

SCOMM

79:9

Key Questions About Limited Liability for Oil Spill Responders

The Marine Spill Response Corporation (MSRC) is a nonprofit mutual benefit corporation organized exclusively to promote the welfare of the public by mitigating environmental damage to the coastal and certain upstream waters of the United States. This newly created organization seeks to establish a program to render its best efforts to contain and cleanup certain large oil spills beyond local response capabilities. It will use funds provided by oil, shipping industry and others to build, staff and equip five regional response centers and numerous prepositioned equipment sites. Together with a host of subcontractors, MSRC hopes to dramatically improve this nation's ability to respond to large oil spills in coastal and tidal areas, in part through a bold and decisive response to a spill. A limited responder immunity is a critical requirement for that type of rapid response.

1. What is responder immunity?

- A limited responder immunity provision would remove liability from an individual or corporation who provides care, assistance or advice in mitigating the effects of an oil spill. If the responder acted with gross negligence, willful misconduct or caused personal injury or wrongful death then this immunity would not apply. However, this in no way exempts a responsible party from liability. Many states under current statute do not provide this limited immunity unless a responder is a volunteer, or acts directly at the request of the coordinating state agency. Other states have a simple negligence standard, rather than gross negligence.

- Under new federal legislation (Oil Pollution Act of 1990) and the laws of many states (Alabama, Connecticut, Delaware, Florida, Georgia, Hawaii, Louisiana, Maine, Mississippi, New Hampshire, New Jersey, North Carolina, Oregon, Texas, Virginia and Washington) spill responders (as distinct from those who are responsible for the spill) are not liable for removal costs or damages arising from their response activities that are in accordance with the National Contingency Plan or as otherwise directed by the President or an appropriate state official unless they act with gross negligence or willful misconduct, or cause personal injury or wrongful death.

- MSRC and other spill response organizations hope to see this same limited immunity for responders in oil spill legislation before other state legislatures.

2. Who are oil spill responders?

- The resources required to respond to a serious oil spill include a broad cross section of fishermen, barge operators, bird and animal rescue centers, spill response contractors, spill cooperatives and volunteers. Each of these need limited immunity if they are to be expected to respond boldly and aggressively to oil spills.

3. Why do spill responders need limited immunity?

- Without reasonable protection from liability, the large number of companies, private persons and organizations necessary to respond to a major oil spill will not be willing to participate boldly and aggressively in spill clean-up activities.

- Instead, they may be overly concerned with the need for advice from their lawyers and the desire to have state or federal authorities clear every decision before proceeding. For many, the risks will simply be too great and they will decline to participate at all.

4. Why do spill responders need immunity now when they have been responding to spills for years without immunity?

- Since the Exxon Valdez spill, the costs and litigation exposure flowing from oil spills have escalated dramatically. Now, under certain conditions, a responsible party can experience unlimited liability. For too many, the risks involved in responding to oil spills of this magnitude have become too high.

5. Are there precedents for this form of immunity?

- Yes. There are many examples of good samaritan immunity covering organizations like fire and police departments, emergency paramedics, medical personnel and others.

- In nearly every instance, the public policy justification for granting limited immunity is the same: the need to ensure that highly trained personnel remain willing to respond boldly and aggressively despite adverse, and sometimes dangerous circumstances, and to ensure that they remain willing to make difficult decisions with less than complete information.

6. Doesn't granting limited immunity to the responder simply let the spiller off the hook thereby pushing the cost onto the innocent victim?

- To the contrary, under the concept of responder immunity found in OPA-90, the law would expressly make the spiller liable both for its own spill-related action and for the responder's immunized acts or omissions as well.

- Moreover, where the spiller cannot compensate the injured party for its damages (e.g., where the spiller has been rendered bankrupt by the spill), the victim is compensated from a \$1 billion federal fund (which is paid for by shipping and petroleum-related industries who transport crude oil and petroleum products).

- Thus, the immunity provision works to allocate risk only as between the spiller and the responder; it does not deny innocent victims full compensation.

7. Why should oil spill response organizations be granted limited immunity when those who handle hazardous waste disposal on land continue to operate without immunity?

- In the on-land hazardous waste response, the clean-up entity ordinarily has several weeks, if not months, to test, analyze, plan and review appropriate response procedures before beginning clean-up operations.

- By contrast, in any major spill, the response organization literally has only a few hours to marshal its initial resources at the scene and to begin making vital decisions.

- These critical, time-sensitive decisions often must be made in the midst of confusion, adverse weather, fast moving currents, high seas and far less than complete information. Time is of the essence and there is no opportunity for the studies and review available to on-land hazardous waste response organizations.

8. Why wouldn't the responders' concerns be satisfied by indemnification from the spiller?

- The concept of indemnification requires the defendant (responder) to exhaust all administrative and judicial remedies before the right to indemnification from the spiller arises. Given the high probability that negligence allegations will arise in nearly every response to a major spill, the responder's management would routinely be tied up in years of time consuming and costly depositions, trial preparation and actual litigation before becoming eligible for consideration for indemnification.

- Moreover, a system which exposes the responder to these highly disruptive transaction costs will have a chilling affect on the willingness to act boldly and aggressively in future spills. Instead of reacting quickly, responders are likely to defer and contemplate opportunities to have state or federal authority direct, and thereby insulate their responses.

- Again, time is critical and responders must be encouraged to make difficult decisions under adverse conditions and with far less than complete information.

9. Won't limited immunity enable responders to be sloppy in the performance of their work?

- No. A sloppy or casual responder could quickly find that it has crossed the line between simple negligence, for which there is protection, and gross or willful negligence, for which it has no immunity.

- Oil spill response is fast becoming one of the most intensely monitored and regulated activities anyone can undertake. Federal, state and local authorities, not to mention the press, environmentalists, local fishermen and the public at large, monitor the responder's every move. Anything less than a best effort response will be viewed as inadequate.

- In addition, OPA-90 establishes a new oil spill planning process. Response Plans will be drawn up to meet the requirements of this process. Response Plans must contain all the resources necessary to remove, to the maximum extent practicable, a worst case spill. The plans will be approved by the federal government.

10. Isn't immunity just a special interest measure sought by the oil companies that support the large spill cooperatives?

- No. While it is correct that some of the largest spill response organizations are funded by oil companies, the immunity is broadly supported by nearly everyone who wants to participate in the clean-up of spills caused by someone else.

- Throughout the country, local groups like fishermen and bird rescue organizations are actively urging legislatures to grant a limited immunity to those who respond to oil spills. Without this immunity, responders are unable to act boldly in oil spills without inviting unlimited and unacceptable liability exposure.

- Moreover, the U.S. Coast Guard and some environmental groups support responder immunity in recognition of the fact that without this provision, they will not have the resources needed to deal with oil spills.

SEC. 4117. MARITIME POLLUTION PREVENTION TRAINING PROGRAM
STUDY

This provision requires the Secretary to conduct a study and report to Congress within one year to determine the feasibility of a Maritime Oil Pollution Prevention Training Program to be carried out in cooperation with approved maritime training institutions. The study shall assess the costs and benefits of transferring suitable vessels to selected maritime institutions, equipping the vessels for oil spill response, and training students in oil pollution response skills.

SEC. 4118. VESSEL COMMUNICATION EQUIPMENT REGULATIONS

Section 355 of the Senate amendment requires the Coast Guard to ensure that every vessel transiting the Mississippi River is capable of radio communications to receive warnings and to communicate with the Coast Guard and other vessels.

The House bill does not have a similar provision.

The Conference substitute adopts section 355 of the Senate amendment but deletes the references to the Mississippi River and makes the reference to vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971.

This section requires that the Secretary issue regulations within one year after the date of enactment of the Act to ensure that vessels, subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971 (33 U.S.C. 1203), including foreign vessels, have the capability to receive navigation safety warnings and to engage in radio communications on designated frequencies with the Coast Guard, other vessels, and such stations as may be specified by the Secretary.

Many vessels do not have the capability to receive Coast Guard marine warnings. This is apparently due to the fact that the frequency the Coast Guard uses for its broadcasts is not always available on the equipment carried by vessels operating in that area.

The Conferees believe that it is essential that certain vessels be capable of communicating with the Coast Guard and with other vessels at all times. The Conferees do not expect that all vessels will be subjected to this requirement. Clearly, however, oil tankers and other vessels posing major risk should be in contact with the Coast Guard. The Secretary is given the discretion to determine the type of equipment necessary to achieve the purposes of this section.

Subtitle B—Removal

SEC. 4201. FEDERAL REMOVAL AUTHORITY

Section 201(a) of the Senate amendment amends section 311(c)(1) of the FWPCA to require the President to clean up or arrange for the cleanup of oil or hazardous substances unless the President finds that the cleanup is being done properly and promptly by the responsible party, and that the responsible party has the financial resources and technical capability to conduct a proper cleanup. Section 201(b) amends section 311(d) of the FWPCA to require the President to coordinate and direct all public and private cleanup efforts whenever there is a substantial threat of a pollution hazard

to the public health or welfare, and to allow the President to act without regard to any provisions of law governing competitive bidding, the employment of personnel or the expenditure of appropriated funds.

Section 202 of the Senate amendment amends section 311(c)(2) of the FWPCA to require the President to revise the National Contingency Plan (NCP). The revisions include development of an international inventory of oil spill equipment and personnel and establishment of criteria and procedures to ensure prompt and proper identification of, and response to, oil spills that create a substantial threat of a pollution hazard to the public health or welfare.

Section 4201 of the House bill amends FWPCA section 311(c)(1) to require the President to ensure effective and immediate removal of a discharge of oil or hazardous substance. The provision authorizes the President to remove or arrange for the removal of the discharge, direct the actions of all on-scene personnel, and monitor all removal actions. The provision exempts from liability for removal costs and damages all persons, other than the responsible party, conducting removal activities who are retained or directed by the President unless they are grossly negligent or guilty of willful misconduct. The liability exemption does not apply to removal of hazardous substances or to claims related to personal injury or wrongful death. Section 4205 of the House bill requires establishment of a comprehensive nationwide computer listing of emergency oil spill removal resources.

The Conference substitute replaces subsections (c) and (d) of section 311 of the FWPCA with a combination of the provisions in the Senate amendment and in the House bill. The substitute establishes a general requirement under new section 311(c)(1) of the FWPCA that the President ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or hazardous substances into or on the navigable waters or the waters of the Exclusive Economic Zone, on adjoining shorelines, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States. With respect to removal of any discharge or mitigation or prevention of any substantial threat of a discharge, the President may assume responsibility and costs of these actions subject to reimbursement from the responsible party (i.e., "Federalize" the effort); direct or monitor all Federal, State and private actions; and remove and, if necessary, destroy a vessel discharging or threatening to discharge. As used in this new paragraph of the FWPCA, the term "Exclusive Economic Zone" is the zone established by Presidential Proclamation 5030 of March 10, 1983.

Section 311(c)(2) of the FWPCA, as amended by the Conference substitute, replaces section 311(d) of that Act to require the President to direct all Federal, State, and private actions to remove a discharge or to mitigate or prevent a substantial threat of a discharge if the discharge is of such size or character as to be a substantial threat to the public health or welfare of the United States. The public health or welfare of the United States includes, but is not limited to fish, shellfish, wildlife, other natural resources, or public and private shorelines and beaches. Examples of spills that

have posed such a substantial threat to the public health or welfare include the spills from the *Exxon Valdez* in Alaska's Prince William Sound and from the *American Trader* in California's coastal waters, and the spill and substantial threat of a larger spill from the *Mega Borg* in the waters of the Gulf of Mexico.

In addition to the requirement that the President direct a response in carrying out FWPCA section 311(c)(2), the President has the same authority as that provided under paragraph (1) of that section to Federalize removal, mitigation or prevention efforts and to remove and, if necessary, destroy a vessel; however, the President may take these actions without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government. The exemption from laws governing contracting procedures and employment of personnel, such as the requirements of section 1012(k) of this Act, is intended to facilitate emergency response and is not intended to apply to long-term removal actions. This subsection is designed to eliminate the confusion evident in recent spills where the lack of clear delineation of command and management responsibility impeded prompt and effective response.

The Conference substitute establishes a new paragraph (4) of FWPCA section 311(c) to provide limited immunity for persons involved in oil spill cleanup. The provision is similar to that contained in section 4201(a) of the House bill except that the limited immunity is extended not only to those persons retained or directed by the Federal On-Scene Coordinator but also to those persons rendering care, assistance or advice consistent with the NCP. The substitute's provision also clarifies that it does not apply to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

This subsection provides immunity from liability established under the substitute for those taking action in response to an oil spill or the threat of a spill, whether that action is performed under the aegis of the National Contingency Plan or under the direction of the President. This takes into account the fact that the NCP and Presidential orders may not cover every detail or eventuality of a spill response and that actions that are in keeping with the overall objectives of the NCP or Presidential order are deemed to be within the scope of this provision. This section reflects the Conferees' intention that responses to oil spills be immediate and effective. Without such a provision the substantial financial risks and liability exposures associated with spill response could deter vessel operators, cleanup contractors, and cleanup cooperatives from prompt, aggressive response.

The term "responsible party" as used in this new FWPCA paragraph has the same meaning that term has in section 1001 of the Oil Pollution Act of 1990. Finally, the Conference substitute amends section 311(o) of the FWPCA to preserve explicitly the authority of any State to impose its own requirement or standards with respect to the liability of persons involved in the removal of oil.

The Conference substitute moves the requirements of existing section 311(c)(2) of the FWPCA, which require the President to prepare and publish the NCP for removal of oil and hazardous sub-

stances, to new section 311(d) of that Act. The substitute adds to these requirements a number of the provisions in section 202 of the Senate amendment and a fish and wildlife response plan, which was added to the NCP under section 2002 of the House bill. Under new FWPCA section 311(d), the NCP must also include establishment of procedures and standards for removing a worst-case discharge of oil and for mitigating or preventing a substantial threat of such a discharge. In preparing the schedule found in paragraph (G) the President should consider the long- and short-term effects on the environment of spill mitigating devices and substances, and select those which are least harmful to the environment. Additionally, the revised NCP requires establishment of procedures for coordinating the activities of Coast Guard strike teams (formerly termed "strike forces"), Federal On-Scene Coordinators, District Response Groups, and Area Committees. The revised NCP must be republished within one year of that date of enactment of this Act.

The substitute amends section 311(a) of the FWPCA to define the new terms used in the NCP provisions, including the term "worst case discharge." In the case of a vessel, a "worst case discharge" is defined as a discharge in adverse weather conditions of the vessel's entire cargo. In the case of a facility, the term means the largest foreseeable discharge in adverse weather conditions. The more general term "largest foreseeable discharge" is used in the case of facilities because it is difficult to describe the entire contents of an offshore facility or an onshore facility such as a pipeline. The largest foreseeable discharge from a given type of facility is intended to describe a case that is worse than either the largest spill to date or the maximum probable spill for that facility type.

The Conferees note that in the aftermath of the *Exxon Valdez* spill untrained workers were involved in the cleanup. As a result, approximately 1,700 workers compensation claims have been filed under federal and Alaska law. The result is that these claims have increased the burden on the Alaska workers' compensation system by 20 to 25 percent. The Conferees note that proper worker training and enforcement of the Hazardous Waste and Emergency Response Standard of the Occupational Safety and Health Administration for members of the response teams as well as for workers employed after a spill will result in more efficient cleanup operations, increased protection of worker health and safety, and potential workers' compensation savings.

SEC. 4202. NATIONAL PLANNING AND RESPONSE SYSTEM

Section 204 of the Senate amendment amends section 311 of the FWPCA to require owners and operators of vessels and onshore and offshore facilities to prepare and submit a contingency plan for the prevention, containment and cleanup of oil spills from their vessels or facilities. If implemented, these plans must be capable, to the maximum extent practicable, of promptly and properly removing oil and minimizing environmental damage from a worst case discharge without the active participation of any federal personnel or equipment. The Senate amendment requires regular inspection of vessels, equipment and facilities; approval of contingency plans; and makes it unlawful to operate a vessel or a facility that is not

in compliance with a contingency plan submitted and approved under its provisions. Section 203 of the Senate amendment adds a new provision to section 311 of the FWPCA to establish, operate and maintain at least eight regional oil spill response teams capable of promptly and properly removing oil from a worst case discharge using all available public and private equipment and personnel.

Section 4202 of the House bill amends section 311(j) of the FWPCA to require contingency plans for areas and for tank vessels and facilities. Local contingency plans apply to areas designated by the President and are required to include descriptions of environmentally-sensitive areas; descriptions of the responsibilities of the responsible party, Federal, State and local agencies; and lists of available personnel and equipment. Vessel and facility contingency plans must be consistent with the NCP; describe actions that will be taken immediately to remove the most serious potential discharge; and ensure the availability of necessary removal personnel and equipment by contract or other means. The House bill requires review and approval of contingency plans and periodic inspections of equipment. Vessels or facilities are not permitted to operate without an approved contingency plan. Section 4203 of the House bill amends section 311(c)(2) of the FWPCA to establish at least seven regional strike teams to carry out the NCP and other local, vessel and facility contingency plans.

The Conference substitute combines elements of the Senate amendment and the House bill to establish a new national planning and response system under section 311(j) of the FWPCA. This system consists of a National Response Unit (NRU), Coast Guard Strike Teams, Coast Guard District Response Groups, Area Committees, Area Contingency Plans and vessel and facility response plans.

The National Response Unit is established at Elizabeth City, North Carolina, to (1) compile a list of oil spill removal resources, personnel, and equipment worldwide; (2) coordinate use of private and public personnel and equipment to remove a worst case discharge; (3) administer Coast Guard strike teams and provide technical assistance; and (4) review and maintain on file area contingency plans.

This section mandates the NRU to coordinate the use of private and public response resources. Implicit in this authority is the need for the Federal Government to avoid duplication of private initiatives. Both the House and Senate response provisions contemplated active use and involvement of private response resources, such as the Petroleum Industry Response Organization (PIRO) which may develop regional response centers. In such a case, the Federal Government should avoid duplicating private personnel and equipment.

The Conferees intend to create a system in which private parties supply the bulk of any equipment and personnel needed for oil spill response in a given area. The Conferees recognize that adequate response may require use of private and public equipment and personnel located throughout the U.S. or the world.

Section 311(c)(2) of the FWPCA previously required establishment of strike forces under the NCP, which are located in San

Francisco, California, and Mobile, Alabama. The Conference substitute maintains the strike force requirement under new section 311(d) of that Act and renames these entities "Coast Guard strike teams." The Coast Guard strike teams consist of available trained personnel, adequate oil and hazardous substance pollution control equipment, and a detailed oil and hazardous substance pollution and prevention plan, including measures to protect fish and wildlife. These teams are available upon request by any Federal On-Scene Coordinator to provide assistance, guidance, and training.

A Coast Guard District Response Group is established in each of the ten Coast Guard Districts. Each group consists of Coast Guard personnel and equipment for each port within the district, additional pre-positioned equipment, and district advisory staff. The Conferees instruct the Coast Guard to give priority emphasis to several factors in determining where to locate the Response Groups and pre-position equipment, including: (1) the availability of facilities suitable to load and unload heavy or bulky equipment by barge; (2) the proximity to an airport capable of supporting large military transport aircraft; (3) the flight time to provide response to oil spills in all areas of the Coast Guard district which hold the potential for marine casualties; (4) the availability of trained local personnel capable of responding in an oil spill emergency; and (5) areas where large quantities of petroleum products are transported.

The Department of Defense is currently testing the tiltrotor aircraft, the V-22, *Osprey*, which takes off and lands as a helicopter yet flies through the air as a fixed wing aircraft. The V-22 *Osprey* has been developed to satisfy a variety of military requirements and appears to have the potential and flexibility to be extended to oil spill response. The V-22 would allow oil spill task forces to rapidly reach the spill area loaded with enough equipment to contain major spills. Nothing in the current or projected Coast Guard inventory has this capability. The Coast Guard should look closely at the tiltrotor technology, especially in reviewing its equipment requirements under section 4202 of this Act.

Area Committees comprised of members appointed by the President from qualified personnel of Federal, state and local agencies are established to prepare area contingency plans. These plans must be reviewed and approved by the President and are required to ensure, when implemented in conjunction with other elements of the National Contingency Plan, the removal of a worst case spill from a vessel or facility operating in or near the area covered by the plan. All U.S. waters and adjoining shorelines would be subject to an area contingency plan.

In describing the procedures for decisions on the use of dispersants and other spill mitigating devices and substances, Area Committees should consider research conducted under section 7001(c)(2) of the substitute.

Owners and operators of vessels and facilities are required to prepare and submit individual response plans to the President. This requirement applies to all tank vessels, as defined under section 2101 of title 46, United States Code, and any facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the nav-

igable waters, adjoining shorelines, or the Exclusive Economic Zone. Consequently, under this standard, all offshore facilities are required to have response plans. Additionally, because even small discharges from an onshore facility could result in substantial harm under certain circumstances, the requirement for these facility owners and operators to prepare and submit response plans should be applied broadly.

Under a vessel or facility response plan, an owner or operator is required to identify and ensure by contract, or other means approved by the President, the availability of private personnel and equipment sufficient to remove, to the maximum extent practicable, a worst case discharge and to mitigate or prevent a substantial threat of such a discharge. The phrase "to the maximum extent practicable" should be construed to require the President to consider the technological limitations associated with oil spill removal, and the practical and technical limits of the spill response capabilities of individual owners and operators. This should not be construed to prevent a significant increase in commercial removal resources in each area for which a response plan is required, if the President determines an increase is needed to comply with the national planning and response system.

The President is required to review vessel and facility response plans; require amendments to any plan that does not meet the requirements established under the provisions of new section 311(j)(5) of the FWPCA; and approve any plan that does comply with those provisions. The President is required to review all submitted vessel response plans and any submitted response plan for a facility that, because of its location, could reasonably be expected to cause both significant and substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines or the Exclusive Economic Zone. The addition of the qualifying term "significant" is not meant to exclude from review and approval any response plan for an offshore facility. However, with respect to review and approval of response plans for onshore facilities, the President should develop criteria to select only those submitted plans for onshore facilities that, in the event of a discharge of oil, could cause both significant and substantial harm to the environment. Only some proportion of all submitted onshore facility response plans, therefore, are expected to be reviewed and approved by the President. Nationwide criteria to determine which onshore facilities are required to submit plans and which of those submitted plans are required to be reviewed and approved should be developed by regulation and with public comment under the Administrative Procedure Act.

The national criteria developed by the President should include, but not be limited to, oil storage capacity, location of environmentally sensitive areas, and location of potable water supplies. The criteria should not result in the selection of facilities based solely on the size or age of storage tanks. Specifically, the selection criteria should not necessarily omit those smaller facilities that are near major drinking water supplies or that are near environmentally-sensitive areas.

Any criteria developed by the President to select onshore facility response plans for review and approval do not preempt or super-

sede regulation of above-ground oil and hazardous materials storage tanks pursuant to other provisions of section 311 of the FWPCA and title III of the Superfund Amendments and Reauthorization Act (SARA), or the regulation of underground storage tanks pursuant to other provisions of FWPCA section 311 and subtitle I of the Solid Waste Disposal Act.

A substantial number of facilities that handle, store or transport hazardous substances are subject to emergency planning requirements under the Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Occupational Safety and Health Act, and other federal statutes. Additionally, chemical emergency planning requirements are in effect for communities under title III of SARA. The requirements under the Conference substitute may well apply to facilities that also are required to prepare and submit hazardous substance emergency plans under one or more of the above laws. The provisions of the Conference substitute do not supplant, supersede or duplicate any of the reporting and planning requirements of title III of SARA or of any other statute. Any facility response plans should be consistent with plans prepared under other laws and any information developed under this section should be made available to the State Emergency Response Commissions and Local Emergency Planning Committees established under title III of SARA.

The President should select onshore facility response plans in a manner that will avoid duplicative or conflicting response plan review requirements and should ensure that such response plans are coordinated with the community emergency planning effort under title III of SARA.

Beginning 30 months after the date of enactment, a vessel or facility for which a response plan is required to be prepared and submitted may not operate unless such a plan has been submitted to the President. Thirty-six months after enactment, a vessel or facility subject to response plan requirements may not operate unless the response plan for that vessel or facility is operating in compliance with that plan. The number of plans requiring review may prevent the President from reviewing a response plan in a timely manner, with the result that a vessel or facility that had submitted a response plan would be prohibited from operating. In this situation and in the case of vessels coming into the U.S. trade, the Conference substitute authorizes the President to allow a vessel or facility to operate for up to two years after the plan has been submitted if the owner or operator has certified that owner or operator has ensured by contract or other means approved by the President the availability of private personnel and equipment necessary to respond, to the maximum extent practicable, to a worst case discharge or a substantial threat of such a discharge.

Finally, the national response and planning system established by the Conference substitute requires the President to conduct periodic inspection of oil spill removal equipment and period drills of removal capability, without prior notice.

SEC. 4203. COAST GUARD VESSEL DESIGN

The Senate amendment has no comparable provision.

THE OIL POLLUTION ACT OF 1990

SUMMARY AND ANALYSIS

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THE OIL POLLUTION ACT OF 1990

SUMMARY AND ANALYSIS

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The Oil Pollution Act of 1990, which President Bush signed into law on August 18, 1990, consolidates and makes sweeping changes to the patchwork of laws for oil spill liability, prevention, preparedness and cleanup. The new law affects vessels, offshore oil rigs, onshore terminals and other onshore and offshore businesses that transport, handle or store crude oil and petroleum products. This paper identifies key implications of the Act, describes how the new law changes existing oil spill requirements, and summarizes major provisions.

The Oil Pollution Act of 1990 ("OPA" or "the Act") followed a tortuous path through the Congress. Fourteen Committees and Subcommittees in the House of Representatives, and eight Committees and Subcommittees in the Senate held hearings or considered oil spill issues associated with the legislation. The unanimous votes on final passage in both the House (360-0) and the Senate (99-0) mask many intense, hard-fought struggles on important and controversial issues. Many elements of the final legislative product reflect intense reaction to several major oil spills over the past year-and-a-half, starting with the EXXON VALDEZ in Alaska in March of 1989.

There are nine titles to the new Act. Title I significantly broadens the liability under federal law of an owner or operator of a vessel or facility from which oil is discharged. Title II amends the hodgepodge of other oil spill laws to reflect consolidation under this new law. Title III describes Congress' attitude toward international oil pollution prevention and removal agreements.

Title IV of the Act adds dozens of new requirements regarding crews, vessels, notification, planning and response for the prevention and removal of oil pollution. This title includes significantly tougher criminal and civil penalties. Title V addresses several issues of specific concern in Prince William Sound, Alaska, including establishment of a new Oil Spill Recovery Institute, and new requirements for oil terminal and tanker

oversight and monitoring, vessel traffic service, and response equipment and personnel. Title VI includes miscellaneous but important requirements, such as the non-preemptive effect of the new law on other legal remedies, and a moratorium on oil and gas leasing, exploration and development off the Outer Banks of North Carolina.

Title VII creates an interagency research program to spur the development of new technologies and techniques to prevent and mitigate oil spills. Title VIII revises requirements of the Trans-Alaska Pipeline System (TAPS). Finally, Title IX amends the Oil Spill Liability Trust Fund to consolidate the many separate cleanup funds under current law.

OIL POLLUTION ACT OF 1990

- Title I Oil Pollution Liability and Compensation
- Title II Conforming Amendments
- Title III International Oil Pollution Prevention and Removal
- Title IV Prevention and Removal
- Title V Prince William Sound Provisions
- Title VI Miscellaneous
- Title VII Oil Pollution Research and Development Program
- Title VIII Trans-Alaska Pipeline System
- Title IX Amendments to Oil Spill Liability Trust Fund, Etc.

MAJOR IMPLICATIONS

The Oil Pollution Act contains many new and important provisions that will significantly affect oil transportation, storage, and handling operations.

One of the more obvious and significant implications of the Act is increased liability for oil spills. The new law raises liability limits, narrows defenses to liability, and provides more instances where a responsible party is subject to unlimited liability. The law also significantly expands the types of damages for which a responsible party is liable. Recoverable damages will now include everything from lost profits of fishermen to reduced tax revenues of local governments.

OIL POLLUTION ACT OF 1990 MAJOR IMPLICATIONS

- ▶ Increased Liability
- ▶ No Preemption of State Standards
- ▶ Double Hulls for Tankers
- ▶ New Vessel Crew Licenses and Manning Procedures
- ▶ Tough New Oil Spill Contingency Plans
- ▶ Greater Coast Guard Responsibility to Direct Cleanup
- ▶ Tougher Enforcement
- ▶ Enhanced Federal and Private Response Capability
- ▶ More Research and Development

Congress explicitly rejected preemption of more stringent State liability laws, even to the point of implicitly rejecting a proposed international agreement the U.S. was instrumental in helping to

draft. Some overseas vessel owners, worried about expanded liability, particularly in the face of Exxon's \$2 billion tab for the EXXON VALDEZ spill, have even announced some fleet shifts away from U.S. service. Concerns have been raised about whether "deep pocket" shippers will continue to serve U.S. industry at least in States with unlimited liability.

The Act commits the maritime industry to build or retrofit double hulls in most tankers serving U.S. ports on a phased schedule, to be completed by the year 2015. This action comes despite considerable controversy and debate based on the very high costs of double hulled tankers.

Congress recognized that the human factor often plays a major role in maritime accidents. The controversy in the Alaska spill over the alleged lack of sobriety of the Captain of the EXXON VALDEZ helped lead Congress to tighten considerably the licensing and certification requirements for masters and seamen. Thus, the new Act contains such requirements as drug testing, driver and criminal record checks, limited license terms and consecutive work hour limits.

The new law will force much more extensive oil spill contingency planning. The law requires tank vessels, offshore facilities, and many onshore facilities, to prepare and obtain Coast Guard approval of oil spill contingency plans as a condition to continued lawful operation. Within 30 months, these plans have to address a "worst case" spill. That type of oil spill response capability is not available today. Thus, these provisions give a major boost to the new Marine Spill Response Corporation, a non-profit independent national spill response organization launched and funded by the petroleum industry specifically to develop the capability to respond to catastrophic spill events.

The law strengthens the role of the Coast Guard in responding to spills. The law will force the Coast Guard immediately to take charge of the response effort for very large spills. Under current law, the Coast Guard must first find that the spiller is not adequately responding to a spill. The Coast Guard will continue to have the opportunity to monitor cleanup by responsible parties of smaller spills. Congress still requires the Coast Guard to consult with States and other federal agencies, but leaves

ultimate responsibility clearly in the hands of the Coast Guard.

The OPA combines tough new substantive requirements with a very potent enforcement arsenal. The OPA provides regulatory agencies with new administrative penalties and greatly increased civil penalties and criminal sanctions, including felony criminal sanctions. Persons subject to governmental orders on cleanup activities must comply or face treble damages plus civil penalties.

The new law will spur the development and readiness of federal and private oil spill response capability. The Coast Guard will be increasing its own readiness, while other requirements will support both the nationwide Marine Spill Response Corporation and the many local oil spill cooperatives. It will also force continued readiness through the use of unannounced drills. These requirements should greatly increase the demand for new oil spill response equipment and supplies.

Finally, Congress recognized that the investment in oil spill research has waned in recent years. To revitalize this research, Congress took several measures. For example, the Oil and Hazardous Materials Simulated Environmental Test Tank Research Center (OHMSETT) in New Jersey will reopen, and Congress has launched several new interagency research programs. The private sector, including the American Petroleum Institute and the Marine Spill Response Corporation, will supplement these research efforts with their own research fund and support.

In conclusion, the Oil Pollution Act of 1990, although costly, will significantly expand the nation's oil spill prevention, response and control capabilities and significantly boost incentives to avoid spills altogether.

The following text briefly describes the major provisions of the Oil Pollution Act of 1990.

DESCRIPTION OF MAJOR PROVISIONS

TITLE I OIL POLLUTION LIABILITY AND COMPENSATION

The (OPA) significantly broadens oil spill liability under federal law by expanding the recoverable costs, raising liability limits and creating new exceptions to liability limitations.

TITLE I OIL POLLUTION LIABILITY AND COMPENSATION

- / "Responsible Party" Defined
- / Recoverable Costs and Damages
- / Third Party Liability
- / Exemptions From Liability
- / Liability Limits
- / Exceptions to Liability Limits
- / Defenses to Liability
- / Oil Spill Liability Trust Fund
- / Claims Procedure
- / Proof of Financial Responsibility
- / No Preemption of State Law

Figure 1

A. "Responsible Party" Liability

The OPA defines a "responsible party" for liability purposes according to the type of facility. § 1001(32). In general, a responsible party is "any

person owning or operating these facilities, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit." *Id.* Where a facility must be licensed, leased or permitted, the responsible party is the licensee, lessee or permittee. For pipelines, the responsible party is any person owning or operating the pipeline. If a facility is abandoned, a responsible party is the person who would have been responsible immediately prior to abandonment. *Id.*

TITLE I / "RESPONSIBLE PARTIES"

Onshore Facility	Any person owning or operating the facility (excluding government agencies)
Offshore Facility	The lessee or permittee of the area in which the facility is located or holder of a right of use and easement (excluding government agencies)
Deepwater Port	The licensee
Pipelines	Any person owning or operating the pipeline
Abandoned Facilities	The person who would have been responsible immediately prior to the abandonment

Figure 2

B. Recoverable Costs and Damages

The OPA explicitly assigns liability to each responsible party for all removal costs and a variety

of public and private damages. § 1002(a). Removal include costs to "prevent, minimize, or mitigate" oil pollution from a discharge or substantial threat of discharge of oil. § 1001(31). "Removal" includes the "containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches." § 1001(30).

Other damages for which a responsible person may be held liable include damage to natural resources, real or personal property, loss of subsistence use of natural resources, lost revenues, lost profits and earning capacity, and net costs for increased or additional public services during or after removal activities. § 1002(b). Although prior law by implication permitted claims for certain of these damages under state law, common law or federal statutes, the OPA explicitly authorizes recovery of this broad variety of damages, backed by the oil spill fund.

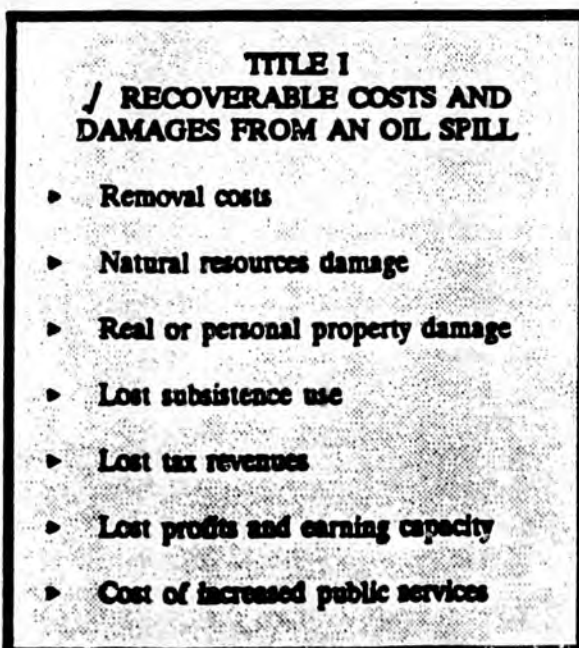


Figure 3

The Act expands the potential recovery for natural resource damages. The United States, a State, an Indian tribe or a foreign government may recover from a responsible party for damage to natural resources belonging to, managed by,

controlled by, or pertaining to such entities. § 1006(a). "Natural resources" include "land, fish, wildlife, biota, air, water, ground water, [and] drinking water supplies." § 1001(20). Trustees must assess natural resource damages attributable to a spill and develop plans for resource restoration, rehabilitation, replacement, or acquisition. § 1006(c). These plans are subject to public review and comment. *Id.*

Congress rejected the approach taken by the Department of Interior in assessing natural resource damages. The Interior rules were challenged by over a dozen states and organizations and rejected by the D.C. Circuit Court last summer. Ohio v. United States Dept. of the Interior, 880 F.2d 432 (D.C. Cir. 1989). Those rules charged responsible parties with the lessor of the cost of replacement or acquisition. Congress showed its displeasure with the Department of Interior by taking away the responsibility for damage assessment regulations and giving it instead to the National Oceanic and Atmospheric Administration (NOAA) in the Department of Commerce.

Under the OPA, the measure of damages for natural resources equals the cost of restoration or rehabilitation, the diminution in value pending restoration, plus the reasonable cost of damage assessment. § 1006(d). NOAA must issue damage assessment rules within 2 years of enactment. § 1006(e). Once the rules are issued, the Act gives any assessment made in accordance with those regulations the force and effect of a rebuttable presumption. *Id.*

In addition to claims by government and natural resources trustees, the new law allows private persons to recover damages. A foreign claimant, however, must make certain added showings of reciprocity of remedies between the U.S. and the foreign claimant's country. § 1007. Government entities and private parties may present any claims directly to a guarantor who provides evidence of financial responsibility (up to the relevant limits) as well as to the responsible party. § 1016(f).

C. Third Party Liability

If an otherwise responsible party establishes that a discharge or threat of discharge was caused solely by an act or omission of third persons (or by such an act or omission in combination with an act of

God or act of war), the third party must be treated as the responsible party for purposes of determining liability. § 1002(d)(1)(A). Under such a situation, the responsible party pays removal costs and damages, and is then entitled by subrogation to all rights of the United States against the third party. The responsible party can also pay a private claimant and then assume the private claimant's rights to recover damages from the third party or the Oil Spill Liability Trust Fund. § 1002(d)(1)(B). Liability limits apply to the third party in the same way as to a responsible party. § 1002(d)(2).

A person may also bring a civil action for contribution against any other person who is liable or potentially liable under the OPA. § 1009. Indemnification agreements remain valid under the OPA, although such agreements cannot transfer liability from a responsible party. § 1010.

D. Exemptions from Liability

The liability section of the OPA does not apply to discharges allowed by a permit issued under Federal, State, or local law. § 1002(c). It also does not apply to discharges from a public vessel or from a facility subject to the Trans-Alaska Pipeline Authorization Act. *Id.*

E. Limits on Liability

The OPA establishes new and higher liability limits for damages and removal costs, as shown in Figure 4. The OPA limits must be adjusted every 3 years to reflect significant increases in the Consumer Price Index. § 1004(d)(4).

The liability limits do not include interest, which must be paid beginning on the thirtieth day following the date on which a claim is presented. § 1005(b)(5).

For purposes of limiting liability, a mobile offshore drilling unit used as an offshore facility is deemed to be a tank vessel. However, if removal costs and damages from an incident exceed the tank vessel liability limit, the mobile unit then is deemed to be an offshore facility. § 1004(b).

TITLE I / LIABILITY LIMITS

Type of Facility	Limitation The Greater Of
Tank Vessel >3000 gt	\$1,200/gt or \$10,000,000
Tank Vessel ≤3000 gt	\$1,200/gt or \$2,000,000
All Other Vessels	\$600/gt or \$500,000
(Vessel carrying oil OCS facility)	(All governmental removal from costs)
Offshore	All removal costs plus \$75,000,000
Onshore Facility	\$350,000,000 (or, by regulation, a lesser amount ≥\$4,000,000)
Deepwater Port	\$350,000,000 (or, after study and regulation, a lesser amount ≥\$50,000,000)
Mobile Offshore Drilling Facility	\$1,200/gt or \$10,000,000 or all removal costs plus \$75,000,000 if costs and damages exceed \$1,200/gt or \$10,000,000

Figure 4

F. Exceptions to Liability Limits

There are several ways that a responsible party can forfeit its limitation on liability. The stated liability limits do not apply if the discharge incident was proximately caused by gross negligence or willful misconduct. More significantly, there also is no limit to liability if the spill results from the violation of any of the many new and existing applicable federal safety, construction, or operating regulations. Further, if a responsible party fails to report an incident, fails to cooperate on removal activities, or fails to obey an administrative order under the Clean Water Act (CWA) Section 311, then liability is not limited. § 1004(c)(2).

The owner or operator of an Outer Continental Shelf (OCS) facility or a vessel carrying oil as cargo from such a facility must bear *all* removal costs incurred by the federal government or any State or local official or agency, regardless of the stated limits. § 1004(c)(3).

G. Defenses to Liability

The OPA contains few defenses to liability. These defenses are (1) an act of God, (2) an act of

**TITLE I
/ EXCEPTIONS TO LIABILITY LIMITS**

- ▶ Spill proximately caused by:
 - Gross negligence
 - Willful misconduct
 - Violation of an applicable federal safety, construction or operation regulation
- ▶ Responsible Party Fails or Refuses:
 - To report the incident as required
 - To provide all reasonable cooperation and assistance or
 - Without sufficient cause, to comply with an Administration Order
- ▶ All removal costs for OCS facility or vessel carrying oil from OCS facility

Figure 5

war, (3) an act or omission of a third party (other than an employee or agent or person in contractual relationship with the responsible party), or (4) any combination thereof. § 1003(a).

An "act of God" is very narrowly defined. It must be "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight." § 1001(1). This likely will be a very difficult standard for anyone to meet.

The third party defense is similarly narrow. The third party cannot be an employee or agent of the responsible party or a third party, whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail). Further, a responsible party must establish that it (1) exercised due care, taking into consideration

the characteristics of the oil in light of all relevant facts and circumstances; and (2) took precautions against foreseeable acts or omissions of any third party and the foreseeable consequences of those acts or omissions. § 1003(a)(3).

**TITLE I
/ DEFENSES TO LIABILITY**

- ▶ Act of God
- ▶ Act of war
- ▶ Act or omission of 3rd party not in contract.
- ▶ Any combination

Unless responsible party fails or refuses:

- ▶ To report the incident
- ▶ To provide all reasonable cooperation and assistance
- ▶ Without sufficient cause, to comply with Administrative Orders

Figure 6

The law provides a limited defense to a third-party claim: to the extent an incident is caused by the gross negligence or willful misconduct of a third-party claimant, the responsible party is not liable to that claimant. § 1003(b).

If a responsible party has knowledge of a discharge and fails to report it, fails to cooperate on removal activities, or fails to obey an order issued under section 311 of the CWA, 33 U.S.C. § 1321, that party loses all defenses otherwise available and becomes strictly liable for all cleanup costs. § 1003(c).

H. Oil Spill Liability Trust Fund

In the Tax Reform Act of 1986, Congress established an Oil Spill Liability Trust Fund (the "Fund"). Revenues for the Fund will now come from (1) a \$.05 tax per barrel of crude oil and imported petroleum products, (2) reimbursement of costs and damages, (3) and penalties paid for violations of the

Act. The OPA abolishes the Offshore Oil Pollution Compensation Fund and rolls that fund into the Oil Spill Liability Trust Fund. § 2004.

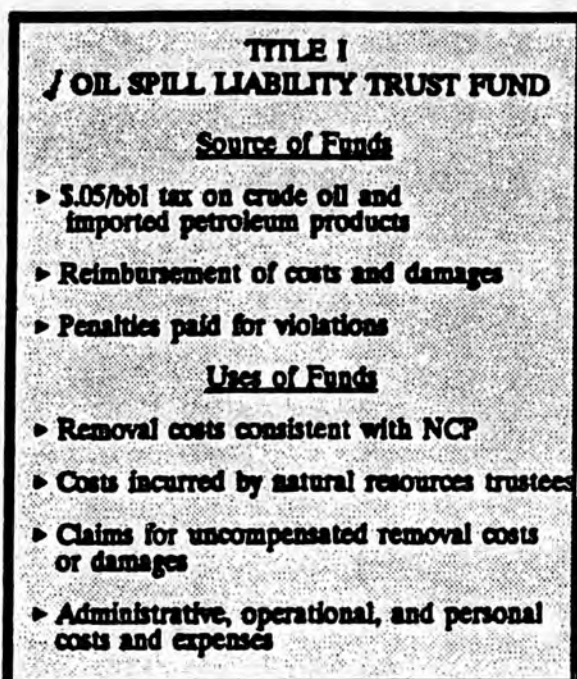


Figure 7

The OPA describes several uses for this Fund. In general, the Fund is available to pay: (1) removal costs that are consistent with the National Contingency Plan (NCP), (2) costs incurred by natural resource trustees in carrying out their functions, (3) claims for uncompensated removal costs or uncompensated damages, and (4) administrative, operational, and personnel costs and expenses associated with implementing and administering the Act. § 1012(a).

A State, under an agreement with the Federal government, may obtain access to the Fund (up to \$250,000) for the immediate removal of a discharge or the mitigation or prevention of a substantial threat of a discharge. § 1012(d). In expending money for oil removal, preference must be given to private parties in the area affected. § 1012(k). Payment of any claim or obligation by the Fund causes the United States to acquire by subrogation rights of the claimant. § 1012(f).

Money from the Fund is not available to pay any claim for removal costs or damages to the extent that such costs or damages are caused by the gross

negligence or willful misconduct of the claimant. § 1012(b). Nor can money from the Fund be used to pay more than once for the same removal costs or damages. § 1012(i). A responsible party may assert a claim for removal costs and damages from the Fund only if the party can show that it is entitled to a defense to or limitation of liability.

I. Claim Procedure

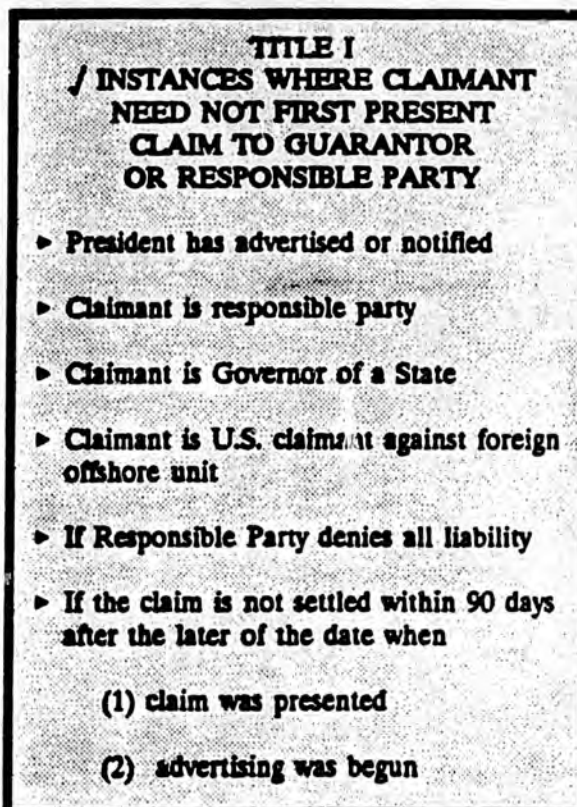


Figure 8

A claimant must first present claims to the responsible party or its guarantor before presenting claims to the Fund. § 1013(a). However, claims may first be presented to the Fund: (1) if the President has advertised or notified claimants that no responsible party has accepted responsibility; (2) by a responsible party who may assert a defense or liability limit; (3) by the Governor of a State; or (4) by a United States claimant in a case where a foreign offshore unit has discharged oil. § 1013(b)(1). Plaintiffs may have to choose whether to bring a claim against the Fund or seek action against the responsible party in court, because a claim against the Fund cannot be approved while a civil action is pending. § 1013(b)(2). A claimant may elect to

commence an action in court or present the claim to the Fund if: (1) the responsible party denies all liability; or (2) the claim is not settled: (a) within 90 days after it was presented, or (b) within 90 days after advertisement. § 1013(c).

J. Designation and Advertisement

The OPA requires the President, where possible, to designate the source or sources of a discharge. The President must advertise the source designation beginning within 15 days after the date of designation and continuing for at least 30 days. § 1014(b). The advertisement must describe the procedures by which a claimant may present claims to the responsible party or guarantor. *Id.* If (i) the responsible party and guarantor both deny designation, (ii) the source of the discharge is a public vessel, or (iii) the President is unable to designate a source, then the President must advise potential claimants of the appropriate procedures. § 1014(c).

K. Litigation

Any interested person may seek court review of regulations promulgated under the OPA. The person must file suit within 90 days of promulgation only in the Court of Appeals for the D.C. Circuit. A person cannot challenge regulations as part of a civil or criminal proceeding for enforcement or recovery of damages or response costs. § 1017(a).

Federal district courts have exclusive original jurisdiction over controversies arising under the OPA, although State trial courts may consider claims for removal costs or damages under the OPA or under State law. § 1017(b),(c).

L. Statute of Limitations

All court actions under the OPA must be brought within 3 years of a trigger event, which varies depending on the nature of the claim. In an action for damages, the trigger event is a claimant's discovery of loss and the connection of the loss with a discharge. § 1017(f)(1). The trigger event for a natural resources damages action is completion of the damage assessment. The trigger event for an action for removal costs is completion of the removal action. In this type of action, the court will enter a declaratory judgment on liability for any further

TITLE I STATUTE OF LIMITATIONS

Damages	3 years from discovery of damage (and linkage to discharge)
Natural Resource Damages	3 years from damage assessment
Removal	3-6 years after removal action
Contribution	3 years after entry of judgment or consent decree
Starting Time	18th birthday for minors or when legal representative appointed
Starting Time for Incompetents	Date incompetency ends or legal representative appointed

Figure 9

removal costs or damages. § 1017(f)(2). A person may not seek contribution from another responsible party unless the action is filed within 3 years from the date of judgment or the date of a judicially approved cost recovery or damages settlement. § 1017(f)(3).

In those instances where a claimant is a minor or incompetent, the trigger event does not occur until the minor is 18, the incompetency ends, or a legal representative is appointed, whichever comes first. § 1017(f)(5).

M. Financial Responsibility Requirements

The OPA will force vessels and offshore facilities to demonstrate increased financial responsibility, once the Coast Guard promulgates new regulations. § 1016. States may enforce these requirements. § 1019.

**TITLE I
/ METHODS OF DEMONSTRATING
FINANCIAL RESPONSIBILITY**

- ▶ Evidence of Insurance
- ▶ Surety Bond (By U.S. Bonding Company)
- ▶ Guarantee
- ▶ Letter of Credit
- ▶ Qualification as a Self-Insurer
- ▶ Other Evidence of Financial Responsibility
 - As determined by the Secretary (vessel) or President (facility) to be acceptable
 - President may specify policy or other contractual terms, conditions or defenses

Figure 10

The responsible party for any vessel over 300 gross tons subject to U.S. jurisdiction, or any vessel using the waters of the 200-mile exclusive economic zone to transship or lighter oil, must establish and maintain evidence of financial responsibility. § 1016(a). Non-self-propelled vessels that do not carry oil as cargo or fuel, vessels that do not use areas subject to U.S. jurisdiction, and vessels that use the exclusive economic zone only to transship or lighter oil destined for areas outside U.S. jurisdiction do not have to meet financial responsibility requirements. *Id.* The Coast Guard may apply various sanctions, including seizure and forfeiture of the vessel, if the responsible party fails to meet financial responsibility requirements. The Coast Guard must withhold vessel clearance if financial responsibility requirements are not met. § 1016 (b).

Each responsible party for offshore facilities and deepwater ports must establish and maintain evidence of financial responsibility sufficient to meet its maximum amount of liability (assuming that liability limits apply). For an offshore facility, which has no limit for removal costs, that amount is

\$150,000,000. § 1016(c). If a responsible party owns or operates more than one vessel or facility, the evidence of financial responsibility need only cover the amount of maximum liability applicable to the vessel or facility having the greatest maximum liability. § 1016(a),(c). A party may show evidence of financial responsibility through insurance, a surety bond, guarantee, letter of credit, qualification as a self-insurer, or other means. The Secretary of the Department of Transportation (for vessels) or the President (for facilities) may establish additional specific requirements under this section. § 1016(e).

A person who fails to comply with the financial responsibility requirements is subject to civil penalties of up to \$25,000 per day. § 4303(a). The United States may also seek a judicial order terminating operations. § 4303(b).

N. Preemption of State Law

Neither section 311 of the CWA nor the OPA preempts state regulations or liability under state law for oil or hazardous waste discharges. Many states have unlimited liability for cleanup or damages associated with oil discharges. However, OPA does not disturb existing preemption law for vessel safety as expressed in Ray v. Atlantic Richfield Company, 435 U.S. 151 (1978). See Conf. Rep. at 122.

TITLE II – CONFORMING AMENDMENTS

The OPA amends several oil spill laws: the Federal Water Pollution Control Act (also known as the Clean Water Act or CWA); the Deepwater Port Act of 1974; and the Outer Continental Shelf Lands Act. Title II makes conforming amendments to these acts. The substantive changes reflected by these amendments appear under their respective headings.

TITLE III - INTERNATIONAL OIL POLLUTION PREVENTION AND REMOVAL

TITLE III INTERNATIONAL OIL POLLUTION PREVENTION AND REMOVAL

- / Sense of Congress on Participation in International Regime
- / Great Lakes Oil Spill Cooperation
- / Lake Champlain Oil Spill Cooperation
- / International Inventory of Removal Equipment and Personnel
- / Tug Escorts in Puget Sound

Figure 11

Congress refused to join in the pending international protocols regarding oil pollution liability and compensation: the 1984 International Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention. The main reason given was that those protocols would preempt state requirements. Rather, Congress simply expressed the desire to have the United States participate in an international oil pollution liability and compensation regime "as effective" as that implemented under Federal and State law. § 3001.

The President, in a statement accompanying his signature of the bill, expressed concern over Congress' failure to ratify the pending liability and compensation protocols. He encouraged the Senate to consider these protocols and "give its advice and consent to ratification of these treaties." Presidential Statement (August 18, 1990). However, it is unlikely the Senate will do so, because of the Senate leadership's strong opposition.

Title III addresses a few specific international concerns, by directing the Secretary of State to report

on U.S.-Canada cooperation over oil spills in the Great Lakes and Lake Champlain and to negotiate over tugboat escorts for tank vessels in Puget Sound. §§ 3002, 3003, 3005.

Title III also directs the President to encourage appropriate international organizations to establish an international inventory of spill removal equipment and personnel.

TITLE IV - PREVENTION AND REMOVAL

Subtitle A - Prevention

1. Licenses, Certificates of Registry, and Merchant Mariner Documents

(a) Manning Standards for Domestic Tank Vessels

Congress hoped to prevent spill incidents by increasing the Secretary of Transportation's authority over licensing vessel workers. The Secretary may not issue a license, certificate of registry, or merchant mariner's document unless the applicant makes available pertinent Driver Register information related to alcohol- or drug-related offenses. § 4101(a),(b). Further, the Secretary must require drug testing of merchant mariner applicants. § 4101(a),(b). The Secretary may also review an applicant's criminal record. § 4101(a),(b). Current holders of licenses, certificates or merchant mariner's documents must comply with these same requirements. §§ 4101-4103.

The Secretary may suspend for 45 days and take possession of a license, certificate or document if he has probable cause to believe that the holder (1) performed a safety-sensitive function in violation of Federal drug laws, (2) has been convicted of an offense that would prevent the issuance or renewal of a license, certificate or document, or (3) has been convicted of a alcohol- or drug-related offense under the National Driver Register Act of 1982 within the previous three-year period. § 4103.

The Secretary may also revoke or suspend these papers if the holder (1) violates any marine safety law or regulation, or (2) commits an act of incompetence, misconduct or negligence. If a vessel master is under

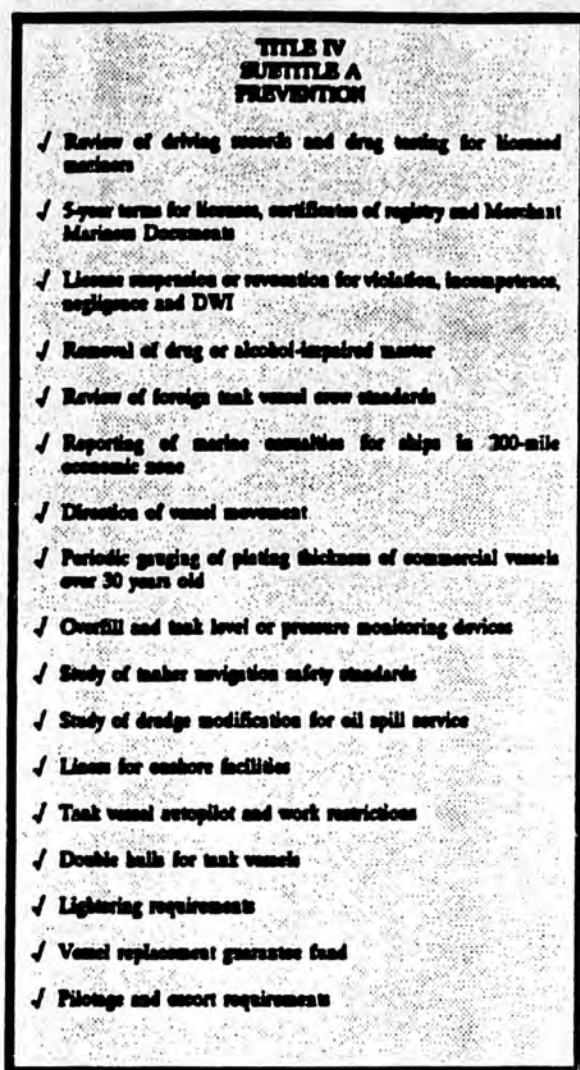


Figure 12

the influence of drugs or alcohol such that the master is incapable of operating the vessel, the two most senior officers must temporarily relieve the master of command. The officers must also report the incident. § 4104.

The OPA limits the duration of all licenses, certificates of registry and merchant mariners' documents to five years (certificates were formerly unlimited). § 4102. Existing licenses, certificates, and documents issued before enactment terminate on the date they would have expired if these provisions were then in effect. § 4102(d). The OPA sets specific documentation requirements for vessel certificates with coastwise endorsements. § 4205.

(b) Manning Standards for Foreign Tank Vessels

The Secretary, on a periodic basis and when a vessel is involved in a marine casualty, must evaluate the manning, training, qualification, and watchkeeping standards of foreign countries that issue vessel documentation. If another country is not enforcing standards equal to those of the United States, the Secretary must prohibit the entry of such foreign vessels. The only exception is if he determines that the vessel is "not unsafe or a threat to the marine environment," or the entry is necessary for the safety of the vessel, crew, or passengers. The Secretary then may admit the vessel provisionally. § 4106(a).

The OPA also adds a trigger to the reporting requirements for marine casualties: an incident must be reported if it causes "significant harm to the environment." § 4106(b).

2. Physical Requirements (Vessels)

Under the OPA, the Secretary must establish minimum equipment standards for vessels or facilities associated with oil loading or shipping. For example, the Secretary must set minimum standards for plating thickness for commercial vessels and require periodic gauging of plating thickness on vessels over 30 years old. § 4109.

Within one year of enactment, the Secretary also must issue regulations that require overfill devices and tank level or pressure monitoring devices for oil in cargo tanks. § 4110.

The Secretary must within one year establish regulations to require vessels to have the necessary equipment to receive radio marine navigation safety warnings and engage in radio communication on designated frequencies. § 4118.

Within 1 year after enactment, the Secretary must begin a comprehensive study of the adequacy of existing regulations to ensure the safe navigation of tankers carrying oil and hazardous substances. The Secretary must complete and submit the report to Congress within 2 years. § 4111. The OPA mandates other studies, such as an Army study on modifying dredges to fight oil spills, § 4112, and the efficacy of liners for onshore facilities. § 4113.

3. Double Hulls

A major new and expensive requirement of the OPA is that all vessels of 5,000 gross tons or greater must be equipped with double hulls. The timing of the requirement depends on the weight and age of a vessel. § 4115. See Appendix I. Vessels that only respond to oil or hazardous substance discharges, and vessels less than 5,000 gross tons with approved double containment systems are exempt. *Id.*

Prior to the time the double hull requirement goes into effect, the Secretary must promulgate structural and operational requirements. These requirements must provide as substantial protection to the environment as is economically and technologically feasible. § 4115(b). With certain limitations, the Secretary may provide financial assistance, such as guarantees to assist owners in financing and refinancing expenditures required by the OPA. § 4115(f).

4. Manning Requirements (Vessels)

The Secretary must begin a rulemaking within 180 days of enactment to define the conditions under which tank vessels may operate on auto-pilot or with an unattended engine room. The new law also limits the work hours of seamen. Except in an emergency or drill, licensed individuals or seamen on a tanker may not work more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period. § 4114.

Subtitle B - Removal

1. Removal and Cleanup Actions

The OPA expands the role of the federal government under section 311 of the CWA, 33 U.S.C. § 1321. A responsible party who discharges oil or hazardous waste into navigable waters still must report promptly any discharge and must respond immediately to the discharge. However, the OPA grants the President (through the Coast Guard or the EPA) explicit authority to remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge at any time. § 4201(a). Unlike prior law, the Coast Guard now can act immediately - it does not have to wait until it finds that a responsible party is doing an inadequate job.

TITLE IV SUBTITLE B REMOVAL

- / Federal Removal Authority
- / National Planning and Response System
- / Coast Guard Vessel Design
- / Determination of Harmful Quantities
- / Coastwide Oil Spill Response Endorsements

Figure 13

TITLE IV REMOVAL

/ FEDERAL REMOVAL AUTHORITY

- ▶ President must ensure effective and immediate removal and mitigation
- ▶ President may
 - remove or arrange for removal
 - direct or monitor federal, state and private actions
 - remove and, if necessary, destroy a vessel
- ▶ President must direct cleanup for discharge posing a substantial threat to public health or welfare
- ▶ All cleanup must be consistent with NCP
- ▶ Liability exemption for cleanup responders
- ▶ Revised NCP within 1 year

Figure 14

The President may monitor response actions and remove (if necessary, destroy) a vessel discharging or threatening to discharge. *Id.*; see 40

C.F.R. § 109.4 (1989). If a discharge poses a substantial threat to public health or welfare, however, the President (i.e., the Coast Guard) *must* direct removal or mitigation actions. To allow rapid and effective response, the government can do so without regard to normal federal contracting procedures. *Id.*

Anyone participating in a cleanup or removal action must act in accordance with the National Contingency Plan ("NCP") and the applicable response plan required under CWA section 311(j) (as amended by the OPA), or as directed by the President. § 4201(a) and (b)(4). The OPA requires revisions in the NCP to enhance federal efforts to be prepared for discharges. The current NCP, found at 40 C.F.R. Part 300 (1989) (as amended at 55 Fed. Reg. 8813 (March 8, 1990)), must be amended within 1 year.

One provision was added to encourage the creation of an industry-financed private cleanup organization now known as the Marine Spill Response Corporation. Persons other than responsible parties who conduct cleanup and removal actions are not liable except for instances of gross negligence or willful misconduct, or for personal injury or wrongful death. § 4201(a).

The President must consult affected trustees on the appropriate removal action to be taken. Congress was also concerned that a responsible party would stop a response action on its own determination. Thus, for purposes of the NCP, a removal is considered complete only when so determined by the President in consultation with governors of affected States. This determination will not preclude additional removal actions under applicable State law. § 1011. Thus, a State can push for a "cleaner" endpoint, but only under its own laws, not through the Federal law or Fund.

2. National Planning and Response System

The OPA amends CWA section 311(j) by setting up a National Response System. The System consists of a National Response Unit at Elizabeth City, North Carolina (operated by the Coast Guard), Coast Guard Response Groups in each Coast Guard District, and Area Committees. § 4202(a). The National Response Unit and Coast Guard District Response Groups must maintain response equipment, provide technical assistance, and review

TITLE IV / NATIONAL PLANNING AND RESPONSE SYSTEM

- ▶ Coast Guard National Response Unit -- Elizabeth City, N.C.
- ▶ Coast Guard District Response Groups
- ▶ Area Committees and Area Contingency Plans
- ▶ Tank Vessel and Facility Response Plans
- ▶ Equipment Inspection
- ▶ Unannounced Area Drills
- ▶ Coastwise Endorsement for Oil Spill Response Cooperatives

Figure 15

contingency plans within their areas. *Id.* These groups must be in place within one year of enactment. § 4202(b).

The Area Committees are created to prepare contingency plans that will be adequate to remove a "worst case" discharge, and to mitigate or prevent the substantial threat of such a discharge. § 4202(a). A "worst case" discharge means, in the case of a vessel, a discharge in adverse weather conditions of its entire cargo. For other facilities, a "worst case" discharge is the largest foreseeable discharge in adverse weather conditions.

The OPA describes specific elements and procedures to be included in area contingency plans. The President must designate areas by February 18, 1991; Area Committees must submit area plans by February 1992. The Coast Guard must review these plans by August 1992. § 4202(b).

In addition to requiring area contingency plans, the OPA mandates regulations requiring tank vessel or facility response plans. § 4202(a) (to be codified at 33 U.S.C. § 1321(j)(5)). The Coast Guard must issue these regulations within 2 years of enactment. § 4202(b)(4).

Vessel and facility response plans must identify a responsible individual for the vessel or facility and the appropriate Federal contact official. Plans also must identify and ensure sufficient personnel and equipment necessary to remove a worst case discharge (by contract or otherwise), as well as describe periodic training and testing actions. § 4202(a). These requirements virtually assure that owners and operators will join the industry-wide spill response effort which financially supports the Marine Spill Response Corporation.

The Coast Guard (or EPA) must review (by contract or otherwise) facility and vessel response plans. A tank vessel, offshore facility, or onshore facility may not handle, store, or transport oil unless its response plan has been approved and it is operating in compliance with the plan. *Id.* This prohibition takes effect February 18, 1993. The Coast Guard may authorize operation of a vessel or facility without an approved response plan for up to 2 years after submission of such a plan, if the vessel or facility certifies that it has through contract or otherwise sufficient personnel and equipment necessary to respond to a worst case discharge. *Id.* The existence of and compliance with a response plan does not provide any defense to liability under the OPA.

Prior to promulgation of the regulations governing vessel and facility response plans, vessels and facilities must still have Spill Prevention Control and Countermeasure (SPCC) plans required under the former CWA section 311(j). EPA has responsibility for "non-transportation" related facilities such as onshore and offshore drilling facilities, oil refining facilities, storage facilities, and on-site pipeline systems. The Coast Guard regulates "transportation related" facilities, including onshore and offshore terminals, transfer hoses, and interstate and intrastate pipeline systems. See Memorandum of Understanding between the Secretary of Transportation and the Administrator of the EPA, 40 C.F.R. Part 112 Appendix (1989). The current regulation requires less extensive plans than does the OPA, and existing plans do not now have to be approved, but must be made available on request.

Subtitle C – Penalties and Miscellaneous

The OPA largely tracks the existing enforcement scheme under the CWA. However, it adds new enforcement tools and increases the severity of penalties. There are several types of enforcement action that EPA and the Coast Guard can take: administrative penalties, civil penalties, and criminal penalties.

TITLE IV SUBTITLE C PENALTIES AND ENFORCEMENT	
✓	Increased Civil Administrative Penalties – \$25,000 (Class I) or \$125,000 (Class II)
✓	Public Participation
✓	Administrative Subpoenas
✓	Civil Penalty of \$25,000/day or \$1,000/bbl for Discharges
✓	Treble Damages Plus \$25,000 Penalty for Failure to Comply With Removal Order
✓	Higher Civil and Criminal Penalties for Vessel-Related Requirements
✓	Inspection and Entry of Vessels
✓	Increased Criminal Penalties for Failure to Notify of Spill (5-year felony)
✓	Self-Notification Subject to Greater, Use in Court Cases
✓	Increased Criminal Penalty for Knowing Violation (5-year felony)
✓	Orders to Abate Imminent and Substantial Endangerment

Figure 16

1. Administrative Penalties

Administrative penalties are assessed by an agency without first going to court. An opportunity for a hearing exists. The OPA provides two types of administrative penalties: Class I with limits of \$10,000 per day/\$25,000 total, or Class II, with limits of \$10,000 per day/\$125,000 total. Payment of an administrative penalty does not affect any person's obligation to comply with other OPA requirements. § 4301.

In a Class I administrative penalty proceeding a person only has a "reasonable" opportunity to be

heard. For a Class II penalty, a person is entitled to a full "trial-type" proceeding under the Administrative Procedures Act. A person can go to court to challenge an administrative penalty, but review is limited to the record before the agency. 4301(b) (amending 33 U.S.C. § 1319(d)(8)).

The CWA provides a unique opportunity for citizens to become involved in administrative penalty proceedings. An interested person may comment on a proposed Class II penalty, and may seek judicial review of that penalty if he feels it was issued in error. *Id.* The opportunity for citizen involvement in a governmental penalty proceeding can make settlement efforts between the government and the alleged violator more complicated.

2. Civil Penalties

The OPA amends the CWA civil penalty provisions. § 4301(b). Existing law allows the Coast Guard to impose up to a \$5,000 penalty for an oil spill. The OPA permits either \$25,000 per day or up to \$1,000 per barrel of oil. § 4301 (to be codified at 33 U.S.C. § 1321(b)(7)). The OPA also institutes civil penalties of up to \$25,000 per day for violations of vessel and facility planning requirements established by CWA § 311(j), such as the failure to prepare response plans. *Id.*

If a violation results from gross negligence or willful misconduct, the penalty limits rise to a minimum of \$100,000 total and maximum of \$3,000 per barrel of oil. *Id.* Under the OPA, any person who without sufficient cause fails to properly carry out a removal action or fails to comply with an order is also subject to a civil penalty. The amount of the penalty may go as high as \$25,000 per day or an amount up to three times the costs incurred by the Oil Spill Liability Trust Fund. *Id.*

In determining the amount of a civil penalty, the EPA, Coast Guard or a court considers the following factors: the seriousness of the violation; the economic benefit to the violator, if any, resulting from the violation; the degree of culpability involved; any other penalty for the same incident; any history of prior violations; the nature, extent and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge; the economic impact of the penalty on the violator; and any other matters as justice may require. § 4301.

If EPA or the Coast Guard is diligently prosecuting an action to assess a class II administrative penalty, or a violator has paid such a penalty, the violation cannot be the subject of a civil penalty action. § 4301.

3. Criminal Penalties

A failure to report an oil discharge subjects a person to criminal penalties under title 18 of the U.S. Code (according to Sentencing Commission Guidelines), imprisonment up to five years, or both. § 4301(a). Criminal penalties also may apply to the actual discharge, with increased fines and imprisonment if a person knowingly endangers another person by virtue of the discharge. See 33 U.S.C. § 1319(c) (as amended by § 4301(c) of the OPA)).

The mandatory notification of a discharge cannot be used against a natural person in any criminal case, but the OPA amends the CWA to allow such information to be used in a criminal case against a corporation. Further, the OPA amends the CWA to allow prosecutors to use information derived from the notification itself in a criminal case against either a natural person or a corporation. The CWA formerly prohibited use of derivative information or the notification itself in any criminal case. The government can continue to use the notification and all derivative information in any civil enforcement case.

4. Other Relief

The law gives the government broad new authority to issue orders or seek judicial relief if the President determines that there may be an imminent and substantial threat to the public health or welfare. He may require the Attorney General to seek any relief from any person as may be necessary to abate such endangerment. § 4306 (amending 33 U.S.C. 1321(e)). Alternatively, after notice to affected States, the President may take any other action, including issuing administrative orders, to abate the endangerment. *Id.* The public health or welfare includes fish, shellfish, wildlife, public and private property, shorelines, beaches, habitat and other living and nonliving resources. *Id.* Federal district courts have jurisdiction to grant any relief that the public interest and equities of the case may require. *Id.*

**TITLE V - PRINCE WILLIAM SOUND
PROVISIONS**

**TITLE V
PRINCE WILLIAM SOUND PROVISIONS**

- / Oil Spill Recovery Institute
- / Terminal and Tanker Oversight and Monitoring
- / Bligh Reef Light
- / Vessel Traffic Service System
- / New equipment and personnel requirements in tank vessel and facility response plans

Figure 17

A. Oil Spill Recovery Institute

The OPA establishes a 10-year Oil Spill Recovery Institute (in Cordova, Alaska) under the Secretary of Commerce through the National Oceanic and Atmospheric Administration (NOAA). § 5001(a),(j). The Institute will conduct research and educational and demonstration projects to identify and develop techniques, equipment, and materials for dealing with oil spills in the arctic and subarctic marine environment. § 5001(b).

The Institute will complement existing damage assessment efforts, particularly efforts associated with the EXXON VALDEZ oil spill. The Executive Board of the Institute will include community residents and Alaska natives of areas affected by the spill, together with various federal employees. § 5001(c).

B. Oil Terminal and Tanker Environmental Oversight and Monitoring

(1) Organizations

Congress strongly endorsed a citizen involvement demonstration program for Alaska, patterned after a European pilot program. Congress anticipates that the program will later become effective in other areas of the United States. § 5002(a)(2)(J). The function of the demonstration program is advisory only. § 5002(b). Owners or operators of terminal facilities or crude oil tankers operating in Prince William Sound will fund the program (up to \$2,000,000). § 5002(k)(2). Owners and operators in Cook Inlet must provide funding of not more than \$1,000,000 for a similar program. *Id.*

The Oil Terminal Facilities and Oil Tanker Operations Association will review policies relating to the operation and maintenance of oil terminal facilities and crude oil tankers. § 5002(c). The Association will consist of one representative each from the terminal facilities, the oil tankers, the State of Alaska, and the federal government. *Id.*

The program also establishes a Regional Citizens' Advisory Council, § 5002(d), which will represent a variety of local interests (fishing, Alaska Native Corporations, etc.) as well as affected communities. *Id.* The Council will provide advice and recommendations to the Association on policies, permits, and site-specific regulations. The Council also will monitor terminal and tanker activities that affect or may affect the environment. § 5002(d)(6). In addition, the Council will review the adequacy of spill prevention and contingency plans. § 5002(d)(6)(D). An alternative voluntary advisory group may be set up in lieu of the Council. § 5002(o).

Each Council must establish two committees. The Terminal and Oil Tanker Operations and Environmental Monitoring Committee will devise and manage a comprehensive program of monitoring environmental impacts. The Oil Spill Prevention, Safety, and Emergency Response Committee will review and assess preventive and preparatory measures for responding to oil spills. § 5002(e),(f).

**TITLE V
ADMINISTRATIVE PROGRAM FOR PRINCE WILLIAM SOUND**

<u>Organization</u>	<u>Membership</u>	<u>Function</u>
Oil Terminal Facilities and Oil Tanker Operations Association	Terminal facilities, oil tankers, Alaska, and federal government.	Review environmental policies relating to terminal facilities and crude oil tankers.
Regional Citizens' Advisory Councils	Voting -- Alaska residents	Advise Association on policies, permits, and site-specific regulations; monitor environmental impacts of operations.
Terminal and Oil Tanker Operations and Environmental Monitoring Committee	Members of Council or recognized scientific experts selected by the Council	Advise the Council on monitoring strategy to detect environmental impacts; develop monitoring programs or projects.
Oil Spill Prevention, Safety, and Emergency Response	Members of the Council or recognized scientific experts selected by the Council	Review oil spill prevention and contingency plans; monitor periodic drills; study environmental factors that affect response ability; identify highly sensitive areas; review tanker standards.

Figure 18

Federal agencies must consult with the appropriate Council before such agencies take substantive action on matters affecting or potentially affecting an area. § 5002(g). The Associations and Council established by the OPA must report to the President and Congress on their activities. § 5002(i).

(2) Vessel Traffic Service

Within 1 year after enactment, the Secretary of Transportation must acquire, install, and operate equipment sufficient to track the locations and movements of tank vessels carrying oil from the Trans-Alaska pipeline through Prince William Sound. § 5004(1). The Secretary must also submit a report to Congress on the feasibility and desirability

of instituting such additional controls and equipment. § 5004(2).

(3) Equipment and Personnel Requirements

In addition to the response plans for vessels required by the CWA, vessels and facilities in Prince William Sound must provide (1) pre-positioned oil spill containment and removal equipment, (2) an oil spill removal organization that can respond to a worst case discharge, (3) training in oil removal techniques for local residents, (4) at least semiannual practice exercises, and (5) periodic testing and certification of equipment. § 5005(a).

(4) Limitation

Any tank vessel that spilled more than 1,000,000 gallons of oil into the marine environment after March 22, 1989, (i.e., the EXXON VALDEZ) can no longer operate on the navigable waters of Prince William Sound. § 5007.

TITLE VI - MISCELLANEOUS

**TITLE VI
MISCELLANEOUS**

- / Savings Provisions
- / Annual Appropriations
- / Outer Banks Protection
- / Cooperative Development of Common Hydrocarbon-Bearing Areas

Figure 19

1. Savings Provisions

An order, rule, or regulation in effect under a law replaced by the OPA remains in effect until repealed, amended, or superseded. § 6001(b). Thus, for example, CWA regulations on oil spills remain valid until new regulations are promulgated. Enactment of the OPA also does not affect rights and duties that matured before the date of enactment, except as otherwise provided by the Act itself. § 6001(d). The OPA does not affect admiralty and maritime law or the jurisdiction of federal district courts with respect to civil actions under that law. § 6001(e).

2. Appropriations

In general, funds in the Oil Spill Liability Trust Fund will only be available as provided in annual appropriations. However, this limitation will not apply to sums recovered by a trustee for natural resource damages, the payment of claims for uncompensated removal costs, funding of part of the Prince William Sound program, and up to \$50,000,000 to

carry out section 311(c) of the CWA and to initiate natural resources damages assessment. § 6002.

3. Outer Banks Protection

One provision not directly related to oil spill prevention and response was added to the bill for the first time in Conference. This provision imposes a moratorium on oil and gas leasing, exploration and development off the Outer Banks of North Carolina. § 6003(c). This moratorium on exploration for oil and natural gas remains in effect until the later of: (1) October 1, 1991, or (2) until 45 days of continuous Congressional session following submission of a written report that certifies the availability of sufficient information to enable the Secretary of Interior to carry out his responsibilities under the Outer Continental Shelf Lands Act. § 6003(c)(3). The President has declared his intention to seek a repeal of this moratorium. See August 18, 1990 Presidential Statement. However, the success of such a repeal before the moratorium expires appears doubtful.

Title VI further requires the Secretary of the Interior to perform ecological and socioeconomic studies on the effects of oil and gas development in this area. It also establishes an Environmental Sciences Review Panel to prepare and submit recommendations with respect to such development. § 6003(d)(e).

Finally, this title amends the Outer Continental Shelf Lands Act to require the Secretary to prevent the "harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area" by requiring cooperative development of such areas. § 6004. Apparently, this provision is aimed at a situation off the Louisiana Coast.

**TITLE VII - OIL POLLUTION RESEARCH
AND DEVELOPMENT PROGRAM**

A. Interagency Coordinating Committee

The Act establishes an Interagency Coordinating Committee on Oil Pollution Research. This Committee will coordinate oil pollution research, technology development, and demon-

**TITLE VII
OIL POLLUTION RESEARCH
AND DEVELOPMENT PROGRAM**

- / Interagency Coordinating Committee on Oil Pollution Research
- / Oil Pollution Research and Technology Plan
- / Oil Pollution Research and Development Program
- / International Cooperation
- / Biennial Reports to Congress
- / Funding

Figure 20

stration among federal agencies. § 7001(a). Members will come from various federal agencies; the chairman will be from the Department of Transportation. *Id.*

B. Oil Pollution Research and Technology Plan

The Interagency Committee must submit an implementation plan for oil pollution research and development by February 1991. § 7001(b). The plan will, among other things, identify significant research gaps and establish research priorities. *Id.* Congress has targeted the program at evaluating, developing, and demonstrating new or improved technologies that prevent or mitigate oil discharges. § 7001(c).

C. Oil Pollution Research and Development Program

The Committee will establish an oil spill research and development program for measures to prevent or mitigate oil discharges. The research effort will include evaluation of prevention and mitigation technology, as well as efforts to monitor and evaluate the environmental fate and effects of oil discharges. § 7001(c)(4). This program will also include marine and vessel simulation models, § 7001(c)(5), and ensure the continued use and

**TITLE VII
/ OIL POLLUTION RESEARCH AND
DEVELOPMENT PROGRAM**

- ▶ Establishment
- ▶ Innovative Oil Pollution Technology
- ▶ Oil Pollution Technology Evaluation
- ▶ Oil Pollution Effects Research
- ▶ Marine Simulation Research
- ▶ Demonstration Projects
- ▶ Simulated Environmental Testing (OHMSETT)
- ▶ Regional Research Program
- ▶ Funding -- \$6 mm/year

Figure 21

operation of the National Maritime Research Center and the Oil and Hazardous Materials Simulated Environmental Test Tank (OHMSETT) Research Center in New Jersey. § 7001(c)(7). Consistent with its research plan, the Committee will also coordinate competitive grants to universities or other research institutions. § 7001(c)(8). For fiscal years 1991 through 1995, the amount available for the grants will be \$6,000,000. § 7001(c)(9).

The Committee will conduct three demonstration projects in the ports of New York/New Jersey, Los Angeles/Long Beach, and New Orleans. § 7001(c)(6). It may also conduct controlled field tests of oil discharges in cooperation with other nations or foreign research entities. § 7001(d).

Up to \$21,250,000 of the Oil Spill Liability Trust Fund may be used annually in carrying out the activities of the Interagency Committee, with minimum and maximum caps for each fiscal year. §

7001(f). All activities of the Committee are subject to appropriations. *Id.*

TITLE VIII – TRANS-ALASKA PIPELINE SYSTEM

TITLE VIII TRANS-ALASKA PIPELINE SYSTEM

/ IMPROVEMENTS TO TRANS- ALASKA PIPELINE SYSTEM

- Liability and Cleanup
- Taps Liability Fund
- Presidential Task Force

/ PENALTIES

- OCLSA Civil Penalties
- TAPS Civil Penalties

/ ALASKA NATIVES

- Land Conveyances
- Impacts of Potential Spill in Arctic Ocean

Figure 22

Subtitle A – Improvements to Trans- Alaska Pipeline System

1. Liability and Cleanup

The OPA effectively expands the liability for the holder of pipeline rights-of-way or a vessel by exempting that person from liability only if damages were caused solely by an act of war or negligence of the United States, other government entity, or the damaged party. §§ 8101(a) (amending 43 U.S.C. § 1643(a)(1)) and 8102(b) (amending 43 U.S.C. § 1653(c)(2)). The OPA also increases the liability limit to \$350,000,000 (instead of \$50,000,000) per incident. § 8101(b) (amending 43 U.S.C. § 1653(a)(2)). Liability of holders of right-of-way in excess of \$350,000,000 is in accord with ordinary negligence rules.

The OPA also clarifies that any activities related to the Trans-Alaska Pipeline System (TAPS), including terminal operations, make a right-of-way or permit holder liable for the control and total removal of pollutants. § 8101(c) (amending 43 U.S.C. § 1653(b)). The liability for costs includes administrative and other costs incurred by the Secretary of the Interior or any other Federal or State officer or agency. *Id.* (Previously recoverable costs were limited to Federal expenses).

2. TAPS Fund

With some reservations, the OPA abolishes the Trans-Alaska Pipeline Liability Fund. The OPA reserves certain amounts to pay claims arising under, or administrative expenses incident to 43 U.S.C. § 1653(c), which also was repealed by the OPA (effective 60 days after certification that all claims have been resolved). The trustees of the TAPS Fund will distribute the remaining balance to the State of Alaska (on a pro rata share for contributions as an owner of oil) and the Oil Spill Liability Trust Fund. § 8102(a)(2).

The repeal of section 1653(c) has no effect on any right to recover or responsibility that arises from incidents occurring prior to the date of enactment of the OPA. § 8102(a)(3). Damage claims or claims by the state or federal government for increased expenses associated with an incident are still covered by 43 U.S.C. § 1653(c) as long as the incident occurred prior to passage of the OPA. § 8102(c). Also, the rights and remedies of contributors to the TAPS Fund under the Tucker Act are preserved. § 8102(a)(6). The OPA increases the amount payable for claims (above \$100,000,000) if a higher amount is certified as necessary. § 8102(a)(4).

3. Presidential Task Force

The President must appoint a task force, consisting of federal and Alaska representatives, to conduct an audit of TAPS, including the Valdez terminal and other related onshore facilities. § 8103. The audit will encompass a comprehensive review of (1) right-of-way holders' compliance with existing law, (2) the adequacy of environmental and health protection under existing law, and (3) improvements necessary to prevent oil releases or damages therefrom and improve response capability and security. § 8103(b)(2). The Task Force will have

broad authority in carrying out the audit; for example, it may conduct investigations, issue subpoenas, and require the production of documents and records. § 8103(c)(4),(5).

The draft report of the Task Force will be made available for public comment. The Task Force must then prepare a final report that will reflect public comment. The final report will include the Task Force's findings, conclusions, and recommendations resulting from the audit. § 8103(b)(5). The President must then issue his own report to Congress and to the Governor of Alaska outlining measures that have been or will be taken to implement the Task Force recommendations. § 8103 (b)(6).

Subtitle B – Penalties

1. Outer Continental Shelf Lands Act

The OPA increases the maximum civil penalty for a violation of the Outer Continental Shelf Lands Act (OCSLA) or any term of a lease, license or permit issued thereunder from \$10,000 up to \$20,000 per day. § 8201 (amending 43 U.S.C. § 1350(b)). This penalty ceiling will increase to reflect future increases in the Consumer Price Index. *Id.*

Civil penalties apply to a failure to comply with the OCSLA or with a lease, license or permit, if such failure constitutes a threat of serious, irreparable or immediate harm or damage to life, property, any mineral deposit, or the environment. The Secretary may assess a civil penalty without regard to the requirement that a period be allowed for corrective action. *Id.*

2. Trans-Alaska Pipeline Act

The Secretary of the Interior may assess and collect a civil penalty with respect to an oil discharge in transit from fields or reservoirs, during transportation through the pipeline, or during handling at terminal facilities. § 8202 (to be codified at 43 U.S.C. § 1656(a)). The penalty may not exceed \$1,000 per barrel of oil discharged. *Id.* (to be codified at 43 U.S.C. § 1656(c)). The Secretary may reduce or waive the penalty if the discharge was solely caused by an act of war, act of God or third party action beyond the control of the person liable. *Id.*

The OPA, in addition to placing liability on the person causing or permitting the discharge, declares that owners of the oil at the time of discharge are jointly, severally, and strictly liable for the full amount of penalties assessed. *Id.* (to be codified at 43 U.S.C. § 1656(b)).

Assessment of a civil penalty can occur only after notice and an opportunity for a hearing. A person who requests a hearing can later seek judicial review in a federal circuit court if aggrieved by the penalty assessed. *Id.* (to be codified at 43 U.S.C. § 1656(d)).

Subtitle C – Provisions Applicable to Alaska Natives

The OPA adds to the Alaska National Interest Lands Conservation Act (ANILCA) a provision confirming that, for the purposes of claims arising from oil discharges, all right, title and interest of the United States are deemed vested in the respective Alaska Native corporations as of March 23, 1989. This declaration is effective only upon a corporation's irrevocable election to accept interim conveyance of lands selected pursuant to the Alaska Native Claims Settlement Act. § 8301.

Congress, in this title of the OPA, recognized the potential development of Canadian reserves in the Amalagak region of the Northwest Territory. In light of potential future development of these reserves, the OPA directs the Secretary of the Interior to study issues of damage recovery, contingency plans, and coordinated actions in the event of an oil spill in the Arctic Ocean. § 8302. Congress also called upon the Secretary of State to begin negotiations with Canada regarding a treaty dealing with issues arising from an oil spill in the Arctic Ocean. *Id.* The Secretary must report on his efforts no later than June 1, 1991.

TITLE IX – AMENDMENTS TO OIL SPILL LIABILITY TRUST FUND, ETC.

The OPA amends the Tax Code regarding transfers to the Oil Spill Liability Trust Fund to reflect funding sources in addition to the tax on oil

and petroleum products. These additional funds come from: (1) amounts recovered for natural resource damages; (2) actions on behalf of the fund to recover compensation paid; (3) amounts required to be transferred from (i) the revolving fund established under the CWA, (ii) the Deepwater Port Liability Fund, (iii) the Offshore Oil Pollution Compensation Fund, and (iv) the Trans-Alaska Pipeline Liability Fund; and (4) any penalty paid as a result of violations of the CWA, the Deepwater Port Act, or the Trans-Alaska Pipeline Authorization Act. § 9001(a). The OPA provides credit against the tax for taxpayers that are members of the same affiliated group. § 9002(b).

Expenditures may be made from the Fund only for specified purposes. § 9001(b); *see supra* pp.4-5. The OPA allows an increase in expenditures per incident (\$1 billion instead of \$500,000,000), and in borrowing authority (same increase). § 9001(c),(d). The OPA amends the minimum balance provision to allow the Fund to go below \$30,000,000 for reimbursing removal costs. § 9001(e).

APPENDIX I

DOUBLE HULL REQUIREMENT FOR TANK VESSELS WITH DOUBLE BOTTOMS OR DOUBLE SIDES

Vessel Weight Type (gross tons)	5,000-14,999	15,000-29,999	30,000 or Greater
<u>VESSEL AGE AT JAN. 1, 1990</u>	<u>COMPLIANCE DATE</u>		
<1	Jan. 2, 2015	Jan. 2, 2015	Jan. 2, 2015
1	Jan. 2, 2015	Jan. 2, 2015	Jan. 2, 2015
2	Jan. 2, 2015	Jan. 2, 2015	Jan. 2, 2015
3	Jan. 2, 2015	Jan. 2, 2015	Birthdate 2014
4	Jan. 2, 2015	Jan. 2, 2015	Birthdate 2013
5	Birthdate 2014	Birthdate 2014	Birthdate 2012
6	Birthdate 2013	Birthdate 2013	Birthdate 2011
7	Birthdate 2012	Birthdate 2012	Birthdate 2010
8	Birthdate 2011	Birthdate 2011	Birthdate 2009
9	Birthdate 2010	Birthdate 2010	Birthdate 2008
10	Birthdate 2009	Birthdate 2009	Birthdate 2007
11	Birthdate 2008	Birthdate 2008	Birthdate 2006
12	Birthdate 2007	Birthdate 2007	Birthdate 2005
13	Birthdate 2006	Birthdate 2006	Birthdate 2004
14	Birthdate 2005	Birthdate 2005	Birthdate 2003
15	Jan. 2, 2005	Jan. 2, 2005	Birthdate 2002
16	Jan. 2, 2005	Birthdate 2004	Birthdate 2001
17	Jan. 2, 2005	Jan. 2, 2004	Birthdate 2000
18	Jan. 2, 2005	Birthdate 2003	Jan. 2, 2000
19	Jan. 2, 2005	Jan. 2, 2003	Birthdate 1999

Vessel Weight Type (gross tons)	5,000-14,999	15,000-29,999	30,000 or Greater
<u>VESSEL AGE AT JAN. 1, 1990</u>	<u>COMPLIANCE DATE</u>		
20	Jan. 2, 2005	Birthdate 2002	Jan. 2, 1999
21	Jan. 2, 2005	Jan. 2, 2002	Birthdate 1998
22	Jan. 2, 2005	Birthdate 2001	Jan. 2, 1998
23	Jan. 2, 2005	Jan. 2, 2001	Birthdate 1997
24	Jan. 2, 2005	Birthdate 2001	Jan. 2, 1997
25	Birthdate 2004	Jan. 2, 2000	Birthdate 1996
26	Birthdate 2003	Jan. 2, 2000	Jan. 2, 1996
27	Birthdate 2002	Birthdate 1999	Birthdate 1995
28	Birthdate 2001	Jan. 2, 1999	Jan. 2, 1995
29 and Over	—	—	Jan. 2, 1995
29	Birthdate 2000	Jan. 2, 1999	—
30	Jan. 2, 2000	Birthdate 1998	—
31	Birthdate 1999	Jan. 2, 1998	—
32	Jan. 2, 1999	Jan. 2, 1998	—
33	Birthdate 1998	Birthdate 1997	—
34	Jan. 2, 1998	Jan. 2, 1997	—
35	Birthdate 1997	Jan. 2, 1997	—
36	Jan. 2, 1997	Birthdate 1996	—
37	Birthdate 1996	Jan. 2, 1996	—
38	Jan. 2, 1996	Jan. 2, 1996	—
39	Birthdate 1995	Birthdate 1995	—
40 and Over	Jan. 2, 1995	Jan. 2, 1995	—

**DOUBLE HULL REQUIREMENT FOR TANK VESSELS
WITH SINGLE HULLS**

Vessel Weight Type (gross tons)	5,000 - 14,999	15,000 - 29,999	30,000 or Greater
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**VESSEL AGE AT
JAN. 1, 1990**

COMPLIANCE DATE

<1	Jan. 2, 2010	Jan. 2, 2010	Jan. 2, 2010
1	Jan. 2, 2010	Jan. 2, 2010	Jan. 2, 2010
2	Jan. 2, 2010	Jan. 2, 2010	Jan. 2, 2010
3	Jan. 2, 2010	Jan. 2, 2010	Birthdate 2009
4	Jan. 2, 2010	Jan. 2, 2010	Birthdate 2008
5	Birthdate 2009	Birthdate 2009	Birthdate 2007
6	Birthdate 2008	Birthdate 2008	Birthdate 2006
7	Birthdate 2007	Birthdate 2007	Birthdate 2005
8	Birthdate 2006	Birthdate 2006	Birthdate 2004
9	Birthdate 2005	Birthdate 2005	Birthdate 2003
10	Jan. 2, 2005	Jan. 2, 2005	Birthdate 2002
11	Jan. 2, 2005	Birthdate 2004	Birthdate 2001
12	Jan. 2, 2005	Jan. 2, 2004	Birthdate 2000
13	Jan. 2, 2005	Birthdate 2003	Jan. 2, 2000
14	Jan. 2, 2005	Jan. 2, 2003	Birthdate 1999
15	Jan. 2, 2005	Birthdate 2002	Jan. 2, 1999
16	Jan. 2, 2005	Jan. 2, 2002	Birthdate 1998
17	Jan. 2, 2005	Birthdate 2001	Jan. 2, 1998
18	Jan. 2, 2005	Jan. 2, 2001	Birthdate 1997
19	Jan. 2, 2005	Birthdate 2000	Jan. 2, 1997

Vessel
Weight
Type
(gross
tons)

5,000 - 14,999 15,000 - 29,999 30,000 or Greater

**VESSEL AGE AT
JAN. 1, 1990**

COMPLIANCE DATE

20	Birthdate 2004	Jan. 2, 2000	Birthdate 1996
21	Birthdate 2003	Jan. 2, 2000	Jan. 2, 1996
22	Birthdate 2002	Birthdate 1999	Birthdate 1995
23	Birthdate 2001	Jan. 2, 1999	Jan. 2, 1995
24 and Over	—	—	Jan. 2, 1995
24	Birthdate 2000	Jan. 2, 1999	—
25	Jan. 2, 2000	Birthdate 1998	—
26	Birthdate 1999	Jan. 2, 1998	—
27	Jan. 2, 1999	Jan. 2, 1998	—
28	Birthdate 1998	Birthdate 1997	—
29	Jan. 2, 1998	Jan. 2, 1997	—
30	Birthdate 1997	Jan. 2, 1997	—
31	Jan. 2, 1997	Birthdate 1996	—
32	Birthdate 1996	Jan. 2, 1996	—
33	Jan. 2, 1996	Jan. 2, 1996	—
34	Birthdate 1995	Birthdate 1995	—
35 and Over	Jan. 2, 1995	Jan. 2, 1995	—

Double hull phased compliance requirements apply to vessels with:

1. a contract placed before June 30, 1990 and delivery before Jan. 1, 1994; or
2. appraised salvage value determined by Coast Guard before June 30, 1990 and qualification for documentation before January 1, 1994.

Birthdate is defined as latest of the following three dates:

1. delivery after original construction;
2. delivery after completion of a major conversion; or
3. determination of appraised salvage value by Coast Guard and qualification for documentation.

*A vessel whose birthday is Jan. 1 and has a "Birthdate" compliance date must comply one year after the date listed on this table.