
Sue Flensburg, Bristol Bay CRSA
Commissioner Paul Fuhs, DCED
Chris Gates, DCED, Economic Development, Director
Ray Gillespie, Gillespie and Associates
Glenn Gray, DGC
Jim Haselberger, Office of the Governor
Representative Joe Green
John Katz, Office of the Governor
Beth Kerttula, Law
Gabrielle LaRoche, DCED
Ted Lehrbach, DCED, Division of Insurance
Senator Loren Leman
Mike Mansker, DEC
Commissioner Harry Noah, DNR
Senator Drue Pearce
Carl Portman, RDC
Cindy Roberts, DCED
Malcom Roberts, Office of the Governor
Carl Rosier, DFG, Commissioner
John Sandor, DEC, Commissioner
Jules Tileston, DNR
Mead Treadwell, DEC
David Walsh, DCED, Insurance, Director
Nancy Wainwright
John Walsh, DCRA

Federal Minerals Management Service - Advance Notice of Proposed Rulemaking

Billing Code 4310-MR

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 253

RIN 1010-AB78

Oil Spill Financial Responsibility for Offshore Facilities Including State Submerged Lands and Pipelines

AGENCY: Minerals Management Service, Interior.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Minerals Management Service (MMS) is announcing its intention to publish regulations governing the establishment of financial responsibility for offshore oil and gas facilities and requests comments from interested parties. This action is necessary to ensure that parties responsible for offshore oil and gas facilities are able to meet the financial responsibility requirements of the Oil Pollution Act of 1990 (OPA 90). These regulations will establish a level of financial responsibility at $150 million for all offshore facilities in, on, or under the navigable waters of the United States.

DATES: Comments should be received or postmarked by [Insert date 60 days after the date of publication in the Federal Register] to receive full consideration.

ADDRESSES: Comments should be mailed or hand delivered to the Department of the Interior; Minerals Management Service, Mail

Stop 4700; 381 Elden Street; Herndon, Virginia 22070-4817; Attention: Chief, Engineering and Standards Branch.

FOR FURTHER INFORMATION CONTACT: William S. Cook, Chief, Inspection and Enforcement Branch, telephone (703) 787-1610 or FAX (703) 787-1575.

SUPPLEMENTARY INFORMATION: The Minerals Management Service (MMS) is developing new regulations to implement Title I and section 4303 of OPA 90 (33 USC 2701) for offshore facilities in navigable waters of the United States. These regulations will:

- Establish the amount of oil spill financial responsibility that must be evidenced by responsible parties at $150 million;
- Extend MMS jurisdiction for financial responsibility to the territorial sea, inland navigable waters, and the navigable waters of U.S. territories, in addition to the Outer Continental Shelf (OCS).
- Define acceptable methods available to demonstrate evidence of oil spill financial responsibility;
- Define procedures to be used to submit evidence of oil spill financial responsibility;
- Define responsibilities, liabilities, and defenses of guarantors;
- Establish the maximum civil penalties to which responsible parties are subject as $25,000 per day of violation; and
- Establish civil penalties procedures.

The MMS solicits information and comments on OPA 90 issues, and MMS' preliminary interpretation of the OPA 90 requirements. Commentors should propose solutions to any problems they anticipate in complying with the OPA 90 requirements. The MMS is also seeking information on the effect of the new OPA 90 requirements on the oil, financial, and insurance industries; how MMS can best utilize the administrative expertise and experience of State regulatory agencies; and the concerns of environmental groups and other interested parties.

In August 1990, Congress passed OPA 90 which contains various provisions aimed at:

- Strengthening oil spill prevention, response capability, and cleanup efforts.
- Ensuring payment of damages resulting from oil spills.

Title III of the OCS Lands Act Amendments of 1978 (OCSLAA 78) was repealed and the Federal Water Pollution Control Act and the Deepwater Port Act of 1974 were amended by OPA 90. To implement the authority under OPA 90, Executive Order (E.O.) 12777 was signed by the President on October 18, 1991, and was published in the Federal Register on October 22, 1991 (56 FR 54757). The E.O. delegated certain responsibilities to the Secretary of the Interior, including responsibilities relative to ensuring evidence of financial responsibility for companies operating offshore facilities on United States navigable waters. The

Secretary subsequently redelegated these responsibilities to the Director, MMS.

This function was previously performed by the U.S. Coast Guard (USCG) on OCS waters under the authority of Title III of OCSLAA 78, and implemented by 33 CFR part 135. On October 1, 1992, a memorandum of agreement (MOA) was signed transferring the personnel, equipment, and files associated with the function to the MMS in furtherance of the delegations in E.O. 12777.

Affected Facilities

The definition of "facility" in OPA 90 [section 1001(9)] includes all structures, equipment, or devices, other than vessels and deep water ports, used for the purposes of exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term specifically includes pipelines. For the purposes of administering Section 1016 of OPA 90, the MMS will apply financial responsibility requirements, in the case of offshore facilities other than pipelines, to the lessee or permittee of the area in which the facility is located or the holders of a right of use and easement granted under applicable State law or the OCS Lands Act for the area in which the facility is located. In the case of pipelines, the MMS will apply financial responsibility requirements to any person owning or operating pipelines located in, on, or under the navigable waters of the United States. Under E.O. 12777, the responsibility for Deepwater Ports has been assigned to the USCG.

Geographic Jurisdiction

The financial responsibility requirements for offshore facilities apply to all U.S. navigable waters. The law (OPA 90) defines U.S. navigable waters as the waters of the United States including the territorial sea. This includes all of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States. Also, these new authorities and responsibilities apply to offshore facilities that the MMS currently regulates for oil and gas operations in the OCS.

The MMS interpretation of the term "navigable waters of the United States," as used in the definition for "offshore facility" in section 1001(22) of OPA 90, extends the OPA 90 provisions concerning offshore facilities to facilities in, on, or under the inland waters of the United States. For example, under this interpretation, a company operating a petroleum pipeline that crosses the Ohio River below Pittsburgh, Pennsylvania, would be subject to the $150 million financial responsibility provisions of this rule, as would the operator of an oil well in the Great Lakes.

Implementation Procedures

In developing regulations to implement the oil spill financial responsibility requirements of OPA 90, the MMS will need to determine whether the following concepts in the existing regulations at 33 CFR part 135 can be used to address the responsibilities delegated under E.O. 12777:

- Evidence of financial responsibility may be provided by one or more Guarantors for one or more offshore facilities of a particular responsible party.
- Where multiple responsible parties own an offshore facility, evidence of financial responsibility may be established and maintained on behalf of all of the parties by that party designated as the lead responsible party.
- When evidence of financial responsibility is established in a consolidated form, the proportional share of each Guarantor must be shown.
- Each responsible party of an offshore facility is subject to civil penalties and/or referral to the Department of Justice if the required evidence of financial responsibility is not established and maintained.
- Evidence of financial responsibility may be established and maintained by any one or any combination of acceptable methods.
- Individual insurance underwriters, indemnitors, and bonding companies are subject to direct action to the extent of their contracts, indemnity coverage, or bond.

Solicited Information

Responses to the following questions are requested to assist MMS in formulating the requirements to implement OPA 90. In addition, to help fulfill its responsibilities for determining the economic effects of regulations, MMS requests information that can be used to determine the potential economic effect of this rulemaking on the oil and gas, the pipeline, the insurance, the fishing, the tourism, and other industries.

1. The MMS solicits information on the types and locations of facilities that may be subject to the offshore financial responsibility requirements of OPA 90. The OPA 90 defines an offshore facility as any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel. In addition, OPA 90 defines a facility as any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes. Comments are invited on whether or not, and if not why not, this definition includes:

- Pipelines crossing over bodies of water on bridges, piers, breakwaters, berms, or similar structures.

- Fuel storage tanks, piping, and hoses installed in, on, or above navigable waters, including those facilities in private marinas.
- Pipelines in, on, or under inland navigable waters but not crossing the inland navigable waters.
- Pipelines that cross in, on, or under both land masses and inland navigable waters.
- Pipelines that cross under inland navigable waters in tunnels or are surrounded by other impermeable barriers.
- Pipelines that cross the waters of the United States and the waters of another country.
- Drill strings, flow lines, or production casing extending under navigable waters but originating from land-based drilling and production facilities.
- Other structures to which the applicability of OPA 90 may be unclear.

2. Section 1016(e) of OPA, and 33 CFR part 135 enumerate the following potential ways of demonstrating financial responsibility:

- Insurance;
- Guaranty;
- Indemnity;
- Surety bond;
- Letters of credit;
- Qualification as self-insurer; or
- Any combination of the above methods.

What additional methods of demonstrating evidence of the $150 million level of financial responsibility exist to enable responsible parties and guarantors to meet the requirement? Do all of these methods provide adequate assurance that claims will be paid in a timely manner?

3. Section 1019 of OPA 90 states, "A State may enforce, on the navigable waters of the State, the requirements for evidence of financial responsibility under section 1016." The MMS is seeking comments on:

- Existing State programs that can be demonstrated to be equivalent to OPA 90.
- Other State programs that address oil spill financial responsibility.
- How States expect to administer evidence of financial responsibility programs consistent with OPA 90.
- What relationships can exist between MMS and States that do and States that do not have their own evidence of financial responsibility programs.
- How MMS can verify that a State program satisfies the requirements of OPA 90.
- What contact and coordination mechanisms MMS can establish with States.
- To what extent MMS may be allowed to defer offshore facility financial responsibility under OPA 90 to a State program.

4. The oil and gas industry has expressed concerns regarding the availability of insurance for those responsible parties that cannot self-insure. Insurers attribute their problem to claimant direct action, duplicative liability under State law, and determinations of covered damages. The MMS is seeking comments regarding:

- Whether and how direct access, language limiting liability, uncertain scope of damage provisions, and lack of preemption provisions in OPA 90 affect the availability of insurance.

- What regulatory approaches are available under OPA 90 that may improve the availability of an insurance market.

5. Section 1016(e) of OPA 90 authorizes MMS, as the agent of the President, to specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing evidence of financial responsibility. The MMS is seeking comments regarding:

- What defenses should be available to a Guarantor to ensure the availability of affordable bonds, insurance, or other forms of guarantees.

- On what terms and conditions, if any, should bank letters of credit be acceptable as evidence of financial responsibility.

- On what terms and conditions, if any, should third party guaranties be acceptable as evidence of financial responsibility.

- On what terms and conditions should a lessee/operator be allowed to self-insure for financial responsibility obligations under OPA 90.

6. Self-insurance, as well as insurance, re-insurance, and other indemnity mechanisms have been identified as methods to achieve the $150 million oil spill financial responsibility requirement of OPA 90. The MMS is seeking comments regarding:

- What organizational structures could be used for these indemnity mechanisms.

- What limitations are appropriate for these indemnity mechanisms to ensure that adequate financial responsibility coverage exists for all participating responsible parties.

- To what extent can a single indemnity mechanism be acceptable as evidence for a number of responsible parties or their offshore facilities.

- Should the utilization of a single indemnity mechanism be limited by a maximum number of offshore facilities or a maximum volume of oil handled by the offshore facilities. If not, why not.

- What financial tests or criteria should be used to judge applications for self-insurance.

7. For the purposes of administering section 1016 of OPA 90, the MMS interpretation of the definition for "oil" in section 1001(23) of OPA 90, excludes facilities that handle or produce

only dry natural gas. The MMS recognizes that some quantity of natural gas liquids may be produced with the gas. Facilities handling at any one time 1,000 barrels or less of these highly volatile, light end petroleum fractions were exempted from the USCG financial responsibility regulations (33 CFR part 135) because these liquids posed significantly less environmental risk than oil. The MMS is seeking comments and the basis for those comments regarding:

- Should offshore facilities that store or process only dry natural gas be exempt from the financial responsibility requirements of OPA 90.

- Should offshore facilities that store or process a de minimis quantity of natural gas condensate be exempt from the financial responsibility requirements of OPA 90.

- What are appropriate de minimis quantities.

8. The oil and gas industry has claimed that the requirement for $150 million in financial responsibility may result in premature abandonment of wells and preclude their transfer to smaller companies. The MMS is seeking comments regarding:

- What information is available to substantiate this claim.

- How regulations can be structured to avoid premature abandonment of producing wells.

Persons choosing to respond to this notice should send comments to the address shown in the addresses section. Following the analysis of comments received, proposed rules governing oil spill financial responsibility for offshore facilities will be developed and published in the _Federal Register_.

JUN 14 1993

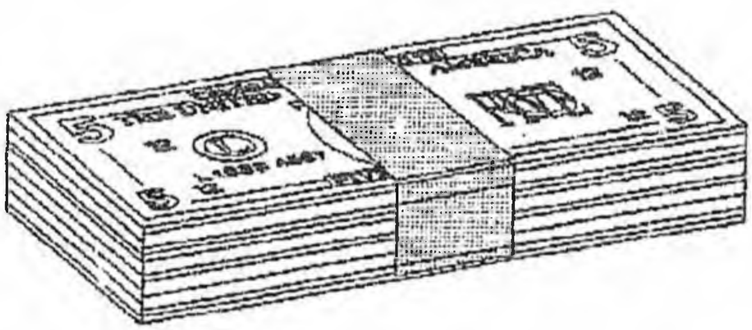
Date

Bob Armstrong

Assistant Secretary for
Land and Minerals Management

Minerals Management Service
U.S. Department of the Interior

Oil Pollution Act of 1990



Certification of Financial Responsibility

Discussion on OPA 90 Financial Responsibility

- New responsibility for MMS
- Working on implementation through ANPR
- Informing the affected public
- Seeking comments and recommendations

Purpose of OPA 90:

- Improve oil spill prevention and response
- Make sure someone pays to clean up spills
- Increase liability for oil spills

Offshore Facilities Liability:

- Unlimited clean-up costs
- $75 million in damage costs
- Unlimited liability if spill resulted from negligence or a violation

Purpose of Financial Responsibility:

- Make sure money is there to pay
- Direct access to guarantors
- Fiscal deterrent to oil spills

Key Dates for MMS:

Aug. 18, 1990	Statute Enacted
Oct. 18, 1991	EO 12777--Offshore Facilities to DOI
Jan. 30, 1992	DOI Re-delegates to MMS
Oct. 1, 1992	COFR Transfers from USCG to MMS
Apr. 16, 1993	MMS Notice to Lessees
Aug. 25, 1993	MMS Publishes ANPR
Feb. 28, 1994	Close of ANPR comment period

Definitions

Facility

"Facility" means any structure, group of structures, equipment. or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes.

Definitions

Offshore Facility

"Offshore facility" means any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or public vessel.

Definitions

Onshore Facility

"Onshore Facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land.

Financial Responsibility Requirements under OCSLA:

- Applies only to the OCS
- Evidence requirement is $35 million
- Civil penalty is $10,000 per incident

Major Changes for Financial Responsibility under OPA 90:

- Increases financial responsibility to $150 million

- New types/classes of facilities

- Expands jurisdiction to territorial sea, inland waters, and wetlands

- Civil penalty is $25,000 per day

Proof of Financial Responsibility under OCSLA:

- Self insurance
- Insurance
- Surety Bonds

Potential Innovative Ways to Show Financial Responsibility and Possible Problems:

- Liquid Asset Pools--P&I Clubs; Tax implications
- Insurance as an asset; may contravene direct access
- Surety Bonds and Letters of Credit; lack of capacity and restrictive State banking rules

Major Issues in the ANPR:

- Types and locations of "offshore facilities"
- Methods available to evidence financial responsibility
- Protections/defenses for responsible parties and guarantors
- Economic impact on people, companies, local economies
- Interaction with States and Territories

MMS Activities

- Issuing COFRs at $35 million
- ANPR versus NPR
- Meetings with potentially affected communities
- Public workshops--NO, Houston, SF; Cleveland, Alaska.
- Compile and make available the public record
- Congressional Hearings

Issues Identified to MMS

- Offshore facility definition
- Geographic jurisdiction
- Insurers won't accept direct access
- Limited insurance capacity
- No consideration of risk
- Economic impacts