The Oil Pollution Act of 1990: Issues and Solutions

A Report of the National Petroleum Council

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H. Leighton Steward, Chairman
Committee on The Oil Pollution Act

NATIONAL PETROLEUM COUNCIL

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U.S. DEPARTMENT OF ENERGY

Hazel R. O'Leary, *Secretary*

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EXECUTIVE SUMMARY

ISSUES AND SOLUTIONS

On October 8, 1993, Energy Secretary Hazel R. O'Leary asked the National Petroleum Council to assess from an energy production perspective the implications of a proposal by the Department of Interior's Minerals Management Service (MMS) to implement the financial responsibility requirements of the Oil Pollution Act of 1990 (OPA).

Properly implemented, OPA could safeguard the public interest by improving oil spill prevention and response, without undue harm to the oil and gas industry. However, this report concludes that the new financial responsibility requirements, as contained in the MMS's preliminary broad interpretation, could have serious and substantial impacts on all segments of the oil and gas industry and disrupt commerce in many other areas without benefiting the environment. Even under a narrower interpretation of OPA's requirements, offshore operators will face significant new cost burdens.

The MMS must exercise its inherent administrative flexibility to incorporate the recommendations made in this report into its regulations. At this point, while those regulations are being developed, the Council believes it is appropriate to concentrate on potential administrative remedies. After the MMS proposes a rule, more will be known as to whether problems associated with OPA have been remedied or whether legislative amendment or additional administrative actions are required.

THE ISSUES

THE OIL POLLUTION ACT OF 1990 PRESCRIBED A NEW PREVENTION, RESPONSE, LIABILITY, AND COMPENSATION SCHEME FOR OIL POLLUTION FROM VESSELS, OFFSHORE FACILITIES, PIPELINES, AND ONSHORE FACILITIES.

Signed into law on August 18, 1990, OPA followed several large and well-publicized transportation-related oil spills. The Act's best known prevention measure was its requirement for double hulls on tankers. Its other prevention and cleanup provisions have been part of new operating regimes industry-wide. The first goal: don't spill.

A central tenet of the law is the "polluter pays" principle. It established a rigorous liability regime backed by "financial responsibility" requirements to assure that those potentially responsible for a spill would have readily available financial resources to pay for cleanup

and damages. Parties responsible for offshore facilities must show evidence of financial responsibility up to $150 million, more than quadrupling from $35 million required under previous law. This evidence of financial responsibility is demonstrated by the issuance of a "certificate" of financial responsibility, or COFR.

THE MINERALS MANAGEMENT SERVICE'S INTERPRETATION OF THE OIL POLLUTION ACT, AS OUTLINED IN THE ADVANCE NOTICE OF PROPOSED RULEMAKING, WOULD EXTEND FINANCIAL RESPONSIBILITY REQUIREMENTS TO NOT ONLY OFFSHORE BUT ALSO ONSHORE OPERATIONS INCLUDING PRODUCTION FACILITIES, PIPELINES, REFINERIES, AND TERMINALS.

The Minerals Management Service has been delegated the responsibility for implementing OPA as it relates to offshore facilities. The MMS released an Advance Notice of Proposed Rulemaking on *Oil Spill Financial Responsibility for Offshore Facilities Including State Submerged Lands and Pipelines* (58 FR 44797) to solicit public comments on financial responsibility and affected parties. The MMS's preliminary interpretation of the definitions and interaction of the terms "offshore facility," "onshore facility," and "responsible party" would have the effect of imposing a financial responsibility requirement on all types of petroleum production, refining, transportation, and distribution facilities, whether located in the traditional offshore—the federal Outer Continental Shelf and territorial sea—or located onshore. As a result, the responsible party for any of these operations would be required to show evidence of $150 million of financial responsibility.

THE MINERALS MANAGEMENT SERVICE'S INTERPRETATION WOULD CRIPPLE A LARGE SEGMENT OF THE DOMESTIC OIL AND GAS INDUSTRY, FROM INITIAL EXPLORATION TO RETAIL MARKETER.

The requirement to show evidence of financial responsibility is a pre-condition for continued operation. If the preliminary interpretation were to prevail in final regulations, including the present self-insurance test, only some of the largest firms would be able to self-insure, leaving hundreds of firms unable to evidence the required financial responsibility. Even if conventional insurance were available to meet such a requirement—and it is not clear that it would be, as discussed more fully later—many companies would not be able to tolerate such an added cost in their operations. Since self-insurers may incur no incremental cost, any firm unable to self-insure would be at a competitive disadvantage in the best of circumstances and unable to operate in the worst.

THE MINERALS MANAGEMENT SERVICE'S READING OF THE OIL POLLUTION ACT IS NOT SUPPORTED IN THE ACT'S LANGUAGE OR LEGISLATIVE HISTORY.

The preliminary interpretation by the Minerals Management Service ignores the Oil Pollution Act's careful distinctions between "onshore facility" and "offshore facility." The law treats the two differently for liability, spill response, contingency planning, and a number of other issues. The law imposes no requirement for evidencing financial responsibility for onshore facilities. Furthermore, the law specifies the "responsible party" separately for on-

shore facilities and offshore facilities. For an offshore facility, the responsible party is the "lessee," "permittee," or "holder of easement," just as it was under the law that preceded OPA, the Outer Continental Shelf Lands Act. These terms apply solely to the traditional offshore area and have no meaning when applied to refineries, terminals, and other facilities located on land.

THE OIL POLLUTION ACT'S FINANCIAL RESPONSIBILITY REQUIREMENTS JEOPARDIZE OFFSHORE OIL PRODUCTION AND IMPOSE SIGNIFICANT BARRIERS TO ENTRY FOR NEW OPERATORS.

Even with an MMS interpretation narrowed to the traditional offshore only, the offshore producers unable to self-insure face a burden from the requirement that they show evidence of $150 million of financial responsibility. This added cost will result in the loss of oil and gas production and reserves due to early abandonment and in increased reliance on oil imports. Furthermore, the increased cost creates barriers to entry for new and existing operators evaluating whether to bid on or purchase offshore properties and increases the threshold economic field size.

THE OIL POLLUTION ACT'S REQUIREMENTS THREATEN NATURAL GAS PRODUCTION.

In contrast to the Administration's stated policy, OPA's requirements will also impair natural gas production. Gas produced in association with crude oil will bear the additional cost of the financial responsibility requirements. Non-associated gas, in the absence of a *de minimis* rule, will also bear a cost because of the co-production of condensate. Under a narrowed rule, these cost burdens will apply only to the offshore, the most prolific gas production area. All exploration wells, regardless of objective, will require the same evidence of financial responsibility.

SERVICE INDUSTRIES, FEDERAL AND STATE ROYALTIES, AND REGIONAL ECONOMIES AND JOBS WILL ALSO FEEL THE IMPACT OF A DECLINE IN OFFSHORE OPERATIONS.

Any decline in activity in offshore operations cascades to their service industries, the royalties and taxes they provide, and finally the dependent regional economies. Louisiana and Texas are the bases for the vast majority of operations in the Gulf of Mexico, and their economies are dependent on the jobs and taxes those operations generate. Federal royalties will also fall with production on the Outer Continental Shelf and lease bonus bids will likely decline.

A $150 MILLION FINANCIAL RESPONSIBILITY LEVEL FAILS TO RECOGNIZE THE OIL SPILL HISTORY OF OFFSHORE OPERATIONS.

The $150 million financial responsibility level is arbitrary: since the imposition of the $35 million financial requirement in 1978, no spill on the federal offshore has breached even that lower level according to the MMS modeling of OPA-covered costs and damages. Low pressure reservoirs and the resultant need for artificial lift, blowout and spill prevention equipment, and automatic shutdown systems, safety training, and drills all have contributed to this exemplary record. These measures

proved effective during Hurricane Andrew, a "100-year" storm, where only small spills occurred even after platforms and other facilities were evacuated, and in some cases destroyed.

THE OIL POLLUTION ACT'S CONDITIONS MAKE CONVENTIONAL INSURERS UNWILLING TO PLAY A ROLE IN THE FINANCIAL RESPONSIBILITY PROCESS.

The insurance industry has indicated that, while it will continue to provide pollution cover for offshore operations, it will not allow those policies to be used as guarantees of financial responsibility. Of particular concern is the combination of the Act's provisions that guarantors of financial responsibility are directly liable for costs and damages, that the guarantor cannot assert standard defenses to that liability, and the fact that OPA does not preempt state laws, which may expose underwriters to liabilities above OPA's financial responsibility level of $150 million. In the absence of insurance cover, evidence of financial responsibility may be unavailable to any company unable to self-insure.

FINANCIAL INSTITUTIONS ARE REEVALUATING THE RISKS AND RETURNS OF LENDING TO THE OIL AND GAS INDUSTRY, BECAUSE OF THE NEW RISKS UNDER THE OIL POLLUTION ACT.

Banks and other financial institutions that have traditionally been the industry's primary source of capital also have serious reservations about certain provisions of the Act. These institutions are reassessing the risks and returns of lending capital in light of potential open-ended liabilities. These institutions will be reluctant to dedicate new capital to the petroleum industry, since the costs associated with a spill could bankrupt the borrower. Furthermore, the assets of a current operator unable to demonstrate evidence of responsibility will suddenly be devalued, forcing lenders to re-evaluate their use as collateral.

THE POST-OPA OPERATING ENVIRONMENT PRESENTS COSTS AND RISKS OF GREAT IMPORTANCE FOR THE PETROLEUM INDUSTRY, ITS INSURERS, AND FINANCIAL PROVIDERS, WHICH HAVE NOT YET BEEN ADEQUATELY APPRECIATED.

The Oil Pollution Act establishes liability for natural resource damages to protect the public's interest in the environment. If interpreted in regulations from the National Oceanic and Atmospheric Administration as currently proposed, these damages will include "passive-use values." Whether or not consideration of passive-use values is necessary in assessing damages to natural resources, is still the subject of debate. Undebatable, however is that these passive-use value liabilities, unless properly measured, may expose operating companies to unpredictable, large, and potentially bankrupting liability regimes. At present, the only mechanism being considered for measuring "passive-use value" is the Contingent Valuation Methodology. Using this unpredictable and unproven methodology could result in an intolerable burden on operating companies, their financial providers and shareholders, and ultimately on the consuming public.

THE SOLUTIONS

THE MINERALS MANAGEMENT SERVICE HAS THE AUTHORITY TO ADOPT REGULATORY METHODS OF DEMONSTRATING FINANCIAL RESPONSIBILITY UNDER THE OIL POLLUTION ACT THAT BOTH CONFORM WITH COMMERCIAL REALITIES AND SAFEGUARD THE PUBLIC INTEREST IN ASSURING THAT OPERATING COMPANIES HAVE THE FINANCIAL RESOURCES TO PAY FOR OIL POLLUTION CLEANUP COSTS AND DAMAGES.

THE MMS MUST CLARIFY THAT OPA'S FINANCIAL RESPONSIBILITY REQUIREMENTS ONLY APPLY TO FACILITIES IN THE TERRITORIAL SEAS AND THE OCS.

The statute specifically differentiates between "onshore" and "offshore" facilities in various aspects of the law—those dealing with elements of liability, defenses to liability, limits on liability, interest paid, claims procedure, advertisement of source, and subrogation. Section 1016 of the Oil Pollution Act applies financial responsibility obligations only to the responsible parties for vessels, offshore facilities, and deepwater ports. The MMS application of "offshore facility" is so broad that it would ignore the statutory and case law distinctions between onshore and offshore facilities, making virtually all facilities "offshore." Such a result is not supported by the statute and its legislative history.

However, the use of the specific term and the statutory definition of "responsible party" further indicates that Congress was clearly focused on imposing the OPA financial responsibility obligation only on traditional offshore exploration and production facilities, rather than all facilities. That definition makes only "lessees," "permittees," or the "holder of a right of use and easement" responsible for evidencing financial responsibility. Those terms generally have no commercial applicability to traditional onshore facilities, financial institutions providing capital, or insurance companies providing coverage to responsible parties. Accordingly, to be consistent with OPA and its legislative history, the Council believes that the MMS must narrow the scope of its rule.

THE MINERALS MANAGEMENT SERVICE MUST UTILIZE RISK-BASED CRITERIA IN ESTABLISHING REQUIRED LEVELS OF FINANCIAL RESPONSIBILITY.

The MMS has the legal and regulatory flexibility to establish both risk-based levels of financial responsibility and to exempt certain small risk facilities from the financial responsibility requirement (but not, of course, from OPA's liabilities and other obligations).

Risk, as reflected in Worst Case Discharge volumes, should be the primary determinant of a facility's financial responsibility

class. Other elements of risk—quality of oil and location—could be used either by petition to the MMS or by formula, to adjust a facility's class. Operators of more than one facility would be placed in the appropriate class for the facility with the largest Worst Case Discharge.

Facilities with Worst Case Discharges of 250 barrels of oil or less should be exempt from the financial responsibility requirement. Facilities with Worst Case Discharges of more than 250 but less than 1,000 barrels of oil should be able to petition for exemption as well, based on factors that mitigate risk of spills and pollution damage.

Facilities handling 1,000 barrels of condensate or less should also be exempted, as they are now.

THE MINERALS MANAGEMENT SERVICE MUST RECOGNIZE THE DISTINCTION BETWEEN GUARANTORS AND INSURERS.

In commerce and in case law, there is a clear distinction between the roles and obligations of insurers and guarantors, which is blurred in OPA's language and in the MMS Advance Notice of Proposed Rulemaking (ANPR). The MMS, however, must recognize the distinction between guarantors and insurers in its rule.

THE MINERALS MANAGEMENT SERVICE MUST ADOPT FLEXIBLE REQUIREMENTS FOR SELF-INSURERS.

The MMS should focus on the real purpose of self-insurance tests: to measure an operator's ability to pay for costs and damages of a spill. The National Petroleum Council has proposed a three-part self-insurance test that incorporates new measures of financial strength more reflective of current operating norms. The self-insurers would be required to meet a traditional "ratio" test, or a "bond rating" test, or finally a "mutual loss membership" test. This last test would include a limited showing of financial strength coupled with a mandatory membership in a newly established, MMS-approved mutual loss funding mechanism. Membership in such a mechanism would be mandatory only for those operators seeking to self-insure through the "mutual loss membership" test.

THE MINERALS MANAGEMENT SERVICE MUST CLOSELY COORDINATE ITS FINANCIAL RESPONSIBILITY REQUIREMENTS WITH STATE REQUIREMENTS.

The MMS should accept evidence of financial responsibility provided to a state as credit toward OPA's requirements, and it should streamline state-federal cooperation on administration and implementation of financial responsibility provisions.

THE SECRETARY OF ENERGY SHOULD ACTIVELY PARTICIPATE IN ONGOING RULEMAKINGS AND HIGH-LEVEL ADMINISTRATION REVIEW.

President Clinton recognized the difficulty of implementing regulatory schemes that meet conflicting national goals in his Executive Order 12866 on Regulatory Planning and Review. Achieving OPA's important environmental goals "without imposing unacceptable or unreasonable costs on society" requires interagency review and the utilization of its regulatory flexibility. The need for a careful regulatory approach is particularly strong in areas such as the U.S. offshore, where the costs of cumulative regulation are high relative to the environmental risks. The Council finds the potential for a serious negative impact on domestic oil and gas production as a result of the OPA financial responsibility requirement. Accordingly, the Council recommends the Secretary of Energy become actively involved in the ongoing rulemakings by:

- Working with MMS to promulgate a regulation that meets OPA and energy policy goals, consistent with Executive Order 12866.
- Working with the President and the National Economic Council to bring about a risk-based approach to this financial responsibility, which recognizes the excellent environmental record of the offshore oil and gas industry.
- Continuing to participate in the natural resource damage assessment rulemakings and ensuring high-level administration review of such assessment issues to avoid unpredictable and potentially bankrupting liabilities on oil and gas operators.

INTRODUCTION

On October 8, 1993, Hazel R. O'Leary, the Secretary of Energy, requested the National Petroleum Council's (NPC) advice and recommendations on certain aspects of the Advance Notice of Proposed Rulemaking (ANPR) from the Minerals Management Service (MMS). The Secretary's letter specifically requested that the NPC consider "the impacts the financial responsibility proposal may have on domestic energy exploration, development and production, as well as recommendations on ways the goals of the legislation could be met while minimizing adverse economic impacts, if any, on the domestic petroleum industry." The Secretary also requested that the Council report by December 1, 1993. (See Appendix A for a copy of Secretary O'Leary's letter and a description of the NPC.)

On October 20, 1993, the Council considered and unanimously accepted the Secretary's study request. The Council established the Committee on the Oil Pollution Act (Committee) and appointed H. Leighton Steward, Chairman, President, and CEO, Louisiana Land & Exploration Company, to chair the Committee. Jack S. Siegel, Acting Assistant Secretary, Fossil Energy, U.S. Department of Energy, served as Co-chair. The Committee is assisted by a Subcommittee chaired by Robert D. Armstrong, Louisiana Land & Exploration Company, and Leonard L. Coburn of the Department of Energy. (See Appendix B for rosters of the Committee and Subcommittee.)

In December 1993, the Committee issued an interim report that reviewed the specific provisions of the Oil Pollution Act of 1990 (OPA), reported on the impact to industry, and made limited suggestions on how the Minerals Management Service could solve some of the problems in its rulemaking activity. This final report discusses specific solutions to the problems that were reported on in the interim report.

The MMS received over 1,700 sets of comments in response to their ANPR. The NPC reviewed summaries of those comments as part of its work in preparing this report.

This report primarily focuses on the impact of the MMS ANPR on Outer Continental Shelf (OCS) exploration and production and also discusses its impact on onshore domestic oil and gas exploration and production activity, refining, transportation, and distribution operations. The reaction of the insurance industry and financial industry to the MMS ANPR is also presented and discussed in some detail.

Understanding the effect of the MMS proposal on the insurance and financial communities is central to under-

standing the consequences the proposal will have on domestic oil and gas production. As will be discussed in detail later in the report, the domestic oil and gas industry cannot survive without access to competitive capital markets, and capital will be diminished if the financial community perceives that the oil and gas industry will be unstable because of the risks imposed by the MMS regulatory requirements. The same is true of the insurance industry; as the risk of doing business with the domestic oil and gas industry increases, their participation will diminish or vanish. Without the participation of the insurance and financial capital markets, part of the existing domestic oil and gas production and future exploration and production are in jeopardy of being lost.

If the MMS regulations are perceived by the insurance industry and financial community to impose a risk on domestic oil and gas producers that cannot be accurately measured, if the liability is assumed to be limitless or unknown, and if financial liability costs are extraordinary and future cash flow difficult to predict, then the providers of these services will seek other business environments and opportunities that carry less risk.

OPA's far-reaching consequences on domestic energy production are only now beginning to be recognized. There is a comprehensive body of literature analyzing OPA's impact on vessels, an aspect not analyzed further here. Likewise, there are many parties potentially affected by the MMS proposal regarding the relationship among the definitions of "offshore facilities," "responsible parties," and "waters of the United States" that this report does not address, including: electric utilities, petrochemical plants, airports, marinas, farms, municipalities, local distribution companies, and industrial plants.

This report proposes solutions that deal both with the MMS's very broad jurisdiction interpretation and the problems associated with the traditional offshore production industry. The NPC finds that the MMS should interpret OPA to set levels of financial responsibility that reflect the risk imposed. Additionally, this report suggests alternative methods that operators may use to meet the financial responsibility requirements.

These solutions are based on the administrative flexibility of the MMS to propose a means for compliance with OPA that would meet the intent of the statute and alleviate some of the financial burdens that could be imposed on offshore facilities. However, the report recognizes that if the problems are not remedied by the MMS rulemaking, there would have to be further consideration as to whether legislative amendment or additional administrative actions are required.

Pertinent legal documents are appended to this report for ready reference. These include:

Appendix C: The Oil Pollution Act of 1990

Appendix D: Status of Studies, Reports, and Rulemakings Pursuant to OPA

Appendix E: Minerals Management Service's Advance Notice of Proposed Rulemaking

Appendix F: Executive Order 12777 on Delegation of Authority

Appendix G: Executive Order 12866 on Regulatory Planning and Review.

CHAPTER ONE

LEGAL BACKGROUND AND HISTORY

Since the early 1970s, actions on three fronts have greatly reduced the risks of oil spills from U.S. offshore production facilities. First, regulation of offshore operations under federal and state laws has been significantly tightened to help prevent spills and to respond quickly to those that do occur. Secondly, improved spill prevention technology, such as automatic shut-in systems, has been installed to virtually eliminate the potential for a catastrophic spill. And finally, oil spill contingency planning and response mechanisms have been implemented on both the federal and state levels to assure timely and effective response and cleanup when a spill does happen.

HISTORY OF OIL SPILL LEGISLATION

Various approaches have been taken to address oil spill liability and compensation in the United States. Section 311 of the Federal Water Pollution Control Act (FWPCA) provided oil spill liability for the discharge of oil by owners, operators, or any person in charge of a vessel or any onshore or offshore facility. Under the FWPCA, liability for onshore and offshore facilities was limited to an amount "not to exceed $50 million except in that where the United States can show that such discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner." However, the President was given the authority to establish, with respect to any class or category of onshore or offshore facilities, a maximum limit of liability under the FWPCA less than $50 million but not less than $8 million. The FWPCA required that certain vessels maintain evidence of financial responsibility and its guarantors be subject to direct action. The FWPCA did not require evidence of financial responsibility for onshore and offshore facilities. Since the statute provided for guarantees of financial responsibility and direct action against those providing such guarantees, the government no longer had to concern itself with certain traditional legal obstacles, such as "the financial status of the vessel owner or the availability of a vessel to arrest and proceed against *in rem*." Liability under the FWPCA was limited to removal or cleanup costs and natural resource damages. No other category of damages was recoverable under the FWPCA.

In 1978, Congress amended the Outer Continental Shelf Lands Act (OCSLA) to provide liability for oil spills

from offshore facilities located on the Outer Continental Shelf and for vessels transporting oil from such offshore facilities. An oil pollution compensation fund was established to be available for cleanup and removal costs and processing claims made under the statute in the event that a responsible party was unavailable. Liability for offshore facilities included unlimited costs of cleanup and removal plus an amount limited to no more than $35 million for all other damages. The recoverable damages included: injury, destruction, or loss of use of real or personal property; injury or loss of use of natural resources; lost profits or impairment of earning capacity due to an injury or destruction of real or personal property; and loss of tax revenue due to injury to real or personal property.

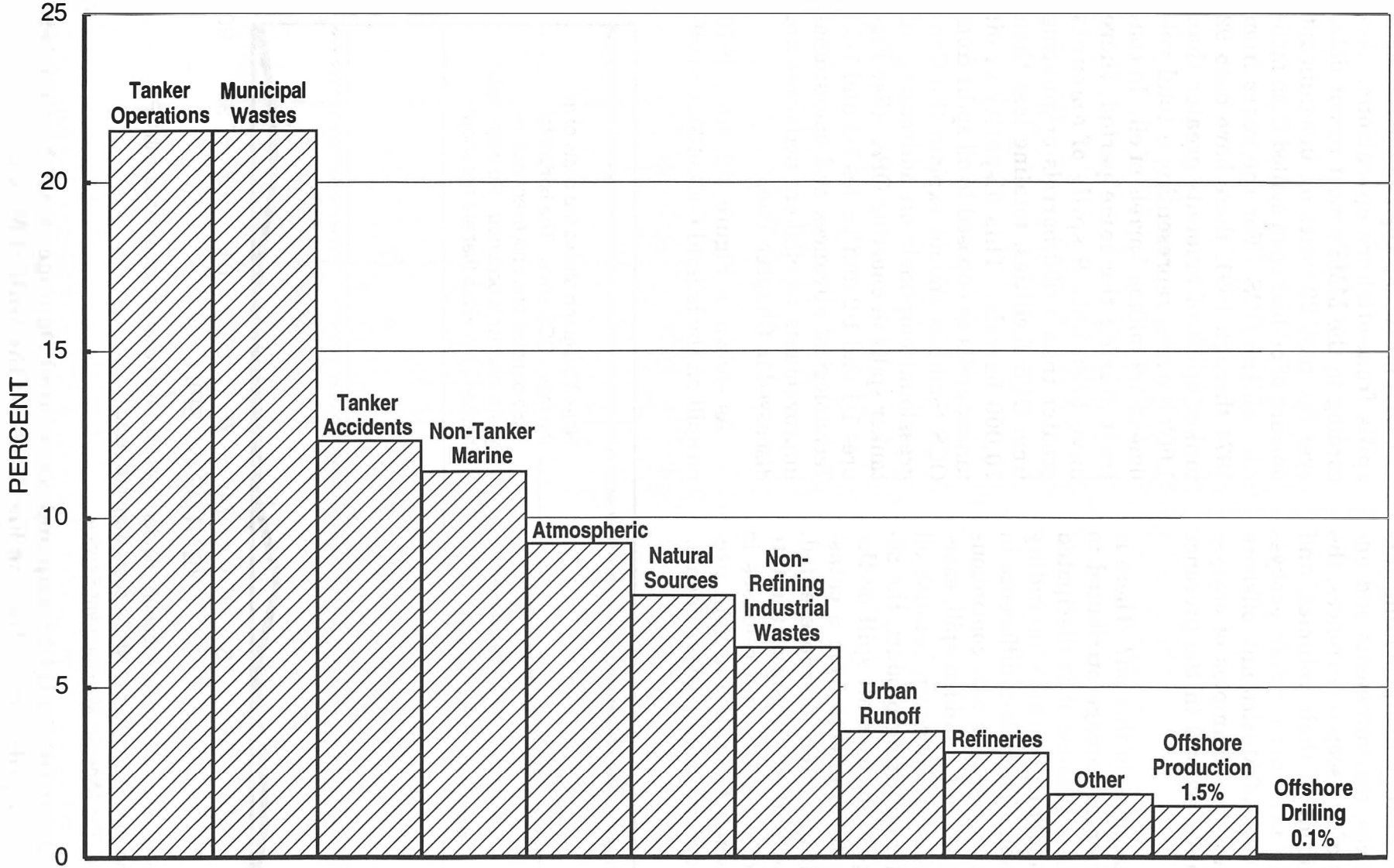
Under OCSLA, the owner or operator of an offshore facility used for drilling, producing, or processing, which had the capacity to transport, store, transfer, or otherwise handle crude oil or 1,000 barrels or more of condensate at any one time, was required to establish and maintain, in accordance with regulations, evidence of financial responsibility sufficient to satisfy the maximum amount of liability that it would be subject to under the statute or $35 million, whichever was less. Further, OCSLA provided for direct action against any guarantor providing evidence of financial responsibility for an owner or operator of an offshore facility. As a result, there was concern regarding the unlimited liability imposed under OCSLA with respect to removal costs which could also be imposed upon the guarantors who provided the evidence of financial responsibility and became liable to be sued directly under the statute.

Consequently, in 1988, Congress enacted the Outer Continental Shelf Operations Indemnification Clarification Act of 1988. Under the Clarification Act, Congress amended Section 305 of OCSLA by adding a new subsection limiting the liability of any guarantor in a direct action law suit (discussed later in this report).

Soon thereafter, various oil tanker spills prompted Congress to revisit the issue of oil pollution. The 250,000 barrel oil spill from the *Exxon Valdez*, in Prince William Sound, Alaska, as well as other transportation-related oil spills, exhibited to Congress that "oil pollution from accidental tanker spills is a real continuing threat to the public health and welfare and the environment." Accordingly, in August of 1990, the Oil Pollution Act of 1990 was enacted. Though the events giving rise to the enactment of OPA involved oil spills from vessels, OPA covers not only vessels but also onshore and offshore facilities as well as deepwater ports. OPA also contained provisions that amended, repealed, or superseded some of the previously mentioned oil spill related statutes. As to the FWPCA, certain provisions were superseded with respect to any incident for which liability was established under OPA. Finally, all amounts in the various oil spill funds set up by certain federal statutes were consolidated into the new Oil Spill Liability Trust Fund established under OPA.

HISTORICAL REVIEW OF OCS SPILL OCCURRENCES

OPA and other oil spill prevention and control legislation are aimed at uncontrolled releases of petroleum from oil and gas operations including transportation. It must be recognized, in addition, that there is a constant input of petroleum into the offshore environment due to natural seeps. These seeps, recognized for centuries, are known to be releasing quantities that overshadow the amounts spilled from offshore exploration and production operations (see Figure 1-1). Recent advances in undersea



Source: National Academy of Sciences (1985) & Warlick.

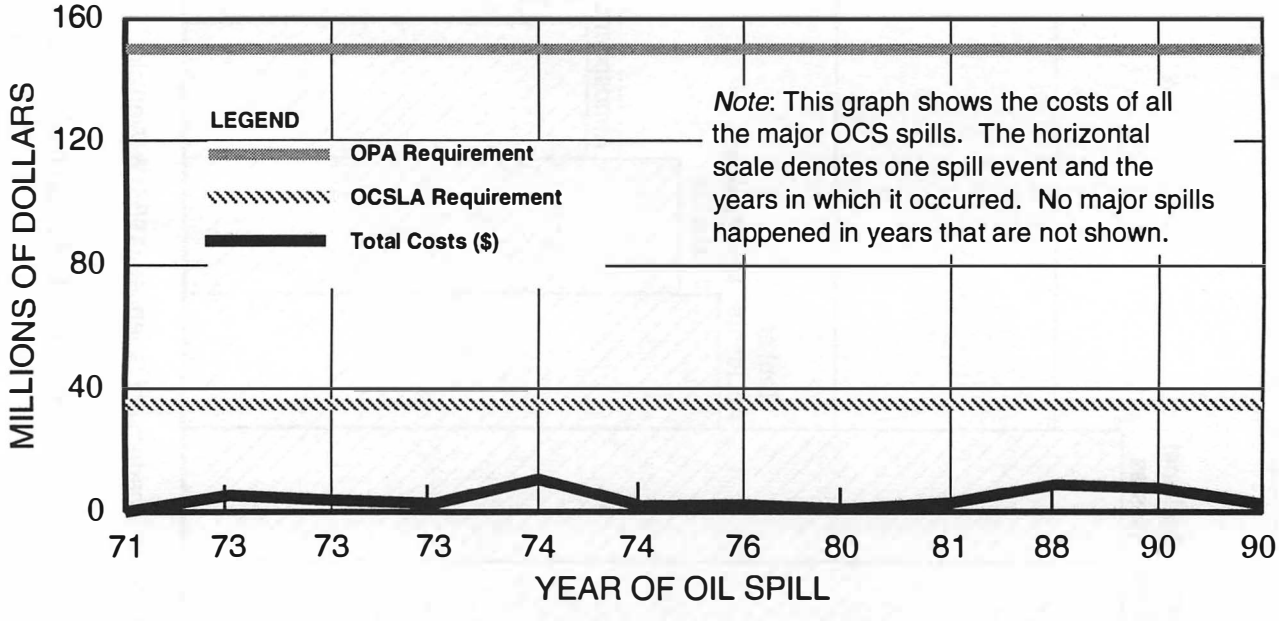
Figure 1-1. Marine Hydrocarbon Pollution Worldwide (64,000 Barrels per Day).

research technology are providing further discoveries, measurements and understanding of the seep occurrences, the large magnitude of their volumes, and their role in the surrounding ecosystems. The Gulf of Mexico and offshore California are two examples of ecosystems that have evolved in the presence of seeps.

What happens to this oil? There is no environmental damage attributed to these releases, because it is dissipated through natural processes including biodegradation. There is a difference in an ecosystem's response to a continuous low level input and a sudden spill, especially near shore. However, because oil is a naturally occurring product, the actual damage from a small spill or the fear of long-term effects from a catastrophic spill are often misrepresented. Thus, a true understanding of the fate and effect of oil spills and releases is necessary when formulating spill prevention policy and damage assessments.

OPA failed to recognize the record of spills from offshore operations. According to the MMS's most recent data, over the past 20 years an insignificant amount of oil had been spilled from facilities on the OCS. For the years from 1974 through 1991, there have been 92 tanker spills of amounts greater than 1,000 barrels, representing a total volume of 1.9 million barrels of oil. In contrast, during the same period, there have been only 9 spills of amounts greater than 1,000 barrels originating from OCS facilities, totaling less than 70,000 barrels. This disparity in oil tanker spills as opposed to oil spills from OCS facilities should explain the Congressional emphasis on addressing oil tanker spills in enacting OPA. (See Figures 1-1 and 1-2 and Tables 1-1 and 1-2.) Technological advances and operational improvements in offshore activities are discussed in Chapter Two.

As shown in Figure 1-2, since 1970 no spill on the federal Gulf of Mexico off-



*Projected estimated costs (cleanup and damages) in 1992 dollars in accordance with OPA definitions. Estimates of NRDA costs were not made.

Source: The Minerals Management Service.

Figure 1-2. Major Oil Spill Cleanup and Associated Damages Costs*—1971-1991 (for Major Spills from Offshore Facilities on the Gulf of Mexico OCS).

TABLE 1-1

OIL SPILLS FROM TANKERS VS. OIL SPILLS FROM OCS FACILITIES (SPILLS OF 1,000 BARRELS OR MORE, 1974-1991)

	Tankers*		OCS Facilities†	
Year	No. of Spills	Volume (Bbl)	No. of Spills	Volume (Bbl)
1974	6	89,676	2	23,333
1975	10	246,358	0	-
1976	8	389,340	1	4,000
1977	4	32,401	0	-
1978	5	15,744	0	-
1979	8	341,345	1	1,500
1980	7	73,475	1	1,456
1981	4	32,047	1	5,100
1982	2	2,466	0	-
1983	3	3,986	0	-
1984	10	138,073	0	-
1985	5	22,607	0	-
1986	5	24,419	0	-
1987	3	31,310	0	-
1988	3	39,350	1	15,576
1989	5	262,034	0	-
1990	4	139,077	2	18,992
1991	0	-	0	-
Total	**92**	**1,883,708**	**9**	**69,957**

* Total of crude oil and refined product spilled in U.S. and coastal offshore waters.

† Total of crude oil and condensate spilled from facilities of Federal OCS Leases (all spills listed took place in the Gulf of Mexico OCS).

shore has resulted in cleanup and damage costs as high as OPA's $150 million financial responsibility requirement. The MMS has taken the records of actual costs for spills and estimated what those costs would have been under OPA. In fact, no spill on the federal Gulf of Mexico offshore exceeded the lower $35 million financial responsibility currently in force under OCSLA. Under OPA, if an offshore facility is subject only to limited liability, its responsible party will pay all cleanup costs and up to $75 million in damages.

OPA's $150 million financial responsibility requirement implies cleanup costs as high as $75 million. The MMS data show the most expensive spill on the Gulf of Mexico OCS had cleanup costs of about $10 million. For that same spill in 1970, before additional facility safety devices and procedures came into routine use, the MMS estimated that OPA damages would have been about $20 million. The new devices and procedures are discussed more fully in the next section.

TABLE 1-2

BLOWOUTS AND SPILLAGE FROM FEDERAL OFFSHORE OIL WELLS COMPARED TO ANNUAL PRODUCTION ON THE OCS, 1971-1990

Year	No. of Well Starts	Drilling Blowouts				Nondrilling Blowouts						Total No. of Blowout	Spills in Barrels	Production MMbbls.
		Exploration		Development		Production		Workover		Completion				
		No.	Bbl	No.	Bbl	No.	Bbl	No.	Bbl	No.	Bbl			
1971	851	2	0	0	0	2	450	1	0	0	0	5	450	418.5
1972	845	2	0	1	0	0	0	0	0	0	0	3	0	411.9
1973	820	2	0	1	0	0	0	0	0	0	0	3	0	394.7
1974	802	0	0	1	0	2	75	1	200	0	0	4	275	360.6
1975	842	4	0	0	0	0	0	1	0	1	0	6	0	330.2
1976	1,078	1	0	4	0	1	0	0	0	0	0	6	0	316.9
1977	1,240	2	0	2	0	0	0	3	0	2	0	9	0	303.9
1978	1,164	4	0	5	0	0	0	2	0	1	0	12	0	292.3
1979	1,140	3	0	2	0	0	0	0	0	0	0	5	0	285.6
1980	1,158	3	0	1	0	1	1	2	0	1	0	8	1	277.4
1981	1,208	2	0	1	0	0	0	2	64	5	0	10	64	289.8
1982	1,255	0	0	4	0	0	0	3	0	1	0	8	0	321.2
1983	1,180	3	0	4	0	0	0	1	0	1	0	9	0	348.3
1984	1,352	3	0	2	10	0	0	1	0	0	0	6	10	370.2
1985	1,169	2	0	0	0	1	40	1	0	0	0	4	40	389.3
1986	694	1	0	0	0	0	0	1	0	0	0	2	0	389.2
1987	845	3	0	1	60	3	0	1	0	0	0	8	60	366.1
1988	950	0	0	1	0	0	0	0	0	0	0	1	0	320.7
1989	947	2	0	3	0	0	0	2	0	0	0	7	0	305.1
1990	1,018	1	0	1	0	0	0	2	8	0	0	4	8	324.4
Total	20,558	40	0	34	70	10	566	24	272	12	0	120	908	6,816.3

Note: Only crude oil and condensate blowout spillage is given here, in barrels for the 120 blowouts that occurred during the past 20 years. Production totals are given in millions of barrels (MMbbl). Information on other than oil and condensate spills may be obtained from the Chief, Engineering and Technology Division, MMS, Herndon, Virginia 22070.

Source: U.S. Department of Interior, Minerals Management Service, Federal Offshore Statistics 1990.

OIL SPILL CONTINGENCY PLANNING AND RESPONSE MECHANISMS

The United States Coast Guard, the MMS, and industry historically coordinate their efforts in order to provide for an effective spill response to an OCS-related discharge. The MMS is responsible for spill abatement and mitigation measures on or within 500 meters of a platform, drilling rig, or other OCS facility. The U.S. Coast Guard has the ultimate responsibility for ensuring that the oil spill incident is effectively cleaned up. The OCS operators are required to prevent pollution, inspect and maintain oil spill response equipment, develop oil spill contingency plans, and conduct drills and training for oil spill response personnel. Oil spill contingency plans provide response guidelines for responsible parties when a spill occurs. These plans provide for the preplanning, management, and coordination of all of the operations at the scene of a spill, as well as of the communications between involved parties at the time of a spill. To effectively accomplish oil spill containment and removal actions, the MMS requires that all Exploration Plans, Development and Production Plans, and Development Operations Coordination Documents be accompanied by an Oil Spill Contingency Plan.

The federal government's current network of contingency plans is continuously updated and reviewed. If analysis indicates that a potential spill could possibly contact the shoreline in an environmentally sensitive area prior to the operator reaching the spill site and/or without allowing sufficient time for cleanup, the operator, as a condition of plan approval, would be required to realign resources and submit a revision to the contingency plan to demonstrate appropriate oil spill protection methodology outlined in its exploration/development plan to protect those resources. Additionally, the MMS has an ongoing program to assure that all offshore operations have personnel trained in the use of equipment and in the methodology of spill containment and cleanup. The MMS, Gulf of Mexico OCS region, conducts unscheduled drills on five or six randomly selected operators each year. The various drills include different stages of deployment of equipment and personnel. In the Gulf of Mexico region, oil spill response equipment, identified in each operator's regional oil spill contingency plans, is maintained at nine strategically located onshore bases by the oil industry cooperative, Clean Gulf Associates (CGA). All CGA bases have offshore skimmer systems known as Fast Response Systems, boat and helicopter spray systems, communications equipment, etc. Similar provisions for unannounced drills and oil spill response are in place in other OCS regions.

In addition to plans by the federal government and private industry, there are contingency plans developed at the state and local authority levels. The states of Florida, Texas, Alabama, and Mississippi (for the Gulf coast), and California (for the Pacific), to name a few, have oil and hazardous substance pollution contingency plans for their coastal areas.

THE OIL POLLUTION ACT OF 1990

The Oil Pollution Act was signed into law by President Bush on August 18, 1990. The Act followed on the heels of several widely publicized oil spills. OPA aims to lessen the number of oil spills and improve the level of preparedness and ability to respond to spills when they occur. As previously discussed, the Act creates a comprehensive prevention, response, liability, and compensation regime for dealing with vessel- and facility-caused oil pollution from spills in navigable waters. When an oil spill

occurs in U.S. navigable waters, OPA mandates that the responsible party will promptly respond and pay its costs and damages.

Until recently, the focus of public and regulatory attention has been OPA's provisions affecting vessels and the implementing language proposed by the U.S. Coast Guard. Currently, however, the definition and breadth of OPA's "offshore facilities" provisions have become the focus of increased attention due to the added breadth in the ANPR. Accordingly, this report explores some of the major issues raised by OPA's definitions of "navigable waters of the U.S.," "responsible parties," and "offshore facilities" and how those terms are used in ANPR published by the MMS.

Under OCSLA, the MMS required that owners and operators of facilities located in the OCS show evidence of financial responsibility equal to $35 million with a civil penalty of $20 thousand per incident. OPA increased the financial responsibility of "responsible parties" to much higher levels than in any previous statute and included the principle of "polluter pays," to prevent the federal and the state governments from being, *de facto,* the guarantor of final resort.

The Act requires that:

> for "offshore facilities" . . . each responsible party . . . shall establish and maintain evidence of financial responsibility of $150,000,000 to meet the amount of liability to which the responsible party could be subjected in a case in which the responsible party would be entitled to the limit liability . . . In a case in which a person is the responsible party for more than one facility . . . evidence of financial responsibility need be established only to meet the maximum liability applicable to the facility having the greatest maximum liability.

Under OPA, financial responsibility may be demonstrated by:

> any one or by any combination of the following methods which the President . . . determines to be acceptable: evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self insurer, or other evidence of financial responsibility . . . the President . . . may specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unacceptable, in establishing evidence of financial responsibility to effectuate the purposes of this Act.

One provision of the Act that has particularly caught the attention of the insurance industry is the financial responsibility section's direct action clause:

> Any claim for which liability may be established . . . may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable . . . for removal costs and damages to which the claim pertains.

OPA's limitations on the guarantor's defense against a direct action claim change the nature of the insurance written for the industry before enactment. These limitations are some of the principal reasons underwriters will not act as guarantors. If the facilities under regulation become increasingly numerous, as they have under the recent MMS regulatory proposal, there are important concerns to be considered in understanding whether today's insurance industry is willing to provide OPA insurance. While the commercial insurance market is willing and able to provide insurance coverage for seepage and pollution liabilities, it does not appear able or

willing to be a guarantor of financial responsibility under OPA.

One change in OPA that has an important impact on the ability of the oil industry and financial institutions to obtain insurance is that the defenses allowed in the Act for the guarantor against a direct action claim do not include the standard policy defenses that may be used by an insurer against an insured. Under OPA, the guarantor can claim one of the three "complete" defenses available to any responsible party. If any of these is successfully asserted, the responsible party or, in the case of direct action, the guarantor, is not liable for removal costs or damages. A guarantor can also defend a direct action claim with the defense that the spill resulted from the willful misconduct of the responsible party. However, other defenses that might reduce insurers' obligations under an insurance contract—incomplete information about the facility, perhaps even non-payment of premium—do not help if the insurer is treated as a guarantor. They do not change the guarantor's liability for a direct action claim.

If treated as guarantors and stripped of the defenses that are part of their normal business, and facing direct action in some states, insurers cannot find encouragement or protection in OPA's limitation on a guarantor's liability, as follows:

> Nothing in this Act shall impose liability . . . on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility . . . which that guarantor has provided for a responsible party.

Guarantors have managed the risks and costs of direct action in the past because liability limits were very much lower than under OPA, potential claimants were clearly defined, and traditional policy defenses were available. The insurers' concern is exposure to unlimited liability. Insurers are concerned that, in the event of a large spill breaching the liability limits, the courts would skirt apparent limitations in order to gain access to the perceived "deep-pocket." Moreover, many state laws do not recognize OPA limits and the Act does not preempt state laws. In this case, the insurer, if treated as a guarantor, may also face unlimited liability.

Thus, the insurance industry may face a new set of rules under OPA. The market's consternation is compounded by the greater numbers of facilities that may need coverage at much higher levels under the MMS interpretation. The ability of insurers to provide the coverage is discussed further in this report. If offshore facilities cannot obtain insurance to demonstrate $150 million of financial responsibility, they may have no option but to shut in domestic production.

Responsible parties are therefore searching for the answers to critical questions:

- Will insurers be treated as guarantors?
- Will insurers provide evidence of financial responsibility?
- If not, will other evidence of financial responsibility be available?
- If it is available, will it be affordable?
- How much production will move from being economic to uneconomic and be shut-in?
- How will producers remain viable in offshore production operations?

Even if offshore facilities could meet the financial responsibility requirements, responsible parties may still face unlimited liability.

THE MINERALS MANAGEMENT SERVICE'S ADVANCE NOTICE OF PROPOSED RULEMAKING

On October 18, 1991, President Bush signed Executive Order No. 12777, which delegated jurisdiction over non-transportation-related offshore facilities and some aspects of transportation-related pipelines that link offshore production platforms to onshore facilities to the Secretary of the Interior who delegated them to the Minerals Management Service. The Service's authority extends to ensuring evidence of financial responsibility for operators of offshore facilities on the Outer Continental Shelf and other navigable waters of the United States.

The MMS's preliminary interpretation encompasses a vastly increased scope for "offshore facilities" beyond the traditional OCS/territorial sea venue. The Service's ANPR asks a series of questions concerning financial responsibility and affected parties, including:

- What are the types and what are the locations of facilities that may be subject to the offshore financial responsibility requirement.
- What additional measures (other than those listed in the ANPR) of demonstrating evidence of financial responsibility exist to enable responsible parties and guarantors to meet the $150 million requirement?
- How can the MMS be certain that any other measures of demonstrating financial responsibility will provide "equal assurance" that all claims will be paid in a timely manner?
- How will "direct action" provisions in OPA affect the availability of insurance?
- What regulatory approaches are available under OPA that may improve the "availability of an insurance market?"
- How can the regulations be structured to avoid premature abandonment of producing wells?

This report addresses these questions and illustrates how domestic oil and gas production will be affected.

Under the MMS proposal, OPA's financial responsibility obligation could apply to pipelines, docks, wharves, or other appurtenances that cross navigable waters but are connected to onshore facilities. The $150 million financial responsibility requirement, if implemented as proposed by the MMS, will affect businesses operating in every phase of the oil and gas industry (including services and suppliers, financial institutions, and insurance companies) from the wellhead to the marketing facility—be it a gas station in the West, a production well in the Gulf or Midwest, a fuel oil delivery truck, or rolling stock in the Northeast, a fishing industry fuel facility in New England, a major energy bank in Houston, an insurance company in New York or London, or aviation services in the Northwest. The broad definition of "offshore facilities" as interpreted by the MMS, therefore, reaches across the oil and gas industry to encompass exploration, production, handling, storing, processing, or transporting facilities and equipment in all fifty states and territories. This preliminary interpretation, by the MMS, is contrary to OPA and its legislative history. Congress did not intend to extend the financial responsibility obligations to onshore facilities and took care to structure the law accordingly.

Under the financial requirements of the Outer Continental Shelf Land Act (superseded by OPA), the MMS rules allowed self-insurance, insurance, and surety bonds as evidence of financial responsibility. Self-insurance has been a prime method of evidencing financial responsibility. Under OPA, the higher amount will make true self-insurance

more difficult. A large number of companies that have qualified in the past will probably be unable to qualify today, if the MMS does not change its self-insurance rules. Currently, the MMS self-insurance rule (33 CFR 135) has three tests—a company can meet any one:

- The "(a)(1)" test: Current U.S. assets must be greater than current U.S. liabilities and U.S. owners' equity must be at least equal to the amount of self-insurance.
- The cash flow test: The difference between daily cash requirements and net daily cash flow from operations must be greater than the requested self-insurance amount. If it is not (and for most companies, it is not), the MMS can quantify a lower amount which the company can self-insure. The company can then use that amount to increase the deductible on an insurance policy, or use it in conjunction with a smaller insurance policy.
- The asset test: The company can identify unencumbered assets—liquid and non-offshore—to satisfy the Certificate of Financial Responsibility (COFR) amount.

The MMS is operating under the existing regulations and has not proposed a new definition of self-insurance under OPA.[1] The MMS may believe that its criteria, which functioned well under the pre-OPA requirements, will prove workable under OPA as well. The current cash flow test, which allows the MMS to certify the amount of self-insurance for which a company qualifies, may reduce costs of getting insurance to comply with OPA's requirements.

The MMS, in the ANPR, requested comments on the various methods it proposed to demonstrate financial responsibility. According to current industry information, however, surety bonds may not be a feasible solution, in terms both of cost and availability. Letters of credit, likewise, are limited in availability and beyond the reach of most operators covered under the MMS ANPR. The size of the required market, at $150 million per operator, is likely beyond the capability of financial markets to supply due to capital constraints. Given direct action provisions, third-party guarantees may also be an untenable solution. Thus, if insurance is unavailable and self-insurance moves out of reach, a COFR may be unavailable for most operators.

The MMS ANPR unreasonably expands the category of facilities required to submit evidence of financial responsibility under OPA. It is the "responsible person," not the "facility," that is required to provide evidence of financial responsibility. The MMS ANPR would require all facilities "in, on, or under navigable water of the U.S." to show evidence of financial responsibility. The statute's requirements for financial responsibility are much more limited than suggested by MMS. A careful reading of OPA's definition of responsible party and financial responsibility requirements shows that only facilities located in territorial seas and the OCS need to submit evidence of financial responsibility. This issue is fully discussed in Chapter Five, Solutions.

[1] Reflecting the essential differences between fixed facilities in U.S. waters and vessels in world trade, the MMS self-insurance criteria are significantly different than those proposed by the Coast Guard for vessels: self-insurance is possible only for a company incorporated in the U.S., that has both working capital and a net worth equal to, or greater than, the total applicable amount of financial responsibility required. Working capital is defined as U.S.-based current assets less worldwide current liabilities; net worth as total U.S. assets less all worldwide liabilities. These provisions are the Coast Guard's assurance that sufficient assets to satisfy a claim will be under U.S. jurisdiction. Questions about the ability of even large integrated companies to meet these self-insurance conditions were raised by an American Petroleum Institute informal survey of its members.

CHAPTER TWO

IMPACT ON U.S. OIL AND GAS PRODUCTION

Not only will an offshore production platform require a Certificate of Financial Responsibility, but the MMS issued an ANPR that contemplates the imposition of OPA's COFR requirements on a wide population of U.S. oil and gas producers; for example, a gathering line that crosses under a river may require a COFR under the expanded interpretation. The volumes it gathers, especially if from a stripper field or other marginal production, may be jeopardized by the new financial burden. An operator must be able to obtain a COFR in order to remain in business.

If COFRs are required of all operators whose facilities seem to meet the MMS definition of "offshore facility," both onshore and offshore production of oil and natural gas will be affected. The onshore impacts will vary depending on the peculiar characteristics of individual production areas and can be very great. For instance, the state of Louisiana, one of the nation's largest oil and natural gas producing states, has estimated that 98 percent of the crude oil and condensate and 95 percent of natural gas produced from onshore and state-water wells will be affected under this expansive interpretation. Some 2,500 independents, few of whom can qualify as self-insured under current regulations or afford as much as $150 million COFR insurance cover (if available), produce about 60 percent of Louisiana's oil, condensate, and natural gas. As such, the potential economic impacts of the potential regulations on the state are staggering.

For the purposes of this discussion, we have confined our examination of the impact of OPA on exploration and production in the territorial sea and Outer Continental Shelf, assuming that, as a minimum, COFRs will be required of these operators.

DEMOGRAPHICS OF AFFECTED PARTIES

In 1992, offshore production accounted for 17 percent of U.S. crude oil production, and 28 percent of natural gas production. The federal domain accounted for about 85-90 percent of offshore oil and gas production. Offshore production in state waters has nearly as many operators as the federal offshore, but much smaller production volumes.

The state and federal offshore areas account for about 15-20 percent of the nation's oil and gas proved reserves, with the federal area offshore accounting for the largest share of these volumes.

There are about 3,800 oil and gas production structures (processing facility platforms, production platforms, etc.) in the federal offshore. Only 23 of these are in the Pacific; the remainder are in the Gulf of Mexico. They are located as far as 140 miles offshore. Some 98 percent of the structures are in shallow water less than 100 meters in depth. There are 10 operators that each account for more than 75 structures; 63 operators have fewer than 5 structures apiece. One operator has 637 structures; 30 operators have only one.

Most of the offshore structures have few, if any, wells. Some 500 of them are process facility platforms that have no wells at all. More than 2,500 of the structures have fewer than 6 wells. Only 118 structures have more than 19 wells.

In 1992, well starts in the federal offshore fell to the lowest level since 1954. Over the past ten years, exploratory and development drilling have each declined by more than 50 percent.

There are approximately 24,000 active oil and gas well operators in the United States. Of these, 139 reported 1992 offshore operations to the Energy Information Administration on Form EIA-23, "Annual Survey of Domestic Oil and Gas Reserves." Of these 139 offshore operators, 102 operated in federal offshore waters of the Gulf of Mexico and the Pacific; 80 operated in state offshore waters in the Gulf of Mexico, the Pacific, and Alaska's Cook Inlet.

Table 2-1 presents a summary of offshore oil and gas production and reserves in 1992, by operator class based on total domestic oil production. It shows that 14 percent of the offshore operators (those with total domestic production greater than 50 thousand barrels per day) accounted for 78 percent of offshore oil production. The remaining 22 percent of production is made by 86 percent of the operators.

Figure 2-1 compares offshore oil production by operator class based on total domestic production. It shows that offshore production is more sharply skewed toward the large operators than total domestic production.

The total number of operators in the federal offshore has roughly doubled over the past ten years. The increase has come entirely from independent operators, as the number of majors is essentially unchanged.

Although only 15 of the 139 offshore operators are major integrated oil companies, the majors are responsible for the bulk of offshore oil and gas production. Independents account for nearly 90 percent of offshore operators, 23 percent of offshore oil production, and 36 percent of natural gas production.

While the majors have the largest share of offshore reserves and production, since 1988 independents have acquired more lease acreage, paid the majority of bonuses to the federal government, made the overwhelming number of new discoveries, placed the majority of new structures on the OCS, and, for 1993, have hired more than 70 percent of drilling contractors active offshore. While the economic impact of OPA is apparent in terms of existing production and reserves, it is extremely difficult to quantify the impact that the statute will have on the future of OCS exploration and development, because of the enormous financial burden that OPA will place on independents.

TABLE 2-1

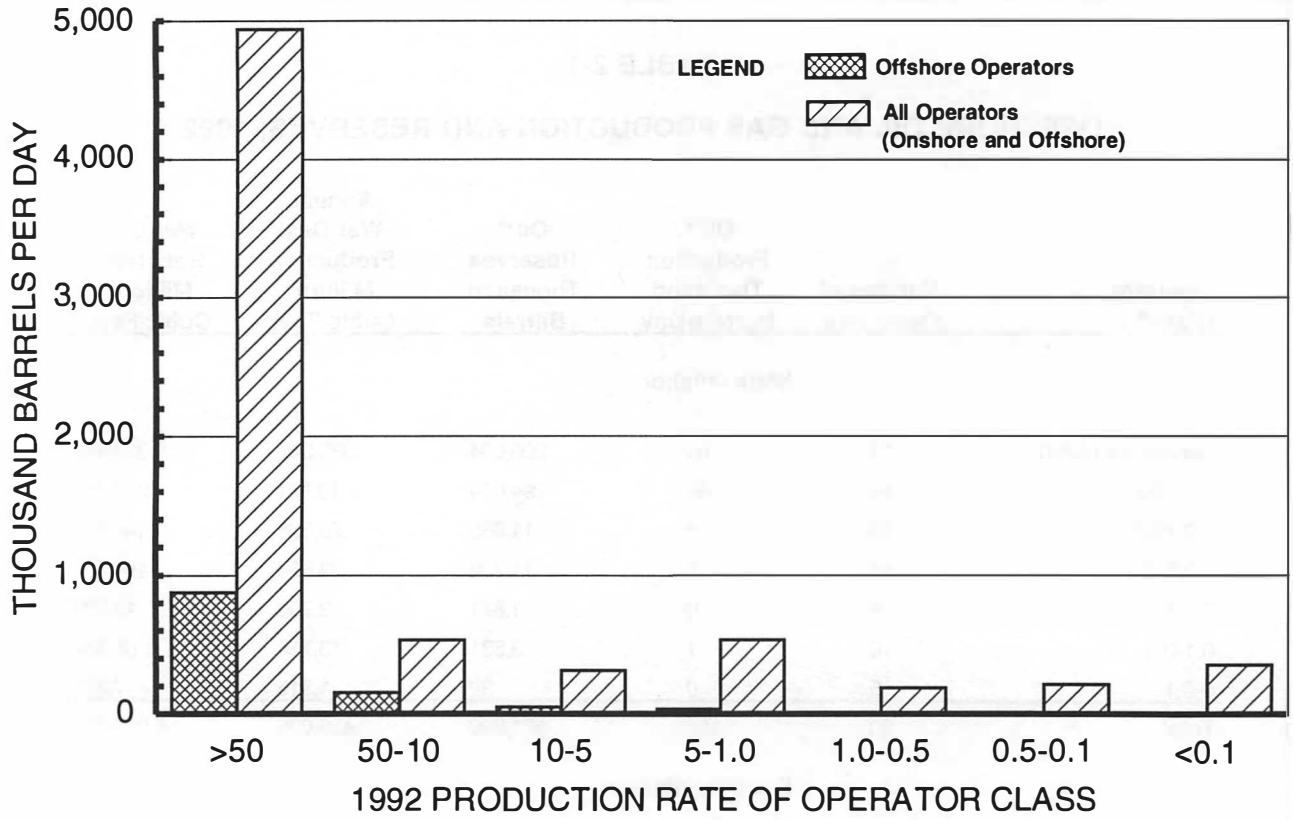
OFFSHORE OIL AND GAS PRODUCTION AND RESERVES, 1992

Operator Class*	Number of Operators	Oil** Production Thousand Barrels/Day	Oil** Reserves Thousand Barrels	Annual Wet Gas Production Million Cubic Feet	Wet Gas Reserves Million Cubic Feet
		State Offshore			
Greaterthan 50.0	13	86	296,604	335,246	5,362,365
10.0-50.0	14	58	194,014	40,861	274,569
5.0-10.0	13	6	14,086	28,808	140,661
1.0-5.0	19	5	11,722	33,930	150,400
0.5-1.0	6	0	1,871	2,709	15,827
0.1-0.5	10	1	3,531	13,766	68,382
0-0.1	5	0	32	1,315	7,233
Total	80	158	521,860	456,635	6,019,437
		Federal Offshore			
Greaterthan 50.0	19	791	2,511,977	3,129,515	20,604,092
10.0-50.0	14	96	168,498	581,496	2,922,833
5.0-10.0	18	44	99,968	443,413	1,994,765
1.0-5.0	22	32	63,264	277,365	1,365,547
0.5-1.0	7	3	5,730	112,908	611,621
0.1-0.5	9	1	5,915	30,331	198,954
0-0.1	13	0	29,130	48,671	487,460
Total	102	967	2,884,482	4,623,699	28,185,272
		State and Federal Offshore			
Greaterthan 50.0	19	877	2,808,581	3,464,761	25,966,457
10.0-50.0	18	155	362,512	622,357	3,197,402
5.0-10.0	22	50	114,054	472,221	2,135,426
1.0-5.0	34	37	74,986	311,295	1,515,947
0.5-1.0	12	3	7,601	115,617	627,448
0.1-0.5	17	3	9,446	44,097	267,336
0-0.1	17	0	29,162	49,986	494,693
Total	139	1,125	3,406,342	5,080,334	34,204,709

* Operator class is based on the operator's daily average of total (onshore and offshore) domestic oil production in 1,000 barrels per day.

** Includes crude oil and lease condensate.

Source: Energy Information Administration, Form EIA-23, "Annual Survey of Domestic Oil and Gas Reserves."



* Includes lease condensate.

Source: Energy Information Administration, Form EIA-23, "Annual Survey of Domestic Oil and Gas Reserves."

Figure 2-1. 1992 U.S. Oil Production* by Operator Production Rate.

IF COFR INSURANCE IS AVAILABLE AT A PRICE

Impact on Profitability

The analysis of the impact of the financial responsibility requirements on profitability goes to the heart of recent trends in exploration and production in the United States. The largest companies, producing more than 75 percent of the oil and about 65 percent of the gas, are likely to be able to meet the tests for self-insurance, assuming the MMS continues to use its present self-insurance tests. As noted in the discussion below, however, the impact of this provision on the smallest companies, the ones very unlikely to qualify under any criteria, may be severe. If they abandon offshore operations:

- Will the large companies purchase their properties?
- Given that the larger firms sold off many of these properties, what will have changed to make them attractive now?

Self-Insurance

Publicly available data were used to judge whether self-insurance would continue to be a viable and important mechanism in the marketplace. According to the Arthur Andersen Reserves Disclosures Database, which compiles published financial and operating data for 234 publicly held energy companies, some 20 to 25 companies could possibly qualify for self-insurance, leaving about 80 percent of the 139 companies operating on the offshore to seek traditional

insurance to back up their Certificates of Financial Responsibility.

This estimate is based upon the following tests:

- Of the 139 companies operating offshore according to the Energy Information Administration, the Arthur Andersen Reserves Disclosure Database includes entries for 46 of them.
- Of these 46 companies, 22 showed 1992 worldwide current assets greater than worldwide current liabilities and shareholder equity greater than the amount of required self-insurance. While the MMS "(a)(1)" test that currently exists under OCSLA specifies U.S. current assets and liabilities, the Council did not have access to regional disaggregations for current assets and liabilities. If MMS adopted a rule similar to the Coast Guard proposal for self-insurance (U.S. current assets vs. worldwide current liability), it is possible that no company would qualify. The MMS rules for the OPA self-insurance test have not yet been proposed, but the Council has recommended three alternative criteria that better reflect current financial operating norms. See Chapter Five, "Solutions."

The Arthur Andersen Database includes information only for publicly traded companies. There are several large private companies that might also meet the self-insurance criteria.

From the data available, it is impossible to estimate whether any of the companies might qualify for MMS-certified partial self-insurance based on the "assets" or "cash flow" tests. Some of the firms that appear to qualify for self-insurance in the test noted above might, given more specific and detailed data, qualify for only limited self-insurance. Likewise, some of the remaining publicly held companies and some of the private ones outside of the Arthur Andersen sample might also qualify for a limited self-insurance.

Increased Costs Due to COFRs

The Council constructed several examples of the impact of the COFR requirements on the cost of doing business in the offshore. OPA's provision that each offshore operator needs one COFR is critical. For the largest operators, the effect may appear small but is still significant. But for the smallest, it may be untenably large. Key questions remain unanswered:

- Will insurance be available? At what price?
- Will it be priced on a sliding scale depending on activity or risk levels?
- Will a *de minimis* rule be developed?

The Energy Information Administration extracted data from its Form EIA-23, "Annual Survey of Domestic Oil and Gas Reserves," by operator size. Operators were ranked by their total domestic production volume of oil and condensate, in barrels of oil per day. The results are used in the cases below. Relatively few companies produce the bulk of the oil, and to a lesser extent, gas. Conversely, on the offshore, 57 percent of the operators—small and medium-sized companies—are producing 9 percent of the gas and oil.

Case 1. Assume that insurance coverage for COFRs was available. As shown in Table 2-2, the result would be a charge of more than $1 per barrel of oil equivalent, for each $1 million of COFR expense for the smallest companies. The data for all of the 46 firms producing 1,000 barrels per day or less are aggregated into one category. The cost estimate for each operator class is based on the average production per operator.

TABLE 2-2

COST PER BARREL OF OIL EQUIVALENT BY OPERATOR CLASS FOR EACH $1 MILLION OF COFR EXPENSE*

Operator Class	No. of Operators	Oil and Gas Daily Prod.† (MBOE/D)	Production per Operator (MBOE)	Cost per BOE	Production Share (%)
> 50,000	19	2,677	72,820	0.01	71
10,001 – 50,000	18	478	9,725	0.10	13
5,001 – 10,000	22	295	4,913	0.20	8
1,001 – 5,000	34	199	2,139	0.47	5
0 – 1,000	46	115	914	1.09	4

* Operator class is based on total domestic production. All other data are for offshore production.

† 5.26 million cubic feet of wet gas per barrel.

At about $1.10 per barrel of oil equivalent, the COFR cost for the small operators would be equal to as much as half of a typical operator's entire net margin per barrel (see Table 2-5). More importantly for small operators, however, they alone would face such a charge. Larger producers, spreading the charge over greater volumes, would have a substantially diminished impact. Since prices of oil are set in world markets, no relief would come for the U.S. producers in the form of higher prices.

Gas markets present additional questions. Under OPA's definition of "oil," the Certificate of Financial Responsibility is assumed to apply to condensate producers as well as to producers of crude oil. Since gas produced in the U.S. offshore is likely to have condensate produced with it, even producers traditionally thought of as "gas only" must meet the regulatory requirement. In these examples which aggregate oil and gas production, spreading the cost of a fixed price COFR across the gas volumes dissipates the unit burden. However, only the offshore natural gas producer bears this new cost of some 18¢ per thousand cubic feet (MCF). At this level, the COFR burden is equal to one-tenth of the entire gross wellhead revenue in recent periods. Thus, the offshore, which contains some of the most prolific gas producing areas, will face a unique and burdensome new cost, a direct counter to the Administration's stated policy to encourage gas use and production.

If the MMS does not develop a *de minimis* rule, natural gas pipelines may refuse to allow producers to inject condensate into the line. The producer then must handle the condensate separately, by building a redundant pipeline to carry it, or by storing it on the platform and barging it ashore. Both of these options require significant investment and *increase* environmental and safety risk. In the absence of an alternative for condensate handling, or if the alternative is too expensive, the gas and condensate may become uneconomic to produce.

Even with the implementation of a *de minimis* rule, however, the gas produced in association with crude oil will bear the COFR burden. As shown in Table 2-3, approximately 12 percent of all offshore gas production was associated with crude oil in 1992. In California, the majority of offshore gas is produced in association with crude oil.

TABLE 2-3

PRODUCTION OF NON-ASSOCIATED AND ASSOCIATED-DISSOLVED GAS, 1992, OFFSHORE (Billion Cubic Feet)

	Non-Associated	Associated-Dissolved	Percent Associated-Dissolved
State Offshore			
California	1	9	90
Louisiana	103	25	20
Texas	71	3	4
Federal Offshore			
California	14	34	71
Louisiana	2,821	471	14
Texas	1,231	53	4
Total State	175	37	17
Total Federal	4,066	558	12
TOTAL	4,241	595	12

Thus, if the oil production is jeopardized because of the cost or availability of a COFR, the associated gas production is also jeopardized.

Re-casting Table 2-2 to spread the cost of a $1 million annual COFR premium over only the crude oil and condensate volumes demonstrates that small operators (this group includes about one-third of all offshore operators) would face an untenable burden (Table 2-4). Even the group in the 1,000 to

TABLE 2-4

COST PER BARREL OF LIQUIDS BY OPERATOR CLASS FOR EACH $1 MILLION OF COFR EXPENSE*

Operator Class	No. of Operators	Daily Production (MB/D)	Annual Production per Operator (MB)	Cost per Barrel	Production Share (%)
> 50,000	19	877	16,894	0.06	78
10,001 – 50,000	18	155	3,152	0.32	14
5,001 – 10,000	22	50	832	1.20	4
1,001 – 5,000	34	37	398	2.51	3
0 – 1,000	46	6	48	20.96	–

* Operator class is based on total domestic production. All other data are for offshore production.

5,000 barrel per day class face costs of $2.50 per barrel.

In assessing any estimate of increased operating cost, it is useful to bear in mind that the net pre-tax margin for federal offshore operations is likely to be running no higher than $3.00 per barrel currently. In state waters, operators also face severance taxes which are not offset by the lower royalty rate. The net pre-tax margin in state waters is less than $1.75 per barrel currently, as shown in Table 2-5. It should be noted that these costs do not include transportation. If the production is transported by a pipeline owned by another company, the additional cost of the COFR must also be borne.

Case 2. Assume a new insurance company is capitalized exclusively to meet the demand for COFRs. Because most of the insurance industry has stated and testified that it will be unable to provide evidence for OPA's COFRs, estimating the cost and structure of insurance is nearly impossible. This case used broad rules of thumb from the insurance industry in constructing a hypothetical insurance company. This hypothetical company does not rely on reinsurance. Its creation started with the question: "If a new insurance company were to be developed to supply COFRs, how much capital would it need, what would be the required premium income, and what would that mean as a cost per unit if allocated across offshore production volumes?"

A number of assumptions were necessary to set up this hypothetical insurance company. The central assumption is the insurance industry's rule of thumb, that the company must maintain a surplus at least equal to 10 times the maximum policy in force. If the COFR policy were for $150 million, as it would be if the MMS does not implement a risk-based COFR, the minimum surplus is $1.5 billion. Under our assumption, the minimum surplus remains the same regardless of the number of policies in force. If, for instance, large companies (which also have large production volumes) are able to self-insure, the required aggregate premium stays the same, but is spread over fewer barrels, or barrels of oil equivalent. Given the $1.5 billion required surplus, and an investor-required rate of return of 15 percent, as well as operating expenses and offsetting investment income, the required premium income could be $276 million per year. If the large companies self-insure, the companies remaining in the pool to insure from this hypothetical company would have to pay almost $3.00 per barrel of oil produced (see Table 2-6). If additional firms were to self-insure, the rate for the remainder would grow further. If the required pre-

TABLE 2-5

OFFSHORE OPERATING MARGINS
(Dollars per Barrel)

	Federal	State
Spot Price	$16.00	$16.00
Less: Royalty	2.56	2.00
Severance Tax	NA	1.92
Finding Cost	6.40	6.40
Lifting Cost	3.95	3.95
Net Before Taxes	3.09	1.73
Less: Fed. Income Tax	1.08	0.61
Net Margin	2.01	1.12

Note: Royalty assumed to be 16 percent in federal offshore, 12 percent in state offshore. Severance tax assumed to be 12 percent. Offshore finding cost and lifting cost from EIA, *Performance Profiles of Major Energy Producers* (rounded to nearest $0.05). Federal income tax rate assumed to be 35 percent. Transportation costs were not included.

TABLE 2-6

HYPOTHETICAL INSURANCE COMPANY FOR OFFSHORE COFRS

	Full Participation	Self-Insurance Assumption*
Number of Operators	139	124
Required Premium Income ($MM)	$276	$276
Cost per Platform (3,819 platforms)	$72,311	NA
Cost per BOE (Oil and Gas) Produced	$0.20	$0.63
Cost per Barrel of Oil Produced	$0.67	$2.94

* Assumes 15 majors operating offshore can self-insure; production volumes are removed from pool.

Note: Calculation is illustrative only. Assumes no reinsurance available. Assumes investors accede to OPA provisions.

mium were spread across volumes of natural gas production as well as oil production, the cost would be $0.63 per barrel of oil equivalent, or $0.10-0.12 per MCF of gas. Note that if pipelines and other distribution facilities also require COFRs, the burden is additive.

In this illustrative calculation, we have assumed that the premium will be tied to some measure of activity. Although there is no actuarial record of Gulf Coast operations to support the $150 million liability implicit in the COFR requirement, and even though the large operator requires the same evidence of financial responsibility as the small one, it may not be unreasonable to assume that an insurer would perceive that the risk of a spill is greater from multiple fields and structures than from single ones. From a practical standpoint, it is unlikely that an insurance company such as the one above could succeed without participation of the reinsurance market, and whether re-insurers will be willing to participate is yet unknown. (As noted in Chapters Three and Five, OPA presents substantial and perhaps insurmountable barriers to full insurance company support of Certificates of Financial Responsibility.)

Impact on Lease Bids

The government will also bear a likely consequence of higher costs and risks: lower lease bonus bids and fewer tracts sold. The value of a petroleum deposit is a complex function of its geologic characteristics, technology, location, and economics. This valuation is even more complex when the petroleum deposit is prospective, rather than known. A high degree of uncertainty is associated with each of the factors that determine a prospect's value. When estimating the dollar amount that they are willing to bid for a particular lease, operators must consider the expected value of the lease. This expected value is a function of the potential net present value of the petroleum deposit that may exist, the probability that hydrocarbons do exist on the lease, and the expected costs of developing that resource.

The new financial responsibility provisions serve to increase both the costs and economic risks of offshore operation. These increases will lower an operator's expected value associated with a lease, and consequently, the bonus bid that the operator is willing to pay. In addition to lower lease bonuses, public sector revenues will be lowered by the royalties and taxes that would have been received on production that does not occur due to the increased costs of compliance with OPA.

The new financial responsibility will also place a disproportionately heavy burden on small and mid-size operators which will have greater difficulty

bearing the added costs of insurance. This will allow fewer and fewer of these operators to bid on offshore leases, thereby reducing the competition for these leases. It should be noted that small and mid-size operators have become some of the most active new participants in offshore activities in recent years as more of the larger companies downsize their U.S. operations.

Impact on Threshold Field Size

Determinations about the development of any new oil or gas discoveries are based on the minimum field size that could be developed economically. Minimum economic field size is a function of the volume of reserves, oil and gas prices, costs of development (development wells), infrastructure costs (structure fabrication and installation, pipeline installation, etc.), and operating costs. These factors typically are used to generate expected revenue and expenditure streams, which are discounted to determine the expected net present value of the investment. Due to the high risks of offshore operation, most companies also consider a "risk premium" or application of a probability of success in the decision-making process.

The added costs of insurance for compliance with the OPA provisions would affect the costs of new field development at several stages:

- Increased cost of rigs for exploratory and development drilling due to higher insurance costs paid by the drilling company for its rigs
- Increased operating costs due to the required insurance on the structure and other facilities
- Increased cost of working and investment capital
- Increased costs for other offshore services used (pipelines, service vessels, etc.).

The effect of these cost increases will be to increase the minimum economic field size because a bigger discovery will be required to generate the production and revenue that is needed to cover the incremental costs. The increased risk premium due to the added uncertainty of future costs for insurance also contributes to raising the minimum size of field that can be developed economically.

As a result of this increase in the minimum economic field size, some of the offshore resources that would have been developed will become uneconomic, lowering domestic production, industry employment, and public sector revenues (taxes and royalties).

Impact on Rates of Abandonment

For currently producing fields, the incremental operating costs allocated to the field will raise the field's economic limit (the point at which the value of production is equal to the costs of production). This means that lower productivity fields will reach their economic limit sooner. Some fields will no longer be economic to produce when the incremental costs associated with demonstration of financial responsibility are included.

Premature abandonment of the nation's petroleum resources, both on- and offshore, during the current period of low prices is already a serious concern to the country. Most of the oil and gas left behind in a reservoir after a field is abandoned will never be produced, and is lost for all practical purposes.

OPA financial responsibility provisions will have an immediate impact on current production, forcing abandonment of less productive fields. Over the longer term, the rate and volume of resource abandonments will increase as fields reach economic limit sooner, leading to their accelerated abandon-

ment. Increased field abandonments translate into more oil and gas being left unproduced in known reservoirs. The loss of this oil and gas lowers future levels of domestic production, public sector revenues, and industry employment. Lost domestic production will lead to oil importation, increasing the balance of payment deficit, exposure to tanker spills, and reliance on foreign producers.

OFFSHORE FACILITIES POSE MINIMAL RISK OF A CATASTROPHIC SPILL

Offshore exploration and production facilities present a very small risk of accidental oil spills of any significant size. Claims have been made that spills from offshore facilities may be infrequent, but can be catastrophic. Supporting this claim was the world's most expensive oil spill, the Mexican IXTOC I blowout in 1979, which released 20 times as much oil as the *Exxon Valdez*. The unique geology of Mexico's Gulf of Campeche, however, is not repeated on the U.S. offshore. Even under operating practices used in Mexico at the time (which excluded routine safeguards used in the U.S.), the reservoir pressure on the U.S. offshore would not sustain a flow of IXTOC proportions. **In fact, according to the MMS, since 1979, the 69 blowouts on the federal offshore resulted in a total of only 183 barrels of oil spilled.** During that time, there were almost 13,000 well starts in the OCS.

Offshore facilities incorporate numerous safety systems and design features, such as blowout preventers, subsurface safety valves, and automated "shut-in" systems, that virtually eliminate the potential for a catastrophic spill. Standard operations and systems are designed to shut in whole areas and are backed up by sophisticated, automated systems that can perform most emergency functions without human operators even being present. All offshore facilities have in place contingency plans, training programs, and emergency response drills and exercises, bolstered by skilled personnel and specialized equipment, both on staff and under contract, to ensure that an operator can respond to a worst case discharge. (The National Petroleum Council's proposal for a risk-based financial responsibility requirement begins with the worst case discharge. See Chapter Five.)

As noted, the nature of oil production in the offshore region itself helps minimize the risk of a significant oil spill. Ninety percent of the 4,282 oil wells in the Gulf of Mexico require artificial lift; that is, the natural reservoir pressure is not sufficient to push the oil to the surface. Therefore, the wells are not free flowing and must employ some mechanical means to produce oil. As a result, if the production line were severed or somehow all safety systems failed, oil would not escape from the well into the environment. These wells are simply not physically capable of producing a continuous, unchecked oil spill of any significance. Many facilities do not store oil and most produce directly into pipelines. Over 98 percent of the production from the OCS is transported by pipeline.

The effectiveness of these safety procedures and spill prevention systems was demonstrated recently during the most destructive storm of the century. In the summer of 1992, Hurricane Andrew churned through the Gulf of Mexico and some of the most heavily concentrated offshore oil and natural gas fields on the globe. More than 700 structures were directly in the path of this "hundred year" storm. Twenty-two, mostly older, facilities were felled and 65 others sustained some degree of significant damage. Several oil and gas pipelines were ruptured. However, the

MMS reported that very little oil or condensate was spilled from these facilities and no measurable oil reached the Gulf's shores.

Various environmental factors change the assessment of actual risk for offshore oil and gas facilities and their insurers. It should be noted that many of these factors have been addressed in stipulations imposed on lessees to control the location of offshore oil and gas activities, to guide operations, or to generate site-specific information for management decisions. The extent to which these factors are addressed and the manner in which they are mitigated should be considered in the assessment of risk for determining the cost of obtaining COFRs. These factors may include:

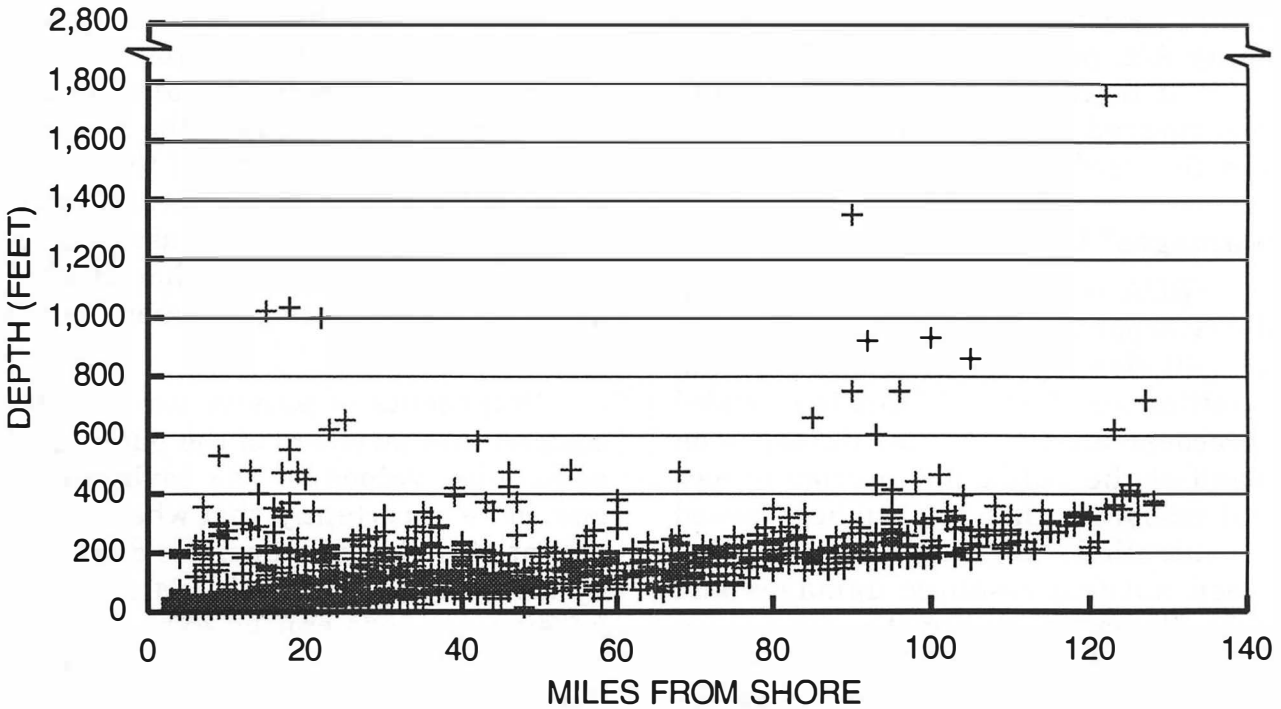
- Proximity to archeological and cultural resources, including historic shipwrecks
- Proximity to rare and uncommon ecosystems, including coral reefs and critical habitat for endangered and threatened species
- Proximity to known offshore geohazard areas
- The availability of down-hole control devices
- Proximity to major commercial fishing grounds and the design of wellheads or other structures not to snag fishing nets, and the extent to which offshore facility operations are coordinated with nearby fishing operations
- The availability of oil spill containment and cleanup equipment and trained personnel
- The onshore processing of offshore oil and gas, especially when the oil and gas is transported to shore by pipeline instead of by tanker
- Proximity to established shipping lanes and areas designated under the national marine sanctuary program
- The presence of wind patterns and ocean currents that would take spilled oil away from coastal and marine resources of significance
- Proximity to known ocean storm patterns
- The manner in which drilling muds, cuttings, and produced waters are contained and disposed.

The fate of discharged oil is related to the water depth and the distance from shore, among other factors. Figure 2-2, drawn from Dwight's Platform Database, plots the two as a scatter. The data include only those platforms producing oil and/or condensate in the Gulf of Mexico, approximately 3,800 structures. The water depth ranges from 2,860 feet at Garden Banks to 9 feet in operations 3 miles offshore. The maximum distance from shore recorded was 125-130 miles. Generally, the platforms closer to shore have lower water depths, but there are some exceptions: some of the Mississippi Canyon developments, approximately 20 miles offshore, have platforms in water depths of about 1,000 feet.

NATURAL RESOURCE DAMAGE ASSESSMENT

Introduction/Background

OPA has created a new operating environment. Companies have undertaken top-to-bottom operations audits that emphasize spill prevention and containment through personnel training and equipment maintenance. OPA has also created a new liability environment. Obviously, preventing a spill is the best way of living with OPA's liability scheme. But the law's Natural Resource Damage Assessment (NRDA) is beyond



*Excludes platforms that do not produce oil and/or condensate.

Source: Dwight's Energydata, Inc., Oklahoma City, Oklahoma.

Figure 2-2. Gulf of Mexico OCS Platforms*–Depth vs. Distance from Shore.

the companies' control. NRDA is intended to recover environmental damages on behalf of the public. Unlike cleanup costs, or even payments for lost revenue due to a spill, which can be evaluated before or after an incident against operating experience, regional economic activity and a variety of other measures, NRDA as currently evolving is both unpredictable and large, potentially requiring multibillion dollar payments, well beyond available insurance coverage. Fundamentally, then, even the largest companies could be risking their continued existence every day. Thus, posting evidence of financial responsibility is only the ante for firms operating under OPA. NRDA, unless properly constrained, exposes companies to unpredictable and potentially insurmountable liabilities that arise not from restoring an injured environment but from a desire to compensate the public monetarily for their concern about the environmental consequences of a spill. The pivotal importance of NRDA to the continued financial viability of such companies should, therefore, be well understood.

OPA charges federal, state, tribal, and foreign trustees with evaluating natural resource damages incurred in OPA-covered oil spills, and charges the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce with writing and implementing regulations to assess them. Of particular concern is the inclusion of "passive use" (also called "nonuse") damages measured by "Contingent Valuation Methodology" (CVM, or CV in some references). NOAA's proposed regulations, published on January 7, 1994, would authorize inclusion of passive-use damages measured by CVM, as would the Interior Department's proposed regulations under the Comprehensive Environ-

mental Response, Compensation and Liability Act, published in May 1994 (the latter, if finalized first, would apply to OPA-covered spills until NOAA's rules were finalized).

"Damages" Under OPA

NRDA is compensatory damages liability separate and apart from liability for spill cleanup and civil and criminal penalties and fines. NRDA is intended to recover environmental damages on behalf of the public for injuries to natural resources that are publicly owned or controlled. OPA distinguishes between natural resource damages and other "damages" to private, commercial entities. NRDA thus does not cover individual losses, damages to private property, or lost revenues to governments, many of which are already compensable under OPA as third-party claims. Rather, OPA's NRDA provisions empower trustees of appropriate governments (federal, state, Indian tribes, and foreign governments) to assess and collect natural resource damages and implement plans to restore or replace those resources. The components of NRDA liability under OPA are: (1) the costs of necessary environmental restoration; (2) the reasonable costs of assessing damages; and (3) "the diminution in value of those natural resources pending restoration."[1]

Economists have theorized that the third component above, "diminution in value," has two subcategories: actual *lost use values* (e.g., the losses to members of the public whose *actual recreational* use of public resources is impaired [hiking, birdwatching, recreational fishing, etc.]) and *lost nonuse values*. Nonuse value (passive-use value) has been described as the public's benefit deriving from the knowledge of: (1) the mere *existence* of a natural resource, separate from any actual uses such as recreational activities or resource extraction that the resource might invite and support; (2) the option to use the resource in the future, again quite apart from any actual use; and (3) the bequest value, i.e., the value attached to the ability of future generations to use the resource.

Proponents of passive-use liability contend that members of the public hold passive-use values for the environment and, more importantly, that when a component of that environment is disrupted by an oil spill, the public's sense of passive-use loss can be expressed in monetary terms. They then conclude that the public should be compensated by the responsible party for such losses.

A major difficulty, and flaw, in implementing this premise arises from assuming that the public value for the environment (and for specific resources) is an economic one that is measurable and compensable in dollar terms. While the public places a high value on environmental quality, many believe that such ethical and aesthetic values are, in practical terms, not properly characterized as economic in nature.

Contingent Valuation Methodology

Another major difficulty, and flaw, in including passive-use values within NRDA is the lack of any method to reliably quantify such values. Economists employ various well-established methods to quantify actual use losses. Estimating *passive-use* losses, however, is a subject of considerable controversy. NOAA has proposed the use of CVM to monetize the value of natural resources deemed to have intrinsic (passive-use) value—clean air, clean water, wildlife, etc. CVM takes survey responses to hypothetical questions to calculate respondents' "willingness to pay" to prevent or

[1] OPA 1006(d)(1)(B), 33 U.S.C. 2706(d)(1)(B).

remediate pollution. Respondents to CVM surveys do not actually have to pay the amounts they say they would be willing to pay. Answers are then multiplied by the assumed affected population to arrive at the total amount to be paid. NOAA would give trustees discretion to determine the relevant population, which could be postulated to be the entire United States. New Yorkers, Chicagoans, and Houstonians, for instance, might all be asked how much they would be willing to pay to prevent a spill off the California coast.

CVM as a measure for passive-use losses in conjunction with environmental liability is still in the experimental stage. It has engendered a seven-year debate among natural resource economists, regulators, regulated industry, and the courts. The controversy surrounding the use of CVM prompted NOAA to appoint a panel including Nobel laureate economists to explore the issue. As the Panel wrote in its final report:

> The contingent valuation method has been criticized for many reasons and the Panel believes that a number of these criticisms are particularly compelling. Before identifying and discussing these problems, however, it is worth pointing out that they all take on added importance in light of the impossibility of validating externally the results of the CV studies.
>
> . . .
>
> Of the other problems arising in CV studies, the following are of most concern to the Panel: (i) the contingent valuation method can produce results that appear to be inconsistent with assumptions of rational choice; (ii) responses to CV surveys sometimes seem implausibly large in view of the many programs for which individuals might be asked to contribute and the existence of both public and private goods that might be substitutes for the resource(s) in question; (iii) relatively few previous applications of the CV method have reminded respondents forcefully of the budget constraints under which all must operate; (iv) it is difficult in CV surveys to provide adequate information to respondents about the policy or program for which values are being elicited and to be sure they have absorbed and accepted this information as the basis for their responses; (v) in generating aggregate estimates using the CV technique, it is sometimes difficult determining the 'extent of the market;' and (vi) respondents in CV surveys may actually be expressing feeling about public spiritedness or the 'warm glow' of giving, rather than actual willingness to pay for the program in question.[2]

Examples of each of these concerns abound in the literature. The first of the Panel's concerns (inconsistency with rational choice) has been the focus of numerous studies. CV results that show the same willingness to pay regardless of quantity, for instance, could be deemed inconsistent. Again, quoting the Panel:

> Desvousges' result is very striking; the average willingness to pay to take measures to prevent 2,000 migratory birds (not endangered species) from dying in oil-filled ponds was as great as that for preventing

[2] Kenneth Arrow, et al., *Report of the NOAA Panel on Contingent Valuation*, January 11, 1993.

20,000 or 200,000 birds from dying. Diminishing marginal willingness to pay for additional protection could be expected to result in some drop. But a drop to zero, especially when the willingness to pay for the first 2,000 birds is certainly not trivial, is hard to explain as the expression of a consistent, rational set of choices.[3]

William H. Desvousges, author of the study referenced in the Panel Report and the economist who developed the technical justification for the Department of Interior's first use of CVM for measuring losses under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or Superfund), concluded in recent comments to the Department of Interior: ". . . CV estimates of passive-use values are not sufficiently reliable for use now in NRDAs."[4]

Among the several concerns cited by Dr. Desvousges and his colleagues (in addition to the above-referenced "embedding" problem addressed by the Panel) is that "willingness to pay" appears unduly sensitive to the framing of the question and other elements of survey design. Many have voiced a similar problem with CVM. For example, Dr. Walter J. Mead examined a series of studies in 1992 among which were three CVM examinations of "willingness to pay" for visibility improvements in the Grand Canyon, prepared in conjunction with a decision on air quality expenditures to be imposed on the Navajo Generating Station. The estimates in these studies ranged from **zero to $10.4 billion** (see box entitled "The *Grand Canyon* Studies").

The *Grand Canyon* Studies: Is the damage zero or is it $10.4 billion?

One study found average annual "willingness to pay" for visibility improvements in the Grand Canyon to be $95 per household per year. Another study found that visibility improvement in the Grand Canyon is worth between $1.30 and $3.60 per household per year. A third study found that comparable visibility improvements in the Grand Canyon are worth between zero and $0.50 per household per year. The differences are the result of different approaches to survey design and data analysis. The results imply that the discounted present value of visibility improvements near the Grand Canyon might range from zero to $10.39 billion. Recall that these reported values are for slight visibility improvements at the Grand Canyon for just a few days each winter. [W. J. Mead, *Review and Analysis of Recent State of the Art Contingent Valuation Studies,* April 1992.]

A literature of CVM studies on oil spills is only beginning to be accumulated, because OPA was passed only in 1990. However, a barge spill in Washington state has been the subject of a CVM study. After paying $3.5 million in cleanup costs and damages, the barge company was presented with a CVM-based NRDA claim for $150 million. This study of the barge *Nestucca* spill illustrates that CVM seems incapable of distinguishing between unique resources with irreversible damage and temporary injury to common resources. (See box entitled "The *Nestucca* Spill.") Yet a substantial increase in the use of CVM to measure passive-use values can be expected if the final rules authorize such use.

A key concern of the NOAA Panel members and others about CVM is that

[3] Kenneth Arrow, et al., *Report of the NOAA Panel on Contingent Valuation,* January 11, 1993.

[4] W. H. Desvousges, et al., *Comments on the Department of Interior's Natural Resource Damage Assessment Proposed Rule,* September 1993, p. 1.

The *Nestucca* Spill: $3.5 Million Becomes $150 Million

In the case of a spill from the barge *Nestucca* off Washington state, the barge towing company settled resource damage claims with the state of Washington and the federal government for $3.5 million, but a subsequent CVM study supported a British Columbia government claim for $150 million, almost 50 times more.

It was estimated that some 40,000 *common* seabirds were killed, although less than one-third of this number were actually observed. The regional population of the affected birds was estimated at 3-4 million, and expected to recover fully in 5 to 10 years. Whether the public actually suffered a loss, particularly a quantifiable one, under these circumstances appears debatable: people who liked to see gulls at the seashore could still do so, and people who liked to know that gulls and other seabirds were soaring offshore could still be assured they were. Yet the range of "willingness to pay" was estimated at approximately $40-140 per year per household in the nearby British Columbia area to prevent a similar spill in the future.

respondents have no basis to develop and express an appropriate answer. They have no expertise or experience to evaluate how much a hypothetical program should cost, or whether damages are accurately characterized in the CV question framework, or how to translate their appreciation of the existence of certain natural resources into dollars and cents. The result is that the responses reflect neither "willingness to pay" nor value. A variety of studies have been conducted to explore the underlying judgment process in respondents' "willingness to pay" answers. In one of these studies, by Professors Payne and Schkade, respondents evinced no reasoned thought process: "Um, I have no idea. I guess $500 sounds like a nice round number," and "There was no thought really put into it. I think the $100 figure just popped into my head and that's why I put it down, really."[5]

Many observers of CV studies, including NOAA's Panel, agree that because the "willingness to pay commitment" from respondents is solely hypothetical, the results are inflated: "The Panel is persuaded that hypothetical markets tend to overstate willingness to pay for private as well as public goods. The same bias must be expected to occur in CV studies."[6]

For this reason and others, the Panel put significant qualifications on its endorsement of the use of CVM, prescribing a set of structural guidelines, and specifying that CV studies should only be a "starting point" for adjudicating NRDAs. It states: ". . . under th[e specified] conditions . . . , CV studies can convey useful information . . . [and] can produce estimates reliable enough to be the starting point of a judicial process of damage assessment . . . . The phrase 'be the starting point' is meant to emphasize that the Panel does not suggest that CV estimates can be taken as automatically defining the range of compensable damages within narrow limits."[7] Perhaps most importantly, the Panel stressed that, to date, none of the available CV studies had adequately addressed all of the reliability-enhancement criteria recommended by the Panel;[8] thus no report to date was, in the Panel's view, reliable enough even to be the "starting point" for an inquiry into inclusion of passive-use values in NRDA. The inclusion of passive-use values was upheld by the D.C. Court of Appeals (*Ohio et al v. the Department of the Interior*, 880 F.2nd 432, 1989), as

[5] David A. Schkade & John W. Payne, "Where do the Numbers Come From? How People Respond to Contingent Valuation Questions," *Contingent Valuation – A Critical Assessment*, J. A. Hausman (Editor), Elsevier Science Publishers, 1993.

[6] Report of the NOAA Panel, op. cit.

[7] Ibid.

[8] Ibid.

long as those values could be reliably measured.

Conclusions

Final NRDA regulations should not include liability for passive-use value losses as measured by CVM, a methodology that has yet to measure passive-use values reliably and which may never do so, particularly if such values are not really economic preferences. Liability for passive-use values under federal rules would be highly speculative and would pose a punitive, arbitrary and economically wasteful burden to many companies, introducing new and unpredictable (but potentially ruinous multi-billion dollar) risks for company operations. Moreover, it is highly inappropriate for federal agencies to authorize CVM under conditions which they hope (but cannot demonstrate) will produce reliable results; doing so can only result in another high transactional cost and lengthy set of disputes (without achieving the OPA objective of timely and effective restoration of injured natural resources), much like the Superfund remediation issue which the government and industry have taken such pains to address and resolve in this session of Congress.

If CVM is used, final NRDA regulations should establish a rigorous and comprehensive set of reliability-enhancing criteria, including but not limited to the NOAA Panel's conditions and restrictions. The currently proposed rules, despite their appearance, would establish few such standards, and indeed ignore many of the Panel's recommendations. While a lack of confidence in CVM has led NOAA to propose applying a 50 percent calibration factor to CVM estimates of passive-use values, such calibration does not address the fundamentally flawed process represented by CVM estimates of passive-use values, and is woefully inadequate to alleviate the potentially disastrous effects of such assessments.

CHAPTER THREE

INSURANCE AND FINANCIAL COMMUNITIES CONSENSUS AND ISSUES

INSURANCE

Conventional Insurance Solutions to Satisfy Financial Responsibility Requirements

The use of insurance as evidence of financial responsibility for offshore facility operators is specifically provided for in Section 1016 of OPA. Since OPA's enactment in 1990, insurers have indicated their unwillingness to provide such evidence for vessel owners and offshore facility operators if they will thus be guarantors. The issues surrounding insurers as guarantors are not new (Outer Continental Shelf Lands Act of 1978), but have been magnified by the increased limits of liability and more exacting requirements under OPA. This section will discuss the basis of insurers' concerns and the potential increased costs to facility operators.

Background Data

- Seepage and pollution insurance for owners/lessees of offshore facilities as defined in OPA is largely available from Lloyd's and Bermuda-based facility underwriters. Limited capacity may be available from U.S., Scandinavian, and European insurers. These underwriters constitute what may generically be referred to as the commercial insurance market. While this market is able and willing to provide insurance coverage for OPA liabilities, it is not prepared to provide evidence of financial responsibility under OPA, which under current thinking may place its providers in the position of guarantors.

- An offshore Bermuda-based company known as Oil Insurance Limited (OIL) exists to insure oil company-related risks. OIL is a consortium of some 45 to 50 oil companies initially formed to provide its founding members with an alternative to the commercial market for seepage and pollution-related insurances. OIL still provides this coverage today.

- It is necessary to distinguish the commercial insurance market from Mutual Protection and Indemnity (P&I) Clubs, which only insure vessels. P&I Clubs do not insure offshore facilities as defined by OPA.

- Lloyd's underwriters do not object in principle to the notion of providing

oil pollution insurance for assureds operating in U.S. waters.

- There is sufficient capacity in Lloyd's alone to meet the strict monetary limits up to $150 million of financial responsibility imposed by OPA on oil and gas exploration and production offshore facilities. There is some uncertainty as to whether there is adequate capacity to cover the potential number of facilities which could be included under the expanded definition of "offshore facility" being considered by the MMS.

The job of the underwriter is to successfully identify acceptable risk, thus differentiating the insurable from the uninsurable. OPA presents underwriters with what they perceive as infinite and undefined exposure to loss. With little or no ability to analyze and underwrite the exposure, and with the multitude of avenues by which the underwriter may be exposed to more than the stated policy limit, the commercial insurance markets have little choice but to refuse to provide evidence of financial responsibility if they are deemed to be OPA guarantors.

Underwriters' Concerns

- Insurers considered as guarantors providing evidence of financial responsibility under OPA are open to direct suit by any third parties. An insurer is in no position to defend the underlying conduct of the responsible party, because it has no assured access to the facts. Yet there is no requirement in OPA that the claimant first sue or even attempt to sue the responsible party.

  Prior to OPA, offshore facilities were subject to the Outer Continental Shelf Lands Act. For the first ten years after the OCSLA financial responsibility provisions were passed, they were not enforced. The Coast Guard did not require any facility owner/operator to comply because no insurers (or any other unrelated party) could be found willing to provide evidence of financial responsibility under OCSLA. This is because OCSLA introduced for the first time two features included in OPA:

  – guarantor status for those who provide evidence of financial responsibility, and

  – third-party direct action.

  OCSLA was a quantum leap beyond the FWPCA, which applied (before OPA) only to vessels. FWPCA required only that the insurer certify to the federal government that appropriate insurance was in place and would not be canceled without prior notice and that the insurer agreed to respond directly to the federal government for its cleanup and removal costs.

  OCSLA allowed third parties, not just the government, to sue the insurer who provided evidence of financial responsibility. The insurer for the first time was considered a "guarantor" and was required to forego virtually all policy defenses which it would have had if the responsible party sought to collect the claim under the policy. In 1988, Congress finally clarified that this waiver of defenses did not mean that an insurer, at least, could not assert as a defense the policy limits that had been certified. Even after this 1988 clarification, the insurers did not consider themselves guarantors.

  The new uncertainties imposed by OPA therefore go beyond what insurers are reasonably able to assume. OPA may open the door even more widely than OCSLA to direct

action suits by third-party claimants. Suits may be brought in federal or state courts. There is no common forum established to ensure preservation of policy limits. Any impacted party (whether impacted directly or indirectly) may initiate action.

- The reference in OPA to Natural Resource Damage Assessment has potentially catastrophic economic consequences for insurers (if considered as guarantors). Following the Federal Appeals Court decision, *Ohio et al. v. the U.S. Department of the Interior*, OPA (in Section 1006[e]) may open the door to the use of Contingent Valuation natural resource damage assessments resulting from an event falling under OPA regulations. Thus, over and above the potential exposure for damage to natural resources, the responsible parties (and their guarantors) may be liable for an additional amount determined by the contingent valuation process for assessing passive-use indirect damages, although this is by no means mandated by the *Ohio* decision or OPA.

- Underwriters (if considered as guarantors) are also not comfortable with the assurances that they would only be exposed up to the financial responsibility level on any one occurrence. Direct action, the lack of normal policy defenses, and OPA's non-preemption of state liability laws create myriad ways and means for underwriters to become the focal point for several separate causes of action. There is no single mechanism or venue established by OPA to consolidate actions and validate damage claims.

- For insurers (in their capacity as potential guarantors), OPA is more problematic than OCSLA for the following reasons:

  – OPA has expanded the types of damages that third parties may recover directly from a guarantor (or responsible party), and, underwriters believe, goes beyond what was commonly assumed to be implied in OCSLA (or common law). One of the pivotal differences is the allowance of indirect damages under OPA.

  – A direct "advertising" and claims-handling responsibility has been imposed on guarantors under Section 1014(b) which did not exist under OCSLA or any other statute.

  – Under OCSLA and FWPCA, the underwriters' view had been that federal law would be considered paramount (even if not expressly preemptive). OPA Section 1018 explicitly preserves state law, setting up possible conflicting standards by which guarantor conduct could be judged. Moreover, Section 1017(c) permits state courts to exercise jurisdiction over OPA claims actions. The potential that different state and federal courts could define the "incident" in different ways so as to impose multiple limits against the guarantor is greatly increased by OPA's non-preemption and its failure to provide a single mechanism to channel all claims for unified settlement.

What Are the Costs?

Insurance costs for OPA-related liabilities for offshore facilities cannot be specifically delineated. Until the risk can be assessed, underwriters have been unwilling to discuss the issue. For illustrative purposes (to highlight the fact that even if the insurance/guarantor

issue can be resolved, there are still additional costs the industry will have to incur), estimated insurance costs have been conceptually developed for various sized operators in state and federal waters.

The insurance industry will not evidence financial responsibility under OPA unless they are not held to be guarantors. If, however, the MMS decides to allow insurance be used as an asset, thus qualifying many independent operators as self-insureds, there are still additional costs that would be incurred by the industry.

- All exploration and production companies operating in the U.S. Gulf Coast waters purchase excess liability insurance coverage. Smaller independent operators typically purchase from $10 million to $100 million of coverage for any one occurrence. Some degree of seepage and pollution protection is almost invariably included within the scope of coverage.
- The excess liability policy is the logical forum to handle seepage and pollution exposures. There are certain impediments that require resolutions prior to ensuring the viability of the excess liability approach. Assuming the MMS can overcome the technical issues, the issue then becomes one of cost. There will be an increased cost to responsible parties that must purchase $150 million in policy limits. This increased cost will directly impact the smaller independent operators. Bearing the finite commodity theory in mind, underwriters will demand a minimum premium for the commitment of their capacity. Thus, the independent operator who heretofore purchased $10 million in excess liability protection and who now must purchase a $150 million limit will be faced with a minimum premium that may seem hardly commensurate with the perceived risk, but that reflects the lowest premium level for which the underwriter is willing to commit his capital.

  For instance, for asset calculation purposes, the MMS would have to acknowledge that aggregate policy limits are not exclusive to OPA and could be eroded by other events.

Nonconventional Insurance Solutions to Satisfy Financial Responsibility Requirements—Special Purpose Entities

Several new insurance facilities have been under development to issue insurance policies to vessel owners solely for certificates of financial responsibility. These special purpose entities, along with at least one proposal to provide surety bonds to creditworthy firms, are by design acceding to the Coast Guard's interpretation of guarantor status. By design, they have also limited their exposure to direct actions claims: the policy's face amount, for instance, will be equal only to the required level of financial responsibility.

The special purpose entities have been awaiting the recent issuance of the Coast Guard's COFR regulations. It will become apparent in the coming months whether these newly formed facilities can induce the reinsurance market to participate and overall, whether they will be viable alternatives to more conventional insurance.

Even if these new special purpose entities become important providers of financial responsibility for vessel owners, however, it is not automatic that an analogous commercial facility could be established for the much smaller market of offshore operators. In any case, such new facilities will be providing du-

plicative insurance coverage. Vessels, for instance, still need to purchase P&I Club cover for pollution incidents that occur outside the United States, and offshore operators would still need to purchase liability insurance for non-OPA incidents. Thus, the new insurance will present an incremental cost. The level of the cost and whether it would burden production intolerably, remains to be seen.

Surety Bonds

Surety bonds have been deemed to be another acceptable method for evidencing financial responsibility. In fact, one insurance broker has announced a new consortium of bonding companies that will provide vessel COFRs under Coast Guard rules. A few comments are in order:

- Surety bonds are not insurance, but are promises to pay specified dollar amounts. The surety company issuing the bond accepts no risk and will not agree to issue a bond unless it is certain of the responsible party's ability to pay the full value of the bond amount.
- Thus, the companies with the greatest financial strength are the target market for surety bonds, but the weaker companies will present the greatest demand for them. The cost of the bond itself may range from $1.5 million to $15 million per bond, based on the surety company's evaluation of each operator's risk.
- The cost to the operator seeking the bond is not only the premium but the lost opportunity cost from capital required for collateral requirements. Therefore, less capital is available to the responsible party for use in exploration and production activities that might otherwise be undertaken.

Letters of Credit or Third-Party Guarantee

The Council is not aware of any letter of credit or third-party guarantees arranged to comply with the Outer Continental Shelf Lands Act. Economically viable sources of funds were never developed.

OPA's $150 million requirement is more than four times OCSLA's financial responsibility level. It is highly unlikely that cost-efficient sources of funds will become available to the petroleum industry to satisfy OPA's financial responsibility requirement when such funds are unavailable under OCSLA's lower required amounts.

As described in detail in the following section, financial institutions are wary of the liabilities imposed on the guarantor. The perceived risks involved are likely to make the U.S. banking community an unwilling participant in the financial responsibility process.

FINANCIAL INSTITUTIONS

Background

This section explores the potential impacts that the MMS interpretation of financial responsibility under OPA will have on the financial community. Of significant note is whether OPA will heighten the perception within financial markets of instability in the energy area. Such a perception would cause reductions in credit and capital availability, increases in the cost of money, and other immediate impacts not intended by the legislation.

Capital and credit at affordable levels are essential to energy industry growth; domestic industry growth is required if oil import levels are to be contained, if natural gas is to become the "fuel of the future," and if the environmental agenda is to be achieved. Availability of capital to any industry is

inexorably linked to the level of perceived risk inherent to the investment versus its economic return. Each capital provider, therefore, must balance assumed risk with the expectation of appropriate economic return. Providers, however, have generally not yet figured the broad MMS interpretation of OPA into their risk/reward equation.

Market efficiency has spawned a healthy process whereby new investment vehicles arise to meet the needs of many types of corporate structures and thus many different risk scenarios. The single constant in this process is that cash flow becomes the basis for measurement of the risk/reward scenario. It stands to reason, therefore, that any element that disturbs the accurate measurement, or predictability, of current or future cash flow alters the investors' or lenders' view of an industry's attractiveness.

The U.S. energy industry has witnessed this immutable facet of economics over the last decade due to commodity price volatility and now due to higher levels of perceived risk attributable to potential U.S. environmental liability. As an example, worldwide oil and gas loans, as reported by *Petroleum Economist,* totaled $63.6 billion in 1984 but fell to $25.2 billion by 1987. Loan providers reacted to the risk attributable to commodity price volatility by restricting credit. And they did so in a rapid, efficient, and market-driven manner, as did equity investors and other lenders of all types. It now appears that providers of capital have adjusted to commodity price volatility and to current levels of environmental exposure but have not fully grasped the potential, much less immediate, impact of the MMS interpretation of financial responsibility requirements under OPA. It is safe to assume, as in previous periods of incalculable risk levels, that capital providers may retrench rapidly once the ability to measure future cash flow becomes clouded. This appears to be the most significant possibility that the MMS interpretation of financial responsibility requirements under OPA brings to bear on the financial community.

Simply put, if risk cannot be accurately measured, if liability is assumed to be limitless or if unknown and potentially large expense levels are necessary to meet financial responsibility requirements, then predictability of cash flow becomes difficult, if not impossible. Capital and credit providers, under this framework, may therefore see energy production, exploration, storage and transportation as undesirable areas of investment and may seek other market opportunity.

Competition for a scarce resource such as capital may leave less available for the energy industry in the future and at a much higher cost if OPA financial responsibility requirements are broadly interpreted. Additionally, an immediate impact may be felt as debt and equity markets readdress asset values of existing portfolios in light of the increased liability possibilities and broad MMS interpretation of "offshore facility." This could cause acceleration of debt, restriction of previously available credit, and exercise of remedies to mitigate risk exposure. For the financial industry, OPA is therefore not simply a future possibility, but a current reality. Its impact will begin to be felt now. And this comes at a time when industry expansion needs are increasing the call for capital and credit, and financial providers have responded to low interest rates, more stable oil prices, and higher gas prices with a more positive view of energy.

Major Impacts

The capital underpinnings of the industry are difficult to calculate due to the breadth of capital sources available

and the lack of consolidation within the energy finance universe. In general, the energy industry is now globalized in terms of activity and sources of capital. Large to medium sized U.S. corporations have traditionally self-financed from cash flow but are now focusing on operations that outstrip this capability. Thus, many are going directly to commercial paper and equity markets. Smaller companies have traditionally combined self-financing with bank borrowings. Under OPA, these "small cap companies" will likely experience erosion of capital availability as markets shy away from intolerable liability exposure.

It is well-documented that the energy industry continues to restructure. The process of handing off marginal economic fields to small, efficient operators is the backbone of the independent exploration and production sector. Bank financing, gas purchaser prepayments, venture capital, and other secured debt transactions and equity arrangements have allowed larger companies to monetize those marginal assets through divestiture to independents as they focus on frontier opportunity. Financiers have been willing to value the subject collateral oil and gas properties and lend against, or invest in, those properties by carefully assessing the sufficiency of projected cash flow from those properties to service debt repayment needs or meet anticipated returns. To interject unknown levels of cost or liability into this valuation process will limit acquisition related financings.

Failure to replace reserves implies self-liquidation in the oil and gas industry. Under strict interpretation of financial responsibility requirements, both cash flow and capital availability will be reduced. Independents' ranks will continue to thin due to self-liquidation of this industry sector. Service and supply companies will be faced with less activity. The capital providers now supporting these segments will additionally lose a valuable source of loan and investment opportunity.

Those who provide capital in any form to the energy industries will begin to view OPA negatively under the MMS's financial responsibility interpretation. This will translate to reduced capital availability at higher costs. The impact will be felt most by smaller companies unable to self-insure to meet financial responsibility requirements. These companies will pay more, where available remedies exist, to obtain a Certificate of Financial Responsibility. The ramifications do not stop with the small producer ranks, however. Less capital implies less economic activity, which translates to immediate impact on service suppliers, drillers, transportation companies, etc., and secondary impacts in housing and retail markets, due to fewer jobs and thus fewer, lower paychecks. A ripple effect through the financial markets and consumer segments can be anticipated.

Of particular concern to financial institutions and investors is MMS's interpretation of the definitions of "responsible party" and "navigable water." For financial institutions and investors involved in providing capital and credit to the oil production and transportation industry, a broad interpretation of these terms could result in lenders and investors being subject to liability for all damages and removal costs from an oil discharge. This is particularly true in the case of an issuer of a letter of credit. The issuing entity may be viewed as a "guarantor" and thus subject to "responsible party" liability.

Even lenders and/or investors that do not participate in the day-to-day management or operation of a vessel or facility, or in the production or transportation of petroleum products, may still be considered owners or operators,

and thus financially liable. Therefore, because of OPA's onerous liability provisions and Congress' apparent rejection of a secured creditor exemption, lenders and investors are justifiably alarmed over the imminent financial risks imposed on them by OPA.

Unresolved under OPA for secured, or collateral-dependent, parties is the extent of the actions they may take to protect their collateral without imposing so many requirements that financial responsibility and liability attaches. Hence, a secured party's desire to increase the extent of control over its investment is in direct conflict with the desire to avoid constructive ownership as a result of provisions in security documents that confer the level of control sought.

For finance lessors, another important provider of capital to the oil and gas production and transportation industry, there is a similar sense of alarm over the heightened risk implications of OPA. In fact, finance lessors under OPA find themselves in a far more vulnerable position than banks because liability is imposed upon an "owner and operator" jointly and severally. This occurs because a lessor is considered the actual recorded owner of property under secured transactions and security rights laws.

Summary

In order not to jeopardize the safety and security of depositors' funds and shareholders' and investors' capital, lenders, investors, and intermediaries must make prudent determinations about risk tolerance. A clear and predictable legal framework within which financial institutions are able to rationalize risks associated with the production, transportation, handling, and consumption of oil is necessary.

Capital providers have, in general, not yet assessed the current or potential impact of OPA. Based on well-documented prior retrenchments that resulted in capital shortages for the energy industry, it is appropriate to ask when such realization will take place. Lenders will reassess asset values for collateral properties and will revise cash flow forecasts to incorporate increased liability risk and greater costs to operate. Available remedies will be sought to "shore-up" existing positions as regulator, shareholder, and other market pressures surface. Equity investors will reassess anticipated returns based on potential reductions in asset appreciation and increased direct liability exposure, and will thus demand higher returns to stay the course or will seek opportunity elsewhere. This implies a higher cost of doing business for the energy industry.

In general, the financial community will seek to avoid energy and energy-related industries as a less-than-desirable investment opportunity unless those issues that limit the ability to predict cash flow are corrected. The past trends in energy financing have shown rapid and efficient movement of capital out of energy when the perception of risk outstrips the tolerance of providers. The MMS must therefore utilize all flexibility afforded under OPA in order to mitigate the risk issues it raises before capital providers' concerns translate to negative action in the form of capital movement away from this vital industry.

CHAPTER FOUR

ADDITIONAL IMPACTED PARTIES

THE OILFIELD SERVICE INDUSTRY

The oilfield service industry is comprised of a wide variety of businesses providing the full array of goods, equipment, and services required to explore for and produce natural gas and crude oil both offshore and onshore. Examples of such firms include those providing contract drilling services, geophysical contractors, crew and supply boat operators, helicopter companies, diving contractors, fabrication yards, and manufacturers of all of the products and equipment used in exploration, development, and production. Total worldwide revenues of this industry exceeded $85 billion in 1992.

The industry sector most directly impacted by OPA would be the offshore contract drilling sector. This industry group owns and operates a fleet of mobile offshore drilling rigs which drill exploration and development wells under contract to major and independent oil company operators. More than one-fourth of the worldwide mobile drilling fleet currently under contract is operating in U.S. waters. Recently, after a decade of accumulated losses exceeding $10 billion, U.S. offshore drilling contractors have experienced the beginning of a modest economic recovery driven largely by natural gas drilling in the Gulf of Mexico. The mobile rig count has doubled in the Gulf to its present level of 134 units and, as the supply/demand balance for these rigs has grown closer, improved day rates have made some drilling contractors profitable for the first time in many years.

U.S. companies are pre-eminent in the worldwide contract drilling industry and contribute significantly to U.S. balance of payments inflows. However, the success of their international business is dependent upon having a sound economic and technology base at home.

Since mobile offshore drilling units are regarded as vessels, they are subject to the liability and compensation provisions of OPA administered by the U.S. Coast Guard. According to rules proposed by the Coast Guard, the base liability of a mobile offshore drilling unit is that of "any other vessel over 300 gross registered tons," i.e. $600 per gross ton or $500,000, whichever is greater, except that while "being used as an offshore facility" the liability is that of a "tank vessel," i.e. the greater of $1,200 per gross ton or $2 million if the vessel is over 300 gross tons and up to 3,000 tons, and the greater of $1,200 per gross ton or

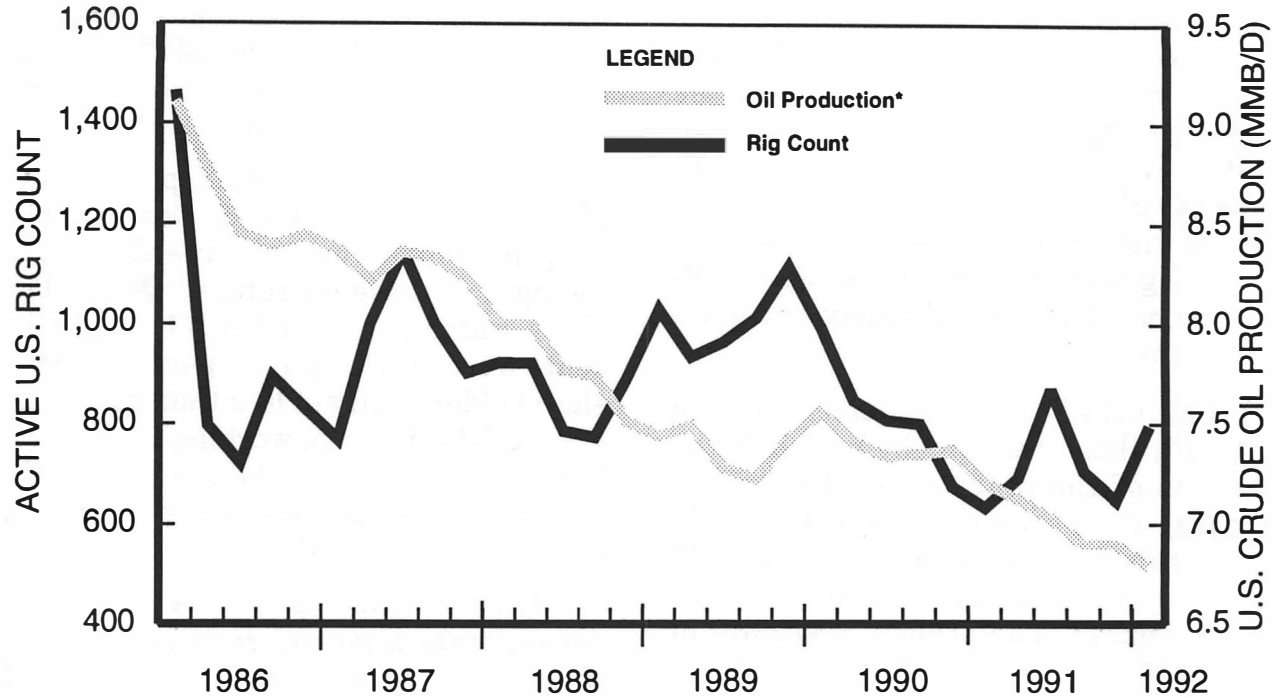
$10 million if the vessel is over 3,000 gross tons. The demonstration of financial responsibility would correspond to the amount of liability. Moreover, the Coast Guard has proposed requiring an additional $5 million as a minimum amount of liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. These requirements would mean, for example, that a 20,000 gross ton semisubmersible drilling rig would be subject to a total liability and certification amount of $29 million.

The drilling industry has questioned whether OPA requires that an additional demonstration of financial responsibility over and above the base amount should be required for a mobile offshore drilling rig that becomes an appurtenance to an offshore facility. The industry takes the position that OPA Section 1001(32)(c) is clear in placing the obligation for establishing financial responsibility for an offshore facility owner with the lessee in accordance with rules promulgated by the MMS and that it would be redundant for the Coast Guard to establish financial responsibility for a mobile offshore drilling rig being used as an offshore facility. Drilling contractors have indicated that few, if any of them, have sufficient net assets in the United States to satisfy Coast Guard's proposed criteria for self-insurance.

The proposed rules have stirred considerable controversy, particularly with respect to the apparent refusal of traditional insurance markets to provide coverage in a manner that the Coast Guard interprets as necessary to meet the statutory requirements. Drilling contractors have commented on the proposed rules. In July 1993, the Coast Guard released a Preliminary Regulatory Impact Analysis assessing economic impacts should the proposed rules be implemented. While the Coast Guard recognized the possibility of severe disruption of U.S. industry, its assessment focused on oil transportation and failed to acknowledge the potential economic damage to the U.S. offshore contract drilling industry or the potential negative impact on domestic oil and gas production. The Coast Guard issued its interim final rule on July 1, 1994.

The tests proposed by the Coast Guard to demonstrate financial responsibility for self-insurance penalize contractors active in the global marketplace in that the formula proposed includes domestic and foreign liabilities, but only domestic assets in determining the amount of net assets and/or working capital necessary to demonstrate financial responsibility. Should insurance remain unavailable in the marketplace, domestic oil and gas production could be hit with a "double whammy effect" where neither a majority of oil company independents or most drilling contractors could continue to do business in U.S. offshore waters. The direct correlation between drilling activity and domestic oil production is demonstrated in Figure 4-1.

Drilling contractors are also concerned about the interpretation of what constitutes "a discharge on or above the surface of the water" for purposes of dividing liability between an oil company operator and leaseholders and the owner of a mobile offshore drilling unit where a mobile offshore drilling unit is deemed to be an "offshore facility" [33 U.S.C. 2704 (b)(1)]. This provision was intended to preserve the traditional division of liability between the operator and the drilling contractor, assigning responsibility and liability for discharges of oil and drilling fluids from the well bore and reservoir to the operator and assigning responsibility and liability for above-surface discharges of fuel oil, lubricant, etc., from the drilling rig itself to the rig owner. Unfortunately, because



*Excluding lease condensate.

Sources: Baker Hughes, U.S. Energy Information Administration.

Figure 4-1. Impact of U.S. Drilling Decline on Oil Production.

oil floats, some have suggested that *any* discharge, regardless of its source or circumstances, could be "a discharge on or above the surface of the water," and therefore could be the responsibility of the rig owner. While recognizing that the courts will determine matters of liability under the provisions of OPA'90, in its interim final rule issued on July 1, 1994, the Coast Guard recited considerable legislative history indicating that Congress's intent has been to preserve the traditional division of liability between the operator and the drilling contractor.

Offshore supply vessels are not tank vessels under the law. All other vessels over 300 gross tons will be required to furnish evidence of financial responsibility under OPA and CERCLA. The availability of insurance for this purpose is in question.

In addition to drilling contractors, other sectors of the oilfield service industry are concerned about the lack of provisions for adjustment of the limit of liability for "offshore facilities." Provision is made for adjusting by regulation the limit of liability for onshore facilities to a range of $8 million to $350 million; however, no similar provision is made for offshore facilities even though they comprise as broad a range of type and potential risk as do onshore facilities. Accordingly, under the definitions contained in the ANPR, the small business owner who has a fuel storage tank as part of a dockside offshore supply base or a helicopter landing facility may have to demonstrate the same amount of financial responsibility (up to $150 million) as the large company owner of a major offshore oil pipeline. As another example, there are several small firms that are in the business of transporting drilling muds and cuttings, produced sand, sludge and other oily wastes to shore for processing and disposal. If such firms are unable to operate because

of the burdens of OPA imposed by the Coast Guard, drilling and production operations producing these wastes would be impacted. Owners of small facilities would thereby be forced to insure far above any reasonable expectation of risk (if insurance is available), incurring unnecessary costs, with self-insurance at this level likely being an impossibility.

Indirect effects of implementation of OPA are those that might be felt if the burdens of the statute and the implementing regulations cause a decline in the number of firms investing in OCS projects and purchasing oilfield services and supplies. The economic vitality of the oilfield service industry and employment levels depend heavily on the level of investment in exploration and development. In the early stages of exploring the OCS, large integrated oil companies were the most prominent investors. Over time, however, the role of independent producers, many of which are relatively small, has grown substantially. Since 1986, the number of wells drilled by independents on the OCS has exceeded the number of wells drilled by major companies. This topic is more fully developed in Chapter Two.

An examination of data provided by the Minerals Management Service for wells drilled in the Gulf of Mexico during September of 1993 reveals that 178 mobile and platform drilling rigs were at work. Similar data published by Offshore Data Services show that as of November 11, 1993, the same number of rigs were at work. The September data show 59 operators were drilling wells, while the November data show 60 operators were active.

It is difficult to determine, today, any certainty about the number of operators who will be forced out of business if the MMS financial responsibility proposal applies to them. One reasonable way, however, to estimate the magnitude of the effect the MMS ANPR could have is to review publicly available financial data about these firms.

Data published in the September 20, 1993 edition of the *Oil & Gas Journal* help measure the relative financial strength of those operators. Of the 178 rigs working in September, 71, or 40 percent, were working for operators with shareholder equity of less than $150 million. Of the 178 rigs working on November 12, 1993, 79, or 44 percent, were working for companies with shareholder equity less than $150 million.

If insurance is not available to demonstrate financial responsibility or, if available, is not within the financial reach of smaller operators, having shareholder equity in excess of $150 million may prove to be the only way to demonstrate the required level of financial responsibility. Companies of lesser financial standing may be unable to comply with the law and thus may be forced out of the offshore oil and gas business discontinuing exploring for and producing crude oil and natural gas from the OCS.

The number of operators currently drilling in the Gulf of Mexico that fall below the $150 million stockholder equity is 39 out of a total of 60, or 65 percent. If a significant number of those operators find themselves unable to continue in business, the oilfield service industry will be adversely impacted commensurate with the decline in investment in OCS projects. This will lead to the further deterioration of the oilfield service industry infrastructure, which is essential to support the future exploration and development activities of the domestic petroleum industry.

PIPELINES

Pipelines provide a vital service to meet our nation's petroleum needs as a

TABLE 4-1

AVERAGE REVENUE PER TON-MILE BY MODE OF TRANSPORTATION (Cents)

	Truck*	Rail	Barge	Oil Pipeline†
1985	22.90	3.04	0.800	0.854
1986	21.63	2.92	0.762	0.814
1987	20.67	2.73	0.742	0.816

* LTL (less than truck load) carriers. Truck load average in 1987 was 9.78 cents.

† Excludes revenues for TAPS.

Source: National Petroleum Council, *Petroleum Storage & Transportation*, April 1989, p. 16.

safe, efficient, economical, and environmentally favorable method of transporting oil. There are over 200,000 miles of liquid petroleum pipelines in the United States.[1] During the period from 1986 to 1992, this network of pipelines carried an average of 586 billion ton-miles of petroleum, or about 20 percent of the nation's total intercity freight.[2] Approximately one-half of all petroleum consumed in the United States is transported via pipelines.

Pipelines offer one of the most economical modes of overland oil transportation, as shown in Table 4-1.

Oil pipelines enjoy an excellent safety record. They provide the safest mode of overland oil transportation. Only three of the nearly 47,000 transportation-related fatalities in 1990 were caused by liquid pipeline failures. When casualty levels are adjusted for ton-miles of petroleum transported, average annual rail tank car and tank truck casualty rates were 100 and 40 times greater, respectively, than casualty rates for liquid pipelines.[3]

Pipelines offer significant environmental benefits to other modes of oil transportation. Data from 1989, presented in Table 4-2, indicates that oil pipelines had the lowest spill rate of major competing carriers.

TABLE 4-2

OIL SPILL RATES BY MODE OF TRANSPORTATION

Mode of Transportation	Oil Spill Rate (Thousands of Gallons/ Billion Ton-Miles)
Pipelines	14.3
Railroads	18.7
Water Carriers	24.4
Motor Carriers	25.1

The apparent broad interpretation of the MMS as to the applicability of

[1] Association of Oil Pipe Lines, *Oil Pipelines of the United States: Progress and Outlook*, August 1991, p. 1.

[2] Smith, Frank A., *Transportation in America*, 1993, p. 44.

[3] Association of Oil Pipe Lines, p. 10.

the $150 million financial responsibility to all pipelines located "in, on, or under navigable waters" would result in virtually all pipelines being subject to the requirement. The requirement would likely result in severe financial hardship for a significant number of pipelines and could potentially result in a major disruption in oil transportation services. Additionally, such a broad interpretation is contrary to the law and intent of OPA that the financial responsibility requirements apply only to traditional offshore facilities. Throughout OPA, onshore and offshore facilities are addressed separately, thus evidencing an intent to treat a facility as either an onshore or an offshore facility.

The magnitude of required financial responsibility under OPA does not reflect the historical level of damages resulting from pipeline oil spills. Table 4-3 shows pipeline spill data for the past five years based on hazardous liquid pipeline accident reports submitted to the U.S. Department of Transportation.

The worst liquid pipeline spill with respect to property damage in 1992 amounted to $11 million. The requirement of $150 million in financial responsibility is an order of magnitude higher than the actual worst case spill.

The proposed broad interpretation by the MMS of financial responsibility of $150 million to virtually all crude oil and refined petroleum product facilities creates a potentially significant financial hurdle for the pipeline industry. Oil pipelines are owned and operated in a variety of corporate structures that make it difficult to generalize about the industry's ability to meet various financial responsibility tests. A case study of one of the largest oil pipeline companies is provided as an example of the difficulties presented by OPA.

Colonial Pipeline Company is one of the largest oil pipeline systems in the world. The system includes more than 5,200 miles of pipe and generates revenues in excess of $500 million. More than 1.8 million barrels of refined petroleum products are delivered from this system on an average day. Over 80 shippers are actively using the Colonial system. Product is picked up at 30 origin refineries and delivered to more than 260 terminals in 13 states and Washington, D.C. Shares of the company are held by 10 energy companies.

Colonial, even as one of the largest pipeline systems, would still be unable to provide insurance as evidence of financial responsibility. While Colonial carries $200 million of liability insur-

TABLE 4-3

SPILLS FROM OIL PIPELINES — 1988-1992

	Number of Spills	Average Volume of Oil Spilled per Incident (Barrels)	Average Property Damage per Incident (Dollars)
1988	194	1,200	$114,000
1989	163	1,200	47,000
1990	179	700	89,000
1991	215	1,000	147,000
1992	216	700	293,000

ance, the policy has a specific exclusion for OPA's financial responsibility provision; coverage could not be purchased that would meet OPA requirements. Indemnity agreements and surety bonds may not be available for Colonial under the OPA requirements.

Self-insurance at the $150 million level is unreachable by Colonial; it has a net worth of $48 million. It is questionable, under current rules, whether the MMS would certify that Colonial has sufficient liquid assets or cash flow to meet the $150 million level.

Colonial may be able to obtain letters of credit to cover the $150 million requirement but at an expected annual cost of $500,000 to $1.5 million. The contingent liability attributable to such letter of credit exposure would create a substantial reduction in borrowing capacity, thus limiting capital availability for other purposes. Colonial's actual loss experience is substantially below $150 million and it has never experienced a spill that generated losses even one-tenth the $150 million level. Despite this fact, Colonial's ability to obtain a COFR under the letter of credit scenario is in question.

If Colonial, which has one of the highest credit ratings in the industry, has difficulty responding to the OPA requirements, then it is highly likely that a substantial number of pipelines simply could not meet the financial responsibility tests.

In summary, the proposed broad interpretation by the MMS of the definition of an offshore facility would have a devastating effect on the existing inland pipeline network. Alternative means of transportation would increase costs to consumers and the risks to human life and environmental contamination. Finally, there is no statutory authority for this broad interpretation and, further, there has been no demonstrated need for such a high level of financial responsibility for inland pipelines.

REFINERIES AND TERMINALS

The MMS Interpretation of Financial Responsibility Under OPA

Historically, refineries and terminals have always been considered *onshore* facilities from a regulatory and legislative standpoint, as well as from a common sense standpoint.

The MMS Advance Notice of Proposed Rulemaking suggests that if a pipeline or other appurtenance on a refinery or terminal dock sits in or crosses navigable waters, that structure will be deemed "an offshore facility," even though it is perfectly clear to any observer that the refinery, pipeline, or terminal sits onshore. As a consequence of this interpretation, the refinery, oil pipeline, and terminal would be subject to the $150 million financial responsibility requirement. Since virtually all refineries and terminals either have a dock with a pipeline or other appurtenance or a pipeline connection that eventually passes in, on, over, or under navigable water, the MMS interpretation of "offshore facility" encompasses virtually all refineries and terminals in the country. This mandatory financial responsibility is, in effect, a "permit to operate." Without it, a facility must shut down its operations.

Assuming that this regulatory interpretation is adopted by the MMS in its final rule, virtually every refinery and terminal in the United States would be covered by the rule. Clearly, this result was not intended by Congress because the statute specifically distinguishes between "onshore" and "offshore" facilities. This distinction and the relief it offers to refineries and terminals is more fully discussed in Chapter Five, Solutions.

Demographics and Impact on Refineries and Terminals

U.S. Petroleum Distribution System

The product distribution system from the refineries to end-users is composed of pipelines, barges and tankers, and tank cars and trucks. The distances transported vary. For example, products such as gasoline and home heating oil are moved daily by the millions of barrels through pipelines from Houston to New York and Houston to Iowa and Minnesota. Due to these logistics, adequate terminal storage capacity at these destinations is critical to the distribution system. Trucks and rail tank cars deliver products directly from refineries or terminals to local markets. Virtually all pipelines, trucks, and rail cars could eventually cross navigable water in their delivery of products. Barges and tankers deliver products to ports along the inland river system as well as coastal areas.

At all these many destination markets, and at markets along pipeline and marine routes, another infrastructure of terminal tankage must be in place to receive the incoming product and to provide storage. From this point, delivery is made, usually by truck, to the many distributors of petroleum products, such as fuel oil dealers, bulk plant operators, and service stations, and ultimately, in the case of heating oil, to individual homes.

In April 1989, the National Petroleum Council concluded a major study on petroleum transportation and storage at the request of the Secretary of Energy. The primary distribution system in the study included refineries, pipelines, and terminals. The products surveyed for the inventory study were crude oil, motor gasoline, kero-jet fuel, distillate fuel oil, and residual fuel oil. Although kerosene, asphalt, lubricating oils, naphtha-based jet fuel, and "other oils" play a key role in the U.S. petroleum picture, these products were not included in the study. Primary system total tankage for the surveyed products amounted to 1,419 million barrels at that time. The percentage of utilization of tank capacity over the 40-year span covered by NPC inventory reports ranged from a high of 53 percent in 1969 to a low of 40 percent in 1983; the average had been 46 percent. The study estimated industry-wide minimum operating inventory of 650 million barrels for the surveyed products in the primary distribution system. Minimum operating inventories were defined as the level below which operating problems and shortages would begin to appear in the distribution system. It is interesting to note that the minimum operating inventory of 650 million barrels equates to 46 percent of total storage capacity, the same percentage as the 40-year utilization average. The minimum operating estimate includes volumes held outside of tanks on pipelines, etc. Table 4-4 summarizes the number of refineries and terminals in the United States.

Impact on Refineries, Terminals, and Other Storage Facilities

Due to the broad interpretation by the MMS of "offshore facility," virtually all refineries and terminals in the nation would be included. The responsible parties for these facilities would each be required to demonstrate $150 million of financial responsibility. Financial responsibility may be demonstrated by insurance, guaranty, indemnity, surety bond, letters of credit, qualification as self-insurer, any combination of these methods, or any other approved method. A study conducted by attorneys for the Independent Liquid Terminals Association (ILTA) indicated that insurance is

TABLE 4-4

NUMBER OF U.S. TERMINALS AND REFINERIES BY STATE

State	Number of Terminals	Number of Operating Refineries	Refinery Crude Distillation Capacity (MB/CD)
Alaska	3	6	256
Alabama	34	2	105
Arkansas	15	3	62
Arizona	10	1	10
California	79	24	1,869
Colorado	16	2	86
Connecticut	16	-	-
Delaware	1	1	140
Florida	58	-	-
Georgia	54	1	5
Hawaii	6	2	146
Idaho	8	-	-
Illinois	58	7	966
Indiana	40	4	475
Iowa	37	-	-
Kansas	19	6	297
Kentucky	21	2	219
Louisiana	31	20	2,359
Maine	13	-	-
Maryland	20	-	-
Massachusetts	15	-	-
Michigan	43	2	116
Minnesota	23	2	267
Mississippi	21	6	372
Missouri	34	-	-
Montana	8	4	140
Nebraska	14	-	-
Nevada	4	1	7
New Hampshire	5	-	-
New Jersey	46	4	408
New Mexico	19	3	95
New York	82	-	-
North Carolina	42	-	-
North Dakota	6	1	58
Ohio	52	4	462
Oklahoma	25	6	397
Oregon	15	1	0
Pennsylvania	76	8	731
Rhode Island	6	-	-
South Carolina	25	-	-
South Dakota	9	-	-
Tennessee	37	1	76
Texas	207	30	3,731
Utah	7	6	155
Vermont	2	-	-
Virginia	44	1	53
Washington	22	7	538
West Virginia	9	2	16
Wisconsin	33	1	33
Wyoming	5	4	130
State Not Identified	167	-	-
TOTAL	1,642	175	14,780

Sources:

1. Terminals: *Petroleum Terminal Encyclopedia*, Sixth Edition, 1992. (Includes respondents to the 1992 survey.)
2. Refineries: National Petroleum Refiners Association, United States Refining Capacity, January 1, 1993.

the only viable source of financial responsibility for most companies. All of the other forms of financial responsibility require capital assets in one form or another.

As discussed in other sections of this study, the potential unlimited liability, direct action, and lack of preemption provisions in OPA create a situation whereby many operators of these affected facilities may not have access to these financial instruments. Even if these options were available, the costs could be prohibitive. To date, no insurance companies willing to provide a $150 million certificate of financial responsibility have actually begun operation. This could leave self-insurance as the only option. The net worth of most independent terminals is less than $150 million, and they could not qualify as self-insurers. This would be true for a good number of refineries also, as evidenced by a recent National Petroleum Refiners Association (NPRA) study discussed later in this section. Several associations representing the affected parties have been working with their membership to determine the impact of the MMS proposed rulemaking on their respective facilities.

Refineries

The NPRA represents virtually all domestic refineries and petrochemical manufacturers using processes similar to refineries. Its membership includes both large corporations and small independent companies. A survey of refineries was made to determine their proximity to "navigable waters" as well as an assessment of their ability to obtain "certificates of financial responsibility." Of the 81 refineries responding to the survey, 93 percent are located adjacent to water, with 64 percent of those indicating that these are in fact "navigable waters" under the conventional use of the term.

It appears that there will be a substantial number of facilities that will be unable to obtain COFRs, primarily facilities owned and operated by small companies. These smaller facilities are generally located in less populated areas and serve rural and fairly isolated communities. Even among refineries that self-insure, some facilities are concerned that an additional $150 million insurance requirement could be prohibitive to further operations.

Out of the 81 refineries responding to the survey, representing over 53 percent of total U.S. operable capacity, 49 percent indicated it would be very difficult or impossible to obtain the necessary insurance. When examining refining company capabilities (treating multiple refineries under a single responsible party's COFR obligation), 65 percent of the 43 refiners responding indicated it would be difficult or impossible to obtain a COFR and several indicated they will have to cease operations if the federal government requires this additional liability insurance.

Most of the very large refineries reported they have easy access to credit markets and therefore should be able to obtain a COFR. However, even among the larger refineries there is concern about what the financial tests and criteria would be and what would be needed to demonstrate capability.[4]

Terminals

The Independent Fuel Terminal Operators Association (IFTOA) is an association of 18 companies (not affiliated with major oil companies) that own or control deepwater oil terminals located along the East Coast from Maine to Florida and are capable of receiving

[4] Integrated oil companies operating offshore production facilities as well as refineries and terminals would be required to obtain only a single COFR for all company facilities.

ocean-going tankers. Members are primarily independent marketers of residual fuel oils (Nos. 4, 5, and 6 fuels) and home heating oil (No. 2 fuel); several companies also market significant volumes of gasoline at wholesale and retail levels. Members handle nearly 50 percent of the non-utility residual fuel oil shipped to the East Coast, nearly 60 percent of the non-utility residual oil shipped to New England, 25 percent of the No. 2 heating oil shipped to the East Coast, and more than 50 percent of the No. 2 heating oil shipped to New England. The 18 companies own or control 68 deepwater terminals and 51 barge and/or pipeline terminals, with a total storage capacity of more than 67.5 million barrels.

In general, if the MMS rule were made applicable to these types of traditional onshore facilities, these companies would have great difficulty or, in many instances, be unable to comply with the OPA financial responsibility obligation. Several of the companies could self-insure, several could purchase insurance if available and if the rates were not exorbitant, but it is likely that the majority could not meet the obligation.

As a result, the market would lose a substantial portion of the independent distribution system on the East Coast and those that remained would be financially weakened and less competitive. The independent sector plays a valuable role in the market, bringing product, both domestic and foreign, into the system and exerting downward pressure on prices. This action enables consumers to purchase home heating oil, gasoline, diesel fuel, kerosene, and other essential products at the lowest possible prices. Thus, extension of a financial responsibility requirement to onshore facilities would have an adverse effect on the distribution of refined petroleum products, their prices, and on the competitive nature of today's market. As noted previously, OPA imposes no financial responsibility requirements on these offshore facilities.

The Independent Liquid Terminals Association (ILTA) represents 92 companies that own more than 450 for-hire bulk liquid terminals internationally, with a total one-time storage capacity of more than 302 million barrels in more than 11,000 above-ground storage tanks.

Of these 92 ILTA member companies, 76 operate more than 400 for-hire bulk liquid terminals in the United States. Five of these companies operate substantial for-hire pipeline operations feeding more than 100 terminals. The storage capacity of ILTA member company terminals located in the United States is more than 250 million barrels (10.5 billion gallons). Customers who store at these ILTA member for-hire terminals include oil producers, oil companies of all sizes, petrochemical producers, oil importers, utilities, manufacturers, airlines, transportation companies, and government agencies including the military agencies. The primary liquid handled is refined petroleum products; this is followed by petrochemicals, chemicals, crude oil, and other liquids, including OPA-regulated animal fats and vegetable oils. Animal fat and vegetable oil terminals would also be subject to the financial responsibility requirement. To the extent these small terminals cannot afford a $150 million insurance policy, this would dramatically curtail the U.S. cooking oil and salad oil business. Thus, the impact reaches beyond the oil industry into the food industry.

There is a wide range in size among terminals. ILTA members' terminals range in storage capacity from 10,000 barrels to 5 million barrels. The smaller the facility, the more it would have to earn or the higher the surcharge it

would have to impose to cover the cost incurred to demonstrate financial responsibility (if customers would agree to a surcharge). Because that would present impossible circumstances, it is estimated that at least 60 ILTA member companies operating in the United States would likely have to stop operating because they could not afford the MMS "insurance operating permit." These 60 members operate 167 terminals with 186 million barrels of storage capacity. These operations represent over 75 percent of the U.S. storage capacity operated by ILTA members. Based on discussions between ILTA and underwriters, however, it is more likely that no ILTA terminals would be able to obtain or afford the MMS-required COFR with insurance.

Other Storage Facilities

While this section of the report focuses on refineries and terminals, smaller storage facilities known as bulk plants are an important link in the distribution network. Bulk plants typically receive and ship petroleum products by truck. These trucks may very well cross waterways in their delivery of products. The broad interpretation by the MMS may be applicable to bulk plants and perhaps even to individual retail motor fuel outlets. The 1989 NPC Storage and Transportation Study mentioned that refiners and independent wholesalers are involved in the operation of about 15,000 bulk plants. The number of retail motor fuel outlets in the report totaled approximately 170,000. The Petroleum Marketers Association of America, the Society of Independent Gasoline Marketers of America, and the New England Fuel Institute are among the marketing groups concerned about the devastating effect the MMS interpretation of the statute could have on their membership.

Storage facilities at U.S. airports have not been specifically addressed in this report. These storage facilities could most certainly be included in the MMS interpretation and the impact of non-compliance could be significant to air transportation in the United States. This same concern extends to others in the transportation industry operating bulk storage facilities.

Conclusion

These three groups (NPRA, IFTOA, and ILTA) fairly represent the refineries and terminals reflected in Table 4-4. A substantial number of refineries and terminals could be forced to close as a result of the MMS interpretation of OPA financial responsibility requirements. These onshore facilities have a substantial amount of storage capacity. Both terminal associations report that a significant number of their members could not obtain a COFR and thus would be forced to close. If this survey is representative of the entire universe of U.S. terminals, this staggering loss of storage capacity could dramatically affect the U.S. distribution system. As reported earlier, the NPC Study on Petroleum Storage and Transportation indicated that inventories had averaged near the minimum operating level over the 40 years of reported data; it is logical to assume that a substantial loss of storage capacity would likely create major distortions in the distribution system with resultant product outages. The distribution system is still adjusting to the addition of a new grade of low sulfur distillate. While some new tankage was constructed, most of the new product will be handled by existing storage. This strain on the system has been intensified by multiple Reid Vapor Pressure (RVP) requirements on gasoline, oxygenated gasoline, and the upcoming reformulated gasolines. The petroleum distribution system is very flexible and

efficient. However, adequate storage capacity must be maintained to make it function.

The MMS interpretation is contrary to the law, particularly considering case law interpreting the Federal Water Pollution Control Act, the underlying statute of OPA. Moreover, the legislative history of the statute demonstrates that such a broad interpretation of the financial responsibility requirement for offshore facilities is incorrect and not warranted. (See Chapter Five, "Solutions.")

FEDERAL AND STATE REVENUES

Oil and gas exploration and production operations on the federal OCS were initiated after OCSLA of 1953; subsequently the first OCS Lease Sale was held in the Gulf of Mexico in October 1954. The sale resulted in the leasing of 394,721 acres and cash bonuses of $116.4 million. From that point in time to the present, with a few exceptions, lease sales have occurred at least annually, and usually two or three times a year.

Throughout the history of OCS production in the United States, several trends are clear. First, the vast majority of petroleum products produced on the OCS have been produced in the Gulf of Mexico (well over 90 percent of the oil and approximately 99 percent of the gas). Second, within the Gulf, most OCS production (98 percent of the oil and 88 percent of the gas) has been within the Central Region of the Gulf. Third, within the Central Region, the overwhelming majority has been produced from waters adjacent to or supported from Louisiana. Fourth, by all indications, current trends will continue into the foreseeable future. The majority of proved reserves on the OCS are in the Central Gulf Region, and the Central and Western Gulf Regions are the only OCS regions where the Minerals Management Service has to date encountered little resistance to lease sales, and OCS activity in general.

Louisiana

Louisiana serves as the base for the great majority of OCS operation in the Gulf of Mexico:

- Of the 3,659 active production platforms located on the Outer Continental Shelf in federal waters, all but 23 are located in the Gulf of Mexico. The vast majority of these platforms are located off the coast of Louisiana.
- The U.S. government has collected a total of $37 billion in revenue from OCS oil and gas production since 1953. Eighty-four percent or $31 billion of the revenue was produced off the coast of Louisiana. The remaining fourteen percent of the revenues was collected from the other OCS Planning Areas.
- Ninety-two percent (7 billion barrels) of the total OCS oil production since 1954 (7.8 billion barrels) has occurred off the coast of Louisiana.
- Ninety percent ($14 billion) of the total $16 billion of OCS generated oil revenues was produced off the coast of Louisiana.
- Eighty percent of the total OCS generated natural gas production (88 billion MCF) was produced off the coast of Louisiana.
- Seventy-eight percent of the total $20 billion in OCS generated natural gas royalties were produced off the coast of Louisiana.

Louisiana benefits from OCS operations:

- The state receives an average of almost $5 million per year, excluding escrow payments, from 28 percent of

the revenue generated in federal waters located from 3 miles to 6 miles off the state's coast.

Nationwide, there are a total of 21 OCS Planning Areas under the proposed 1992-1997 Draft Proposed Five-Year National Gas and Oil Leasing Program. This proposal provides for 23 lease sales over a five-year period. Ten of the 23 lease sales (43 percent) would occur in the Western and Central Gulf of Mexico Planning Area. Thus, 43 percent of the proposed lease sales over the next five years will occur in 8 percent of the total U.S. OCS acreage. Because a moratorium on OCS lease sales along the coast of California, Washington, Rhode Island, Massachusetts, New Hampshire, and Maine has been imposed through the year 2000, the Gulf of Mexico region will be asked to carry the burden of domestic OCS oil production until the next century.

OCS activities in the northern Gulf of Mexico, off southern Louisiana, provide an excellent example of the widespread economic development such activities bring to an area. When the OCSLA passed in 1953, Lafayette was the "Acadiana" region's traditional distribution center, having recently transformed from a railroad town to the center of a highway network; Morgan City was the self-proclaimed "shrimp capital of the world;" and most of the remainder of the region was primarily oriented toward agriculture or the harvesting of renewable resources: shrimp, fish, crawfish, etc. Over the next three decades, OCS and other offshore activities gradually came to constitute the most important primary sector of the economy (both in the Acadiana area and eastward along the coast) and secondary and tertiary support sectors developed in response to the growth opportunity.

Thus, new investment (some of it massive) was centered around the needs of the offshore primary sector. Fabrication yards sprang up on the banks of local bayous as OCS and other offshore production platforms, OCS and other offshore drilling rigs, and support vessels, and metal fabrication of all types were in great demand. In order to attract the fabrication and construction industries associated with OCS, and other offshore activities, and thus produce local jobs, communities approved long-term bond issues for the construction of local industrial parks contiguous to the waterfront near the community. By the mid-1970s, Morgan City was a major hub for OCS development.

Some feeling for the extent of this development can be had from the Minerals Management Service's (1988) analysis of the impacts of OCS development, which estimated that OCS-related activities account for approximately 190,000 jobs with an annual payroll of over $4 billion. Most of these occurred in the Gulf of Mexico, and most of those in Louisiana. If there is anything that is certain concerning the socio-economic and environmental impacts of OCS activities, it is that it is impossible to spend $4 billion a year on salary and wages alone, then suddenly stop spending much of that, and not have an impact. Simply put, the northern Gulf of Mexico is one of the most developed, and impacted, areas in the world with regard to offshore oil and gas activities. Thus, the vulnerability of the OCS-related activities and development to the proposed COFR requirements under OPA are of great concern.

The MMS ANPR could affect most of Louisiana's state onshore and offshore production. Mineral revenues comprise much of Louisiana state government revenues. In 1981, the state of Louisiana's oil and gas royalty and severance tax revenues onshore and state offshore operations amounted to $1.1 billion. By 1992, that figure had declined to $640 million. Additionally, energy

revenues amounting to $1.2 billion comprise one-fourth of the total 1992 state's revenues ($5.1 billion). Revenue from federal oil and gas leases offshore Louisiana totaled $2.2 billion in 1991. To date, $69 billion in revenues from oil and gas leases has been produced offshore Louisiana. While the total fiscal impact of the full implementation of OPA on the state's economy and mineral revenues has yet to be determined, a preliminary analysis of the economic impact of the MMS's far-reaching ANPR concerning Certificates of Financial Responsibility has been conducted. The results are indeed sobering and quite problematic.

According to Dr. Robert Baumann at the Louisiana State University Center for Energy Studies, the economic impact from the proposed rule, as applied to what have traditionally been considered "onshore facilities" under the FWPCA, would literally shut down the oil and gas industry in Louisiana. There are approximately 2,500 oil and gas operators currently in the state. The discussion that follows assumes that an operator is realizing a net operating profit of $3 per barrel and that the preliminary cost estimates for surety bonds to satisfy COFR requirements are as shown below:

BASE COST
(PER $1000 OF COVERAGE PER YEAR)

Large Major	$5
Mid-Size Major, Large Independent	$10
Small Independent	$20-100

Based upon current production rates in Louisiana and the state of the oil and gas industry in Louisiana, if Louisiana operators could obtain a $5 base cost per $1,000 of coverage per year for a surety bond to satisfy the $150 million COFR, only 122 state operators would be able to afford the coverage.[5] If the available price for that same coverage is $10 per $1,000 of coverage, then only 70 operators could afford that coverage. Finally, if the available price for that coverage is $20, only 37 operators in Louisiana could afford that coverage. Simply put, the COFR requirements as contemplated by the MMS would devastate Louisiana's economy and government. In particular, Louisiana's 12 coastal parishes, which harbor 6,700 wells and produce 1.1 billion cubic feet of natural gas and 140 million barrels of oil per year, could potentially cease to exist as financially viable political subdivisions and cultural centers. In addition, the Caddo-Pine Island field, a field in north Louisiana which has been in production since 1910, would completely shut down. Since no major oil companies operate in that field, every well in the field would cease operations.

Although it is difficult to precisely equate the loss of operators in Louisiana due to the COFRs to an exact decrease in production, the results are fairly obvious. Without question, the remaining operators in the state could not make up a sufficient amount of the lost production to sustain an adequate flow of mineral revenues to the state's coffers. Thus, the state of Louisiana could easily suffer a 50 to 80 percent reduction in mineral revenues if the proposed rule is adopted.

Texas

There are approximately 4 million acres of publicly owned state land submerged, including bays, estuaries, and Gulf of Mexico waters out to 10.3 miles (3 marine leagues).

The revenue from leasing this land to oil and gas exploration and production companies is deposited into the

[5] These estimates are based on an assumed profit margin and rate of production per operator.

Permanent School Fund which helps fund public education in Texas. Fiscal year 1992 deposits into the fund were $45.5 million. The proposed COFR requirements threaten this educational funding.

They also threaten the 839 operating wells in Texas state waters—the owners, operators, the subsidiary service industry, and the employees and families of these entities.

Only a handful of the independent operators of the 839 wells have a net worth near $150 million. They cannot afford to establish $150 million in financial responsibility. The bonding companies want five percent of the bond per year ($7.5 million). The majority of companies don't make that much money a year.

Takings Issue

Assuming that the cessation of production resulting from the proposed rule is essentially the same for the coastal, energy-producing states (and there is no evidence to suggest otherwise), most states could argue that the subsequent loss in mineral revenues (royalties and taxes) is a "takings without compensation" by the federal government. How will the federal government remedy this?

Effects on Indian Tribes

The MMS ANPR seems to have the effect of applying to Indian lands without recognition of the unique factors pertaining to oil and gas development and production on those lands. Minimally, the following should be taken into consideration: (1) the effect of $150 million financial responsibility obligation on non-major producers as well as on stripper wells; (2) the effect of $150 million financial responsibility obligation on tribally owned production and development by oil and gas companies operating on Indian lands; and (3) the recognition that the appropriate body for jurisdictional purposes for regulating within Indian lands under the framework envisioned in the proposed regulations should be the local Indian tribal government and not the state within which the tribe and its lands are situated.

In 1991, Indian lands produced more than 131 million MCF of natural gas valued at $210 million, and more than 18 million barrels of oil valued at more than $300 million. A great deal of this production is developed by small independent operators who could not possibly demonstrate a financial responsibility level of $150 million. On the Osage Reservation alone, for instance, there are no fewer than seven navigable bodies of water created by the U.S. Army Corps of Engineers and significant rivers and creeks, including a 150-mile stretch of the Arkansas River. Virtually all of the 4 million barrels of oil per year produced from this reservation is from marginal and stripper wells operated by small producers who could not demonstrate a $150 million level of financial responsibility. Osage is not atypical in this respect. In the Upper Missouri River Basin, from the Milk River in northwestern Montana to the Pick-Sloan reservoirs in eastern Montana and the Dakotas, significant marginal and stripper production may be prematurely abandoned if operators are required to demonstrate an impossible level of financial strength. Similarly, more than $220 million per year of oil and gas production from Indian lands in the Upper Colorado River Basin is produced by independent operators who could not possibly demonstrate a $150 million level of financial responsibility in the present marketplace for insurance or guarantees. (Even bonds for plugging and abandonment of on-Reservation wells are becoming increasingly difficult to obtain).

In addition, consistent with federal policies to encourage tribal self-sufficiency and economic independence, many Indian tribes have, in recent years, achieved market position for themselves by the repurchase or development of mineral interests on their own lands through a tribally created and owned oil and gas production and development company. The Jicarilla Apache Tribe has operated its own company, The Jicarilla Energy Company, for years, developing, producing, and marketing its own oil and gas. The Navajo Nation recently created the Navajo Oil Company and the Southern Ute Tribe has, in the recent past, created and now operates the Red Willow Production Company. These companies were created by tribes that accepted the invitation from Congress to vertically integrate and develop their own natural resources as embodied in the policies contained in the National Energy Policy Act of 1992 as well as in other federal legislation passed over the last 20 years. To drive these tribes from the marketplace inadvertently by imposition of an impossible level of financial responsibility requirement would be, at the very least, at odds with the Congressional policies and purposes of encouraging self-determination and economic self-sufficiency.

Similarly, Congress has also sought to enhance and strengthen tribal self-government through specific policies expressed in legislation. Recent amendments, for example, to the Safe Drinking Water Act, the Clean Air Act, and the Clean Water Act, expressly provide a mechanism for tribes to undertake regulation of resources located within tribal lands by providing a federal framework that expressly contemplates tribal regulation rather than state or federal regulations at the local level. This recognition of tribal sovereignty on the one hand and the absence of jurisdiction by states on the other should be encouraged and continued through proper language in the proposed regulations at issue here. The definition of tribal lands should expressly include the lands within a tribe's jurisdiction including lands that come within the common definition of "Indian country."

CHAPTER FIVE

SOLUTIONS

INTRODUCTION

The National Petroleum Council has focused its efforts on finding solutions to two categories of problems which OPA and its rulemakings present: those that arise from the MMS's very broad jurisdiction interpretation and those that arise from OPA's impact on the traditional offshore production industry. It is clear that a broad interpretation of OPA's financial responsibility requirements, such as that put forward in the MMS Advance Notice of Proposed Rulemaking, would have a damaging, even devastating, impact on many parts of the petroleum industry. As noted below, however, this broad interpretation is not dictated by OPA.

It is critical that rulemakers understand the difficulties which OPA, especially as interpreted by the MMS, presents to the offshore industry. Even if the rule is implemented with the most reasonable geographic scope, however, it will create new costs for offshore producers, shift the competitive balance among current offshore producers, create a significant barrier to entry for new operators, and increase the economic field size in the offshore arena, to name but some of the impacts. For small companies, particularly those active only in state offshore waters where they are not currently required to show evidence of financial responsibility, the burden of the financial responsibility requirement, if inflexibly implemented, may be excessive. The result would be that the companies may withdraw from offshore activity. These companies, furthermore, would be forced out of the offshore market because Congress had a misapprehension about offshore operations. The kind of catastrophic spill feared by Congress is not supported by the reservoir characteristics of the U.S. offshore or by the offshore facilities' design and operating procedures.

This section discusses why the MMS should narrow its jurisdictional definition of offshore facility and discusses the flexibility available to the MMS in five critical interwoven areas of the OPA financial responsibility rulemaking:

- The $150 million financial responsibility level
- The implementation of a *de minimis* provision
- The definition of "guarantor"
- The criteria for self-insurance
- The interaction of OPA's financial responsibility regulations with state requirements.

THE JURISDICTIONAL QUESTION

The MMS links the definition of offshore facilities to onshore facilities. While OPA does not combine the definitions of onshore and offshore facilities into one broad category, the MMS has interpreted the financial responsibility requirements for offshore facilities to include many onshore facilities—and proposes extending this definition to include and require that "responsible parties" for these facilities comply with the "offshore facility" financial responsibility requirements. In fact, the OPA definitions of "responsible party" are separate for onshore and offshore facilities, as are the liability schemes, and the statutory language determining response plans are also separate and distinct. OPA only requires an oil spill response plan for an onshore facility that could cause "substantial harm." Imposing the financial responsibility requirement of OPA on onshore facilities is inconsistent with provisions of the statute that address and define the liability limits of a "responsible party" with operations in, on, or under waters of the United States.

The definition of a "responsible party" for an offshore facility [Section 1001(32)(c)] narrows the categories of persons required to show financial responsibility to three types of entities: "lessee," "permittee," or "the holder of a right to use land and easement granted under applicable state law or the Outer Continental Shelf Lands Act."

OPA defines "lessee" [Section 1001(16)] as:

> a person holding a leasehold interest in an oil or gas lease on lands beneath navigable waters (as defined in Section 2(a) of the Submerged Lands Act) or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable state law or the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.). 33 U.S.C. 1001(16).

OPA defines "permittee" [Section 1001(26)] as:

> a person holding an authorization, license, or permit for geological exploration issued under Section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. Section 1340) or under applicable state law. 33 U.S.C. 1001 (28).

While the term "holder of a right of use and easement" is not defined in OPA, it refers again to the possessor of interest "granted under applicable state law or the Outer Continental Shelf Lands Act," and such possessor is a "responsible party" for an offshore facility only when it is a "different person than the lessee or permittee" [Section 1001(32)(c) of OPA].

Thus, the MMS's overbroad interpretation of the scope of the financial responsibility requirement is contrary to OPA's structure and intent. In fact, if the MMS were to impose financial responsibility requirements on a refinery, terminal, or other on-land facility, it would find no OCSLA lessee or permittee and hence no responsible party for an OPA offshore facility.

The MMS interpretation ignores this distinction, and thereby forces every facility to evidence financial responsibility in the amount of $150 million or stop its operations. Pursuant to Executive Order 12777, the Secretary of the Interior is given the authority and responsibility for implementing OPA Section 1016 financial responsibility requirements for offshore facilities. To assume that such authority and responsibility is extended to onshore facilities is inconsistent with the clear intent of Executive Order 12777 to delegate the authority and responsibility for on-

shore facilities to the Environmental Protection Agency and the Department of Transportation. In fact, the MMS recognizes these distinctions in the Memorandum of Understanding that divides jurisdiction for offshore facilities, onshore facilities, and deepwater port and onshore pipelines among MMS, EPA, and the Department of Transportation.

OPA is clear in its distinct and separate treatment of offshore and onshore facilities. The terms are individually defined and used independently throughout the Act. Congress specifically excluded onshore facilities from the financial responsibility requirements; therefore, Section 1016 is not applicable to any onshore facility. Rather, Section 1016 applies solely to vessels and offshore facilities. The legislative history is completely clear, as stated in the Report of the Senate Committee on the Environmental and Public Works, page 16: "There is no requirement for showing evidence of financial responsibility for onshore facilities." [S. Rep. No. 94, 101st Cong., 1st Sess. 16 (July 28, 1989)]

OPA defines "offshore facility" as "any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any waters, other than a vessel or a public vessel" [§ 1001(22)]. An "onshore facility," as defined by OPA, "means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under any land within the United States other than submerged land" [§ 1001(24)]. OPA relied on definitions used in the Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1321(a)(10) & (11) (FWPCA). OPA's legislative history states that:

> [t]he terms "offshore facility," "onshore facility," . . . and "vessel" are re-stated verbatim from Section 311(a) [33 U.S.C. § 1321(a)] of the FWPCA. . . . In each case, these FWPCA definitions shall have the same meaning in this legislation as they do under the FWPCA and shall be interpreted accordingly. To the extent that docks, piping, wharves, piers, and other similar appurtenances that rest on submerged land and that are directly or indirectly connected to a land-based terminal are deemed to be part of an onshore facility under the FWPCA, they are likewise deemed to be part of an onshore facility under the Conference substitute.

H.F. Conf. Rep. No. 101-653, 101st Cong., 2d Sess. 779-80 (1990) (emphasis added).

Thus, it is useful to examine how an onshore facility is defined and applied under the FWPCA. The Committee's logic reflects earlier case law. In *Union Petroleum Corp. v. United States* [651 F.2d 734 (Ct. Cl. 1981)], the U.S. Court of Claims held that an onshore facility, as defined under the FWPCA, encompassed the plaintiff's entire oil terminal and distribution facility, including the pipeline that ran to the pier. The plaintiff's terminal consisted of an "onshore facility, dock area, and the pipeline area that leads to the dock." *Id.* at 737. The Court of Claims first quoted 33 U.S.C. §1321(a)(10), noting that "[t]he Act broadly defines an 'onshore facility'." *Id.* at 742 (emphasis added). The court then concluded: "There is no doubt that under the definition the Union Terminal, consisting in part of a transportation facility which includes loading racks for trucks and railroad tank cars, and a dock extending into Chelsea Creek for oil tankers, is an 'onshore facility'." *Id.*

Thus, *Union Petroleum Corp.* stands for the proposition that the various components of a shore-based facility should not be segmented, merely because the pipeline portion passes over navigable water to reach a dock. Rather, because the pipeline's terminus was on the shore, attached to Union's tank farm for the storage of oil and gas, it was properly considered part of the onshore facility. This is consistent with the courts' understanding that a dock or pier is considered an appurtenance to the shore from which it originates. Also *Sea Cabin on the Ocean IV Homeowners Ass'n v. City of Myrtle Beach*, ____ F.Supp. ____, ____, No. CIV. A. 4:90-1411-2, 1993 WL 290295, at 2-3 (D.S.C. July 27, 1993) (discussing various cases holding pier is appurtenance to shore-based realty). The MMS's attempt to narrow the "broad" definition of onshore facilities under OPA conflicts with the FWPCA and its treatment under *Union Petroleum Corp.*[1] Congress clearly intended that a pipeline or loading or receiving dock that is "directly connected to a land-based terminal" is part of an onshore facility under OPA.

In addition, Congress took careful steps in framing OPA to exempt *onshore* facilities from the financial responsibility requirements demanded of offshore facilities and vessels. Onshore facilities, along with the latter two categories, are included in all other respects of the statute. For example, OPA defines "responsible party" separately for vessels, offshore facilities, *and* onshore facilities [§ 1001(32)]. Thus, all three categories are addressed in the bulk of OPA's substantive provisions, including those dealing with the elements of liability (§ 1002), defenses to liability (§ 1003), limits on liability (§ 1004), interest paid (§ 1005), recovery by the responsible party (§ 1008), claims procedure (§ 1013), advertisement of source (§ 1014), and subrogation (§ 1015). Yet, the financial responsibility section applies *only* to vessels and offshore facilities [see §§ 1016(a)&(c)]. The explicit exclusion of onshore facilities was not a Congressional oversight; rather, Congress specifically chose to exempt onshore facilities from the financial responsibility requirements because of the fundamentally different nature of those facilities, in contrast to vessels and offshore facilities.

Based on the foregoing, the MMS's proposed regulations to treat an onshore facility as an offshore facility violate Congressional intent as evidenced in the FWPCA, OPA, and OPA's legislative history, and as construed by the courts in *Union Petroleum Corp.* Pipelines that are an integrated part of an onshore terminal are properly classified as "onshore facilities" and thus are exempt from the scope of the proposed rule.

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[1] *Union Petroleum Corp.'s* holding, as well as OPA's Conference Report, is echoed in a recent interim final rule issued by the Research and Special Programs Administration (RSPA) of the Department of Transportation. These regulations are mandated by OPA and are directed at improving response capabilities and minimizing the environmental impact of oil discharges from *onshore* pipelines. RSPA noted that

> most onshore pipelines, because of their locations, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters or adjoining shorelines. This determination is based on the volume of oil transported by pipelines and the fact that they often cross, or are located adjacent to, navigable waters. Thus, most onshore oil pipeline operators will be required to prepare and submit response plans.

Response Plans for Onshore Oil Pipelines, 58 *Fed. Reg.* 247 (January 5, 1993) (emphasis added).

Hence, the mere fact that an onshore pipeline crosses navigable waters does not render that segment of it an "offshore pipeline," where it is part of an integrated onshore unit. RSPA's comments reflect the common sense approach of *Union Petroleum Corp.*, that a pipeline crossing over water may still be considered an onshore facility. *See e.g.*, 49 C.F.R. § 194.3 (1993).

In addition, the response plan requirements under Section 4204(5) of OPA clearly define onshore facilities as being different than offshore facilities. This further supports the position that including onshore as part of an offshore facility is not intended by OPA. In the course of regulating for OPA's response plan requirements, the MMS properly observed these legal distinctions between onshore and offshore facilities. In light of this recent regulatory history, the MMS's current attempt to ignore those distinctions is inconsistent with the statute.

Recommendation

The MMS should:

- ***Clarify that OPA's financial responsibility requirements only apply to facilities in the territorial seas and the OCS***
- ***Clarify that the financial responsibility requirements only apply to lessees, permittees, or holders of a right of use or easement under state law or the Outer Continental Shelf Lands Act.***

THE $150 MILLION FINANCIAL RESPONSIBILITY REQUIREMENT AND *DE MINIMIS* PROVISIONS

A central concern for the offshore industry and financial providers is the sheer magnitude of the requirement to evidence financial responsibility of $150 million, more than four times the former level for OCS operators, and an entirely new requirement for operators in state waters. While many operators were able to self-insure for the former $35 million level, only the very largest operators, perhaps some 15 to 20, would be able to self-insure at the new $150 million level under existing rules (a later section discusses possible alternative criteria for self-insurance). Furthermore, OPA's provision for direct action against guarantors has so far stymied attempts to arrange commercial insurance coverage for certifications of financial responsibility (see later section on this subject). Were the MMS to specify that insurers are not guarantors, or for other reasons insurance companies were to accede to insuring the financial responsibility amount, the enormously increased coverage will come only at a large price. Finally, the largest offshore operators produce about 175,000 barrels per day each (from multiple facilities), and the smallest, about 10 barrels per day (from a single facility). A common $150 million financial responsibility requirement imposes vastly different per-barrel burdens on the operators.

The flexibility in OPA's language and in applicable Court decisions provides the underpinning of a workable regulatory regime. As discussed in the following sections, the National Petroleum Council finds that the MMS has the flexibility to impose financial responsibility for amounts lower than $150 million, and to exempt certain small, low-risk facilities from the requirement to show evidence of financial responsibility. The lower amounts will continue to meet the central purpose of the financial responsibility provisions: to assure that responsible parties have enough funds immediately available to pay for the costs and damages of an oil spill. A paramount point to remember is that these lower amounts in no way change or diminish a responsible party's obligations or responsibilities under OPA.

Available Regulatory Flexibility

The $150 Million Financial Responsibility Requirement

As noted previously, OPA's Section 1016 requires evidence of financial responsibility "to meet the amount of lia-

bility to which the responsible party could be subjected under Section 1004(a) in a case in which the responsible party would be entitled to limit liability under that section." Section 1004(a)'s liability limit for an offshore facility (except a deepwater port) is "the total of all removal costs plus $75 million." An integral part of the financial responsibility provision, which is not mentioned in the MMS ANPR, is the second sentence: "In the case in which a person is the responsible party for more than one facility subject to this subsection, evidence of financial responsibility need to be established only to meet the maximum liability." This statutory language is a clear recognition of the fact that not every offshore facility is required to have evidence of financial responsibility at the level of the greatest maximum liability. Section 1016, read as a whole, does not require every offshore facility to provide $150 million in financial responsibility. Rather, the section repeatedly emphasizes that not all facilities will be subject to the maximum liability. [See also OPA Sections 1016(c)(2) and 1016(a)(2).] Therefore, the language provides the MMS with the flexibility to consider circumstances affecting liability. Such a construction is consistent with OPA's other provisions recognizing risk:

- In its provisions for onshore facilities, OPA specifies the risk factors to consider in establishing liability.
- In its provisions for vessels, OPA requires a responsible party to establish and maintain financial responsibility sufficient to cover the limited liability on its largest vessel.
- In its provisions for spill contingency planning, OPA requires responsible parties to plan for a Worst Case Discharge, a maximum most probable discharge, and an average most probable discharge (see later discussion).

Thus, OPA was designed to consider a volume/risk weighting. Taking the $150 million level of financial responsibility as an inflexible mandate ignores the language of the financial responsibility provision and OPA's overall design and intent.

The OPA Conference Report may suggest that the single $150 million financial responsible party level was purposeful. The statute's language, however, provides flexibility. In a recent Supreme Court decision, Justice Scalia, writing for the majority, held:

> Petitioners appeal to the legislative history of [the Resource Conservation and Recovery Act of 1976], which includes, in the Senate Committee Report, the statement . . . But it is the statute, and not the Committee Report, which is the authoritative expression of the law . . . [*City of Chicago v. Environmental Defense Fund*, 62 LW 4283, 4285-6 (May 2, 1994)].

OPA's language in Section 1016(c)(1) expresses the concept that offshore facilities have different levels of financial responsibility. And, as noted by Justice Scalia, the language of the statute is the most appropriate guidance for a regulatory agency.

Factors that influence the potential liability of an offshore facility include the quantity of oil that the facility produces, transfers, or stores, and its proximity to areas that require protection from oil spills. Finally, as discussed in earlier chapters, U.S. offshore facilities have a history of relatively small spills (when they occur) and low removal costs. Thus, the amount of limited liability for any producer is unlikely to reach $150 million. The financial responsibility provision is intended to ensure that there will be adequate funds immediately available to compensate in-

jured parties. Given all of the factors discussed above, a financial responsibility lower than $150 million will achieve this goal. In the section entitled Risk-Based Evidence of Financial Responsibility later in this chapter, we outline how such lower requirements might be applied.

De Minimis Provisions

In addition to the explicit language of the financial responsibility provisions and OPA's other sections, the MMS has authority, like any other agency developing implementation regulations, to prescribe exemptions from the requirement for evidence of financial responsibility. *United States v. Allegheny-Ludlum Steel Corp., et al.*, 92 S.Ct. 1941 (1972). The MMS's discretion in this area is limited by reasonableness and consistency with the expressed intent of Congress. *United States v. Riverside Homes, Inc., et al., 106* S.Ct. 455 (1985). The MMS could maintain consistency with Congressional intent while exempting certain offshore facilities from proof of $150 million for financial responsibility.

As previously discussed, Executive Order 12866 requires the MMS to consider the "burden on . . . businesses of differing sizes, consistent with obtaining the regulatory objective. . . ." The regulatory objective of the financial responsibility provision is to ensure that an offshore facility can meet its limited liability. Limited liabilities are all cleanup costs, plus $75 million in damages (third party and natural resource). Historical experience indicates, however, that removal costs, for even the largest and most complex facilities, have been significantly less than the $75 million level that is implied under the $150 million requirement. As such, limited liability for virtually every facility should be less than $150 million. Because the burden of the proposed financial responsibility requirement falls most heavily on the small producer and because smaller facilities are overly burdened by the implied limited liability requirement, the MMS can and should fashion a reduction that includes a *de minimis* provision, as other agencies have.

OPA's regulations have not been finally implemented by the Department of Transportation, the Environmental Protection Agency (EPA), or the MMS. But for purposes of facility and vessel contingency planning, these agencies have implementing regulations in place. Each of them has established exemptions and *de minimis* categories. The U.S. Department of Transportation, Research and Special Programs Administration (RSPA), has exempted onshore small pipelines, distant pipelines, and all natural gas pipelines from response planning requirements. RSPA has also exempted all non-petroleum oil carriers who transport less than 42,000 U.S. gallons and all petroleum bulk carriers of less than 3,500 U.S. gallons.

The U.S. Coast Guard has exempted marine transportation-related facilities, including deepwater ports, from vessel/facility response plan requirements where the vessels utilizing the facility have a capacity of less than 10,500 U.S. gallons (250 barrels). The EPA has exempted onshore facilities which do not perform over-the-water transfers and which handle less than 42,000 U.S. gallons. The EPA has also established circumstances under which onshore facilities handling 1 million U.S. gallons or less may be exempt.

A possible solution is already proposed by the MMS, in its ANPR on the financial responsibility requirements, wherein comments are requested on the current U.S. Coast Guard exemption of offshore facilities handling less than 1,000 barrels of condensate. Condensate is a light "nonpersistent" hydrocarbon liquid obtained by condensation of

hydrocarbon vapors and produced with natural gas. Highly volatile, evaporating quickly if spilled, it poses a minimal environmental threat. There was a wide consensus among those commenting to the MMS on the ANPR that retention of the 1,000 barrel condensate exemption, at the least, is appropriate. However, natural gas pipelines do not present the same risk of an instantaneous spill of 1,000 barrels or more because the condensate is entrained within the gas stream throughout the length of the pipeline. Therefore, natural gas pipelines carrying condensate should reasonably be treated differently, as outlined in the section entitled *De Minimis* later in this chapter.

The MMS also has the authority to exempt offshore facilities which handle less than a certain amount of oil, just as other agencies have. A paramount point: an MMS exemption from the financial responsibility requirements for *de minimis* quantities in no way changes a responsible party's OPA liabilities or other obligations to respond to any discharge. An exemption from the financial responsibility regulations would be consistent with the Executive Order 12866 by recognizing the burden of the $150 million requirement on small independent oil operators, particularly those who operate wells of limited production capacity. Further, such an exemption is consistent with the Congressional recognition, and the reality, that not all offshore facilities will incur the greatest maximum liability.

Risk-Based Evidence of Financial Responsibility

Previous discussions in this report have emphasized two kinds of risks which prevail in offshore production operations: the risk of spill occurrence, which is low, based on historical records, and the risk of catastrophic damage from a spill, which can be evaluated and quantified. Factors such as the location of a producing facility, the distance from shore, the water depth, its proximity to marine features that require protection (e.g., a coral reef or marine sanctuary), prevailing wind and current conditions, spill trajectories, and activities a facility must be protected from (e.g., commercial fishing grounds) form the basis for an evaluation of the potential for damages that might occur in the event of a spill.

The MMS can fashion a regulation which requires different levels of financial responsibility based first on volumes ("Worst Case Discharges" as described below) and adjusted in some instances by the other factors which affect the risk of damage. The approach is analogous to the spill response planning process, which takes into account these interwoven factors. The Coast Guard's regulations implementing OPA's response plans provide a conceptual model. Its "planning volumes" begin with a calculation of the "Worst Case Discharge" to determine the volume (see below), and then look at the quality of the oil, the removal capacity, and the area impacted. The same concepts are applicable here.

Remembering that volume (Worst Case Discharge) becomes the first determinant, the following elements may also enter the equation:

- Quality of oil
- Location
  - Distance from shore
  - Distance from marine features
  - Depth of water.

Volume of Oil

The "Worst Case Discharge" calculation takes account of facility characteristics. Under OPA, facility response plans must identify and ensure, through the use of contractors or company equipment and personnel, the availability of

resources sufficient to remove, to the maximum extent practicable, a Worst Case Discharge and to mitigate or prevent substantial threat of such a discharge during adverse weather conditions.

Formal Worst Case Discharge calculation methodologies have not yet been promulgated under OPA for offshore facilities. The calculations will use release detection time, response time, flow rates, and volumes to arrive at the estimate. Table 5-1 provides illustrative calculations for different types of facilities.

It is important to note that the Worst Case Discharge calculations will be required for spill response planning. Thus, their development does not impose an incremental burden on companies or on the Minerals Management Service. Secondly, the use of the Worst Case Discharge calculation as the basis for determining the appropriate financial responsibility level, while a departure from current practice, is a significant improvement in developing a regulation which meets the purpose of the statute. The applicability of the

TABLE 5-1

ILLUSTRATIVE CALCULATIONS OF WORST CASE DISCHARGES FOR OFFSHORE FACILITIES

Pipelines	**Pipeline Diameter**		
	4"	**8"**	**10"**
Release Detection Time (Hr.)	1.00	1.00	2.00
Shutdown Response Time (Hr.)	+0.04	0.04	.50
Total Response Time	=1.04	1.04	2.50
Highest Flow Rate over Prev. 12 Months (Barrels/Hr.)	x110.0	78.6	885.0
Worst Case Discharge	=114.0	81.7	2212.5
Facilities (Excluding storage tanks)	**Production Volume**		
	70 B/D	**1480 B/D**	**2100 B/D**
Facility Release Detection Time (One hr. for manned or remotely monitored facilities)	1.00	1.00	1.00
Shutdown Response Time (may be based on automatic shutdown system: e.g., here .04 Hr.)	+ 0.04	0.04	0.04
Total Response Time	= 1.04	1.04	1.04
Highest Normal Oil Throughput (Flow Rate) over Prev. 12 Months (Barrels/Hr.)	+ 2.9	78.6	104.0
Subtotal	= 3.1	81.7	108.0
Draindown Volume (Capacity of Largest Production Vessel, i.e., Heater Treater/Separator) (Barrels)	+ 14.0	14.0	135.0
Worst Case Discharge (Barrels)	= 17.1	95.7	243.0
Storage Tanks			
Capacity = Worst Case Discharge (Barrels)	200.0	120.0	191.0

final Worst Case Discharge regulations to this second use will need to be closely examined. Under such a mechanism, an operator with many facilities would provide evidence for the facility with the highest Worst Case Discharge. Thus, such an operator might have a lower requirement to show financial responsibility than an operator of one large facility.

The other risk factors noted above can be used to adjust the financial responsibility level based on risk. Each is discussed below.

Quality of Oil

The quality of oil is an important consideration in the evaluation of potential damages from a spill. Condensate, a light and highly volatile hydrocarbon, dissipates quickly. Crude oils, on the other hand, are classified as "persistent." Even with crude oils, some of the heaviest oils may be easier (and cost less) to remove than some lighter crude oils. The Coast Guard response plans have established five "groups" of oil ranging from "non-persistent oils" (distilled product similar to condensate) to four classes of "persistent oil" based on specific gravity and API gravity. The MMS should use these classifications of oil in assessing the risk of significant environmental harm from an offshore facility.

Location

The three elements of location—depth, distance from shore, distance from marine features that need protection or from which platforms need to be protected—have been extensively outlined in Chapter One and Chapter Two. Each has an important impact on the effect of a given spill, and thus has a direct bearing on the cost of cleanup and likely damages. These, taken together with the quality of the oil handled at the facility, should be the basis for determining the amount of financial responsibility required.

Implementation

The different levels of financial responsibility could be established as bands: Ranges of volumes that would qualify for a given financial responsibility level, such as 0 (*de minimis*), $35 million, $50 million, $75 million, and $150 million. Texas has used a similar structure of establishing a tiered approach in its legislation limiting natural resource damages. Industry could assist the MMS in developing this process.

Figure 5-1 shows conceptually how such a regulatory structure might work. In the lower left hand corner, a *de minimis* provision will exempt from financial responsibility requirements those facilities with the lowest risk of a spill that exceeds the financial capability of the operator. (Suggested *de minimis* levels, based on "Worst Case Discharge" calculations, are discussed more fully below.) At the upper right hand corner, large facilities show evidence of the full $150 million. In between, the "variable" area might be divided into several bands of financial responsibility levels.

Some possible methods for incorporating the additional parameters are:

- A petition mechanism, where an operator could petition the MMS for a lower financial responsibility requirement based on the mitigating circumstances reflected in these factors. This is analogous to the approach suggested for the *de minimis* volumes, as discussed below. It also provides an incentive for operators to minimize environmental risk by decreasing the quantity of oil stored offshore.
- A formula, where each of the factors could be assigned a relative value. California has used such an approach in developing its financial re-

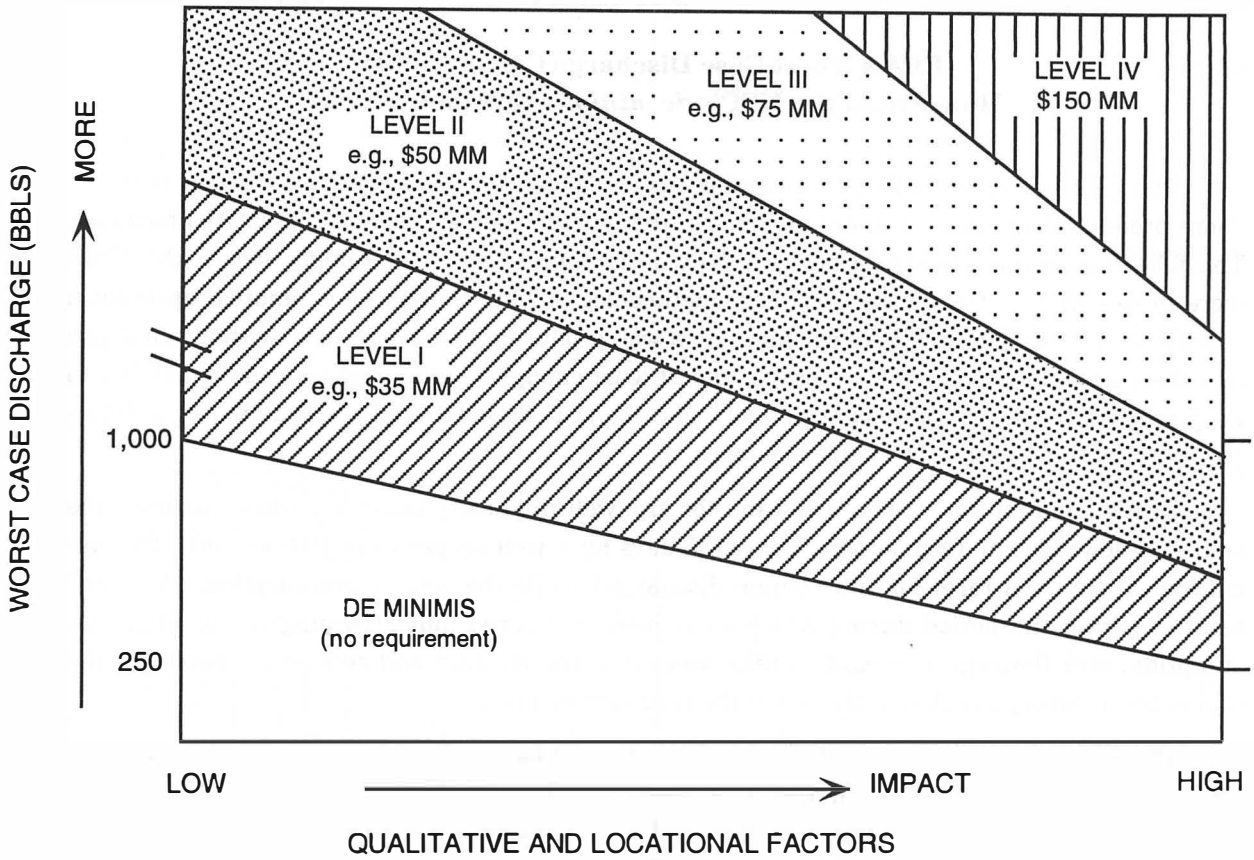


Figure 5-1. Risk-Based Levels of Financial Responsibility—An Illustration.

sponsibility regulations. While the development of the formula requires consultation and care, its application would be straightforward.

De Minimis

Offshore facilities which handle oil should be considered for a complete exemption if their Worst Case Discharge would not cause significant environmental harm. Setting financial responsibility requirements based on a realistic appraisal of the potential damages to be incurred will satisfy the purpose of OPA's financial responsibility requirements. In fact, the term *de minimis* applies more appropriately to environmental risk than to volumes. The lower the risk of environmental damage, the lower the risk of incurring cleanup costs and damages that will exceed an operator's ability to pay. Accordingly, the following categories of exemptions should be adopted by the MMS.

Condensate

The MMS, in its ANPR, has referred to the existing U.S. Coast Guard exemption for facilities handling 1,000 barrels or less of condensate and has requested comments on its extension to this rulemaking. This exemption should be adopted by the MMS in exempting Worst Case Discharges of less then 1,000 barrels of condensate from financial responsibility requirements. However, this exemption is based on the normal volumetric storage capacity on offshore facilities for a Worst Case Discharge, not the volume of condensate physically moving through an offshore pipeline at any one time. Thus natural gas pipelines can reasonably be treated differently.

EPA's Worst Case Discharge Calculations:
How would the NPC's *de minimis* thresholds look?

The EPA has recently finalized regulations for calculating Worst Case Discharges from onshore production operations under OPA's requirements for non-transportation-related facilities. The following graphs illustrate how the NPC's *de minimis* thresholds might look if the MMS were to use EPA's Worst Case Discharge methodology. Note that these estimates represent a specific set of variables in EPA's calculation: a well producing under pressure, with a well depth less than 10,000 feet, no on-site storage, and at least enough cleanup and recovery capability to keep pace with the rate of discharging oil. The Worst Case Discharge is calculated by a different formula if any of these variables changes.

EPA's equation for such a well (and for any well producing under pressure) assumes the well will flow in some fashion for 30 days (45 days for a well deeper than 10,000 feet). The calculation includes a term for the volume discharged while the well is uncontrolled. A second term, covering the period during which oil is being recovered (but according to the EPA's assumption, still flowing), is meant to take account of the cleanup and recovery capability: the higher the recovery capability, the lower the resultant volume.

The NPC's *de minimis* thresholds of 250 and 1,000 barrels imply minimum production volumes of 8.3 barrels/day and 33 barrels/day, respectively. The maximum qualifying production rate will vary with response time and recovery capability. An operator with nameplate capacity and personnel sufficient to recover 2 times the well's flow and no lag time for response could produce as much as 16.6 barrels per day and still have a Worst Case Discharge of 250 barrels, or produce 66 barrels per day and have a Worst Case Discharge of 1,000 barrels. The production levels that allow an operator to meet any given Worst Case Discharge—whether 250, 1,000, or some other volume—change rapidly with changes in equipment and personnel levels (i.e., recovery capacity) and response time. An "uncontrolled" event in excess of a few days is unlikely; spill response plans and measures are realistically geared to events of a much shorter duration. The graphs are meant only to show the application of an equation.

The EPA's Worst Case Discharge would allow the small operators such as the stripper producers in state waters to qualify for *de minimis* financial responsibility status under the

(cont'd)

With condensate in natural gas pipelines entrained over the length of the pipeline, risk of an instantaneous release of its entire condensate volume is low. Therefore, a natural gas pipeline should be subject to no more than the minimum COFR class ($35 million), even if its Worst Case Discharge volume exceeds 1,000 barrels.

Oil

At the very least, the MMS should exempt offshore facilities that have Worst Case Discharges of 250 barrels of oil or less from the financial responsibility regulations. The MMS also may exempt some offshore facilities that have Worst Case Discharges greater than 250 barrels, based on the quality of oil handled and the location of the offshore facility.

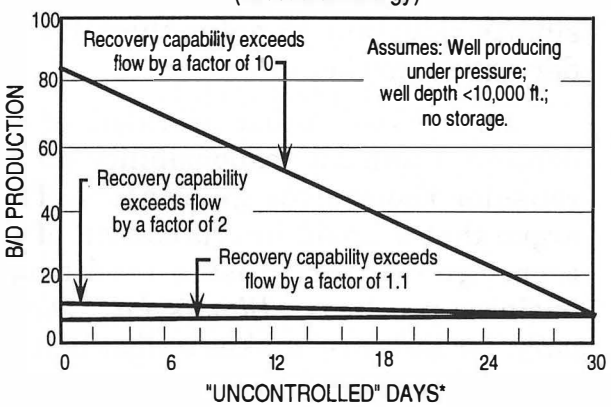
As noted above, the U.S. Coast Guard, in its rulemaking to implement the response planning requirements of OPA, determined that certain transportation-related facilities did not repre-

EPA's Worst Case Discharge Calculations:
How would the NPC's *de minimis* thresholds look? (cont'd)

NPC's proposal, even with minimally adequate response capability. With more aggressive response capability, operators with a fair range of production could also have Worst Case Discharges of 1,000 barrels or less, and thus petition for a *de minimis* status. These results are consistent with the NPC's intent in framing its proposal.

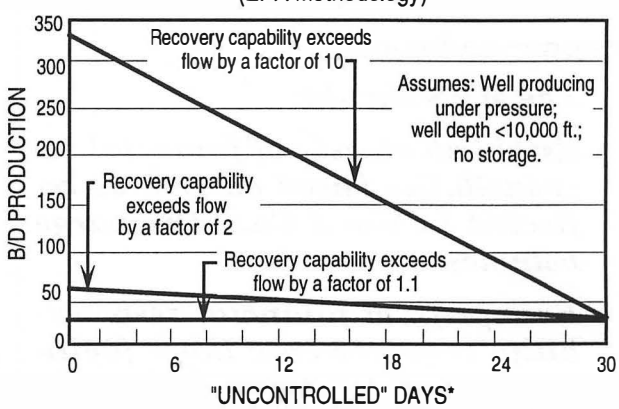
EPA chose to use historical flow rates in calculating Worst Case Discharges for *onshore* production, where there are no mitigating factors such as water depth. Furthermore, because 90 percent of the Gulf of Mexico OCS wells are on artificial lift, EPA's treatment of pumping wells is of particular interest; the Agency uses a simple formula: historical flow rate times days unattended (or, where days unattended is unknown, historical flow times the maximum number of days the well has been unattended times 1.5). This is a clear recognition that the pumping well will not surge out of control. EPA's methodology is in contrast to formulas currently under discussion at MMS that would assume that all downhole safety equipment will be lost/inoperative in the event of a spill, an assumption not borne out by experience on the Gulf of Mexico offshore.

Production Rates for Worst Case Discharge of 250 Barrels (EPA Methodology)



*Days unattended plus days to respond.

Production Rates for Worst Case Discharge of 1,000 Barrels (EPA Methodology)



*Days unattended plus days to respond.

sent a substantial threat of harm to the environment and therefore would not be required to prepare and submit response plans. These marine transportation related (MTR) facilities, which transfer oil to or from vessels with a capacity of 250 barrels or less, were exempted from response plan requirements. (See 58 FR 7334, February 5, 1993.)

The U.S. Coast Guard determined that these waterfront facilities, even though they are close to navigable waters and adjoining shorelines, did not represent a substantial threat of harm because of the quantity of oil handled. The MMS should acknowledge this and other analyses conducted by other federal agencies implementing OPA and adopt similar exemptions from the requirement for financial responsibility.

Companies with Worst Case Discharges greater than 250 and less than 1,000 barrels could petition for exemption from the financial responsibility requirements. Such a petition would set forward safety features, location, and

other factors that mitigate risk. For example, a facility with a Worst Case Discharge volume of 950 barrels of light, sweet crude oil, located ten miles from shore, on artificial lift, monitored 24 hours a day, having automatic shutdown equipment could make a compelling argument that risk of a catastrophic spill is *de minimis*.

Dry Gas

The MMS has indicated in the ANPR that it has interpreted the OPA definition of oil as excluding dry gas. This interpretation is entirely appropriate and should be reflected in the rulemaking. Facilities that only handle dry gas should be entirely exempt from OPA's financial responsibility requirements. Dry gas is not oil and therefore these facilities are not subject to OPA's jurisdiction.

Recommendation

The MMS should:

- ***Establish classes of financial responsibility based on risk as reflected in Worst Case Discharge volumes***
- ***Exempt from financial responsibility requirements those facilities with Worst Case Discharges of 250 barrels of oil or less***
- ***Accept applications for exemption from financial responsibility requirements, based on mitigating risk factors, from facilities with Worst Case Discharges greater than 250 barrels and less than 1,000 barrels of oil***
- ***Exempt facilities handling only condensate of 1,000 barrels or less***
- ***Limit the financial responsibility to $35 million for Worst Case Discharges of more than 1,000 barrels of condensate from natural gas pipelines***
- ***State that dry natural gas is exempt from financial responsibility requirements.***

GUARANTORS

The concerns of insurers and other providers of financial responsibility over OPA's provision for direct action against guarantors is a core issue in the difficulties OPA presents to the petroleum industry: the providers' participation in underwriting markets is central to meeting OPA's financial responsibility requirements. OPA expanded liability amounts and extended direct action rights to third party claimants, thereby increasing potential claims and transactional costs. In addition, the lack of federal preemption and the ensuing uncertainty about the relationship between state and federal liabilities make providers of evidence of financial responsibility reluctant to enter the OPA underwriting market.

Insurers and other providers of evidence of financial responsibility do not consider themselves guarantors. They argue that a broad interpretation of the term "guarantor" upsets traditional business practices. *Black's Law Dictionary*, for instance, makes a clear distinction. According to it, indemnity insurance is a contract where one party, the insurer, undertakes for a stipulated fee to compensate another, the insured, for loss on a specified subject by specified or unknown perils or some contingency or act to occur in the future. A guarantor, in contrast, is one who become secondarily liable for the payment of another's debts or agrees to perform for another.

A distinction between guarantor and insurer has been recognized by a federal district court, which interpreted "guarantor" to mean only those persons offering a guarantee. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [42

U.S.C.A. Section 9601 et seq.] has a direct action provision similar to OPA's. (CERCLA defines "guarantor" as "any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator..." [CERCLA Section 9601(13)]. OPA defines "guarantor" as "any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party..." [OPA Section 1001(13)].)

The issue in *Port Allen Marine Services, Inc. v. Chotin* [765 F. Supp. 887 (M.D.La., 1991)] was whether a party could directly sue the insurer of an owner or operator under CERCLA. The court noted that "insurers" are not "responsible parties" in CERCLA. After quoting the CERCLA section which allows direct action against "guarantors," the Court held:

> An insurer is not necessarily a guarantor. Therefore, considering the clear meaning of the statute, the Court can logically conclude that Congress only intended to allow direct actions in cases involving guarantors. *Port Allen* @ 889.

This language comports with established legal distinctions between those who insure and those who guarantee. Like CERCLA, OPA does not list insurers as responsible parties. The reasoning in *Port Allen* can be applied in interpreting OPA's direct action provision. The *Port Allen* decision was cited for its holding that CERCLA does not provide a direct cause of action against a responsible person's liability insurer by the First Circuit in *American Policyholders Insurance Company v. Nyacol Products, Inc.* [989 F. 2nd 1256, 1263, fn. 11]. The MMS should recognize this distinction and specifically apply it to the financial responsibility rulemaking.

OPA's language does differentiate between "guarantors" and others who provide evidence of financial responsibility. In Section 1010, Indemnification Agreements, OPA lists agreements to insure, hold harmless or indemnify a party for liability as not prohibited. This statutory acknowledgment of these forms of financial responsibility indicates that the drafters of OPA were aware of the difference between an agreement to insure and a guarantee. Section 1016(e), Methods of Financial Responsibility, lists insurance, surety bond, guarantee, letter of credit, or qualification as a self-insurer. This is another clear distinction between a guarantee and insurance.

Further, Section 1016(f), Claims Against Guarantor, specifically lists the defenses which a guarantor may assert in direct action cases. This is significantly different from Section 1016(e), which gives the MMS considerable discretion in establishing the defenses available to other providers of financial responsibility. The fact that Congress specifically delineated the defenses that could be asserted by a guarantor while leaving to the Executive Branch the ability to define the defenses for other persons providing evidence of financial responsibility indicates an intent to treat guarantors differently from other providers of financial responsibility. Finally, the Clean Water Act specifically asserted direct action against "insurers." OPA, however, contains no such specification. These statutory distinctions and the *Port Allen* case lead to the conclusion that insurers and others who provide evidence of financial responsibility are not guarantors.

Recommendation

The MMS must:

- ***Recognize the distinction between guarantors and insurers and specify in its rule that an insurer is not a guarantor.***

SELF-INSURANCE

OPA provides for self-insurance as a means of establishing financial responsibility in lieu of guarantees, letters of credit, and surety bonds. The self-insurance rules have gained new importance under OPA because of the increased amount of financial responsibility required and because of the direct action provision. Not only must companies show evidence of the quadrupled amount, but under existing conditions they will be unable to use conventional insurance to do so. The issue of the self-insurance rules would be substantially alleviated by the adoption of a *de minimis* rule for oil and by the recognition of insurers as non-guarantors. In the absence of these changes, the flexibility represented in the self-insurance provisions discussed below may be the only way for the majority of offshore producers to qualify as self-insurers. Even with the implementation of a *de minimis* rule and movement on the insurer/guarantor issue, the self-insurance provisions discussed below merit continued consideration. They will provide reasonable regulatory flexibility while continuing to meet the central objective: they measure the responsible party's ability to pay for costs and damages under OPA. This ability can be demonstrated by a number of means.

Proposed Self-Insurance Criteria

Self-insurance tests under various regulations prior to OPA were based on a company's audited financial statements. These tests typically look at a company's working capital and net worth as a means of measuring its ability to meet financial responsibility requirements. However, conventional financial statements are a measure of the historical costs and operations of a company and are not necessarily a true indicator of a company's value or its ability to meet future obligations. Furthermore, industry norms and practices with respect to asset management and capital deployment have changed over time. Historical rules of thumb that were used to establish the "acceptable" ratios no longer apply.

New Elements of the Proposed Self-Insurance Test

In an effort to make the self-insurance test more representative of a company's ability to pay its claims, the proposed self-insurance test is based upon a combination of tests utilizing the following criteria:

- Historical cost financial statements
- Public debt ratings
- Pollution liability insurance limits in force
- Net proved reserve value based upon an independent reserve report
- Identifiable assets
- Membership in an MMS-approved mutual loss funding organization.

The proposed self-insurance test uses several features which are different from previously approved self-insurance tests. One feature is the use of pollution liability insurance policy limits in addition to tangible net worth as a measure of the company's total financial resources. This concept assumes that if a company's assets are liquidated, the measure of those assets is tangible net worth. In addition to the tangible net worth, a company also has available any insurance policies in force which may be drawn upon. (They will provide protection when the insured is in liquidation only if a loss payee clause—which the MMS can require and approve—has named the Oil Spill Liability Trust Fund.) Letters of credit might also provide funds. While committed lines of credit could also be a possibility if a potential borrower is in liquidation, it is

unlikely that banks will be willing to lend on the lines of credit due to the "material adverse change" language contained in credit agreements.

Critics of using pollution liability insurance policy limits in a self-insurance test say that this is an attempt to circumvent the direct action provision of OPA. (The definition of "guarantor" excludes responsible parties, i.e., self-insurers.) In fact, however, a pollution liability insurance policy is an asset which attains its value uniquely in the event of a pollution incident. It is an asset contractually matched to the occurrence of the specific liabilities in question: pollution liabilities. Since the purpose of the self-insurance test is to establish what resources a company has available to meet its pollution liability obligations, a pollution liability insurance policy should be the first to be considered.

A second new feature recommended in the proposed self-insurance test is the use of an independent reserve report as a means of establishing the value of a company's proved oil and gas reserves. This replaces the traditional view of "net worth" reported in financial statements. Because the true worth of an exploration and production company is the value of its oil and gas reserves less its liabilities, historical cost financial statements may not accurately reflect reserve value or, thus, "worth" of the company. Independent, third-party reserve reports may indicate asset values substantially greater than those established by historical cost financial statements and, thus, should be incorporated in the calculation of net worth. Reports assessing proved oil and gas reserve quantities are required and accepted as part of the financial reports of public energy companies submitted to the Securities and Exchange Commission. Even private companies may have included such a report in an application for borrowing.

The third feature recommended in the proposed self-insurance test is that of inclusion of identifiable assets. This is not a new element since the use of identifiable assets has been previously approved by the U.S. Coast Guard for use in its self-insurance regulations, and is now incorporated in current MMS rules. The U.S. Coast Guard has applied specific principles relative to evaluation of assets identified by self-insureds as those assets that may be liquidated to recover claims as provided under 33 CFR 135.213(a)(2). Further, the Cost Guard has required that the identified assets be included in a certified list and that any changes in the status of the identified assets be reported. A similar set of principles relative to valuation, and ultimate inclusion of other identified resources such as cash flow, committed lines of credit, oil and gas reserves, etc., in the self-insurance test, is important in fashioning a workable regulation.

The final new concept introduced in the self-insurance test is the use of alternative funding mechanisms: new entities that would bring together the resources of a group of operators for a showing of financial responsibility. One method of alternative funding would be to establish a mutual loss funding mechanism similar to CRISTAL, which is used to meet cargo owners' pollution liability obligations. CRISTAL, the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, was begun in 1971 and operates as a mutual, cooperatively paying pollution claims due to tanker spills. It works as a supplement to the tanker owners' mutual, TOVALOP, Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution. Its members include oil companies, traders, and oil receivers such as utilities. This type of organization would not necessarily be classified as an insurance company and would not be expected to meet insurer in-

THE SELF-INSURANCE TEST

To self insure, an operator must meet one of the following tests:

I. The Ratio Test: The responsible party (or designated operator) must have:

A. The following two ratios:
   1. a ratio of total liabilities to owner's equity less than 1.5; and
   2. the greater of either:
      a) a ratio of cash flow (the sum of net income, before extraordinary items, plus depreciation, depletion, amortization, and deferred taxes) to total liabilities greater than 0.1; or
      b) a ratio of the average cash flow, as defined above, for the last three years to its most recent total liabilities greater than 0.1.

and

B. Owner's equity minus intangible assets (i.e., tangible net worth), or tangible net worth plus certifications of pollution liability insurance, equal to the amount of financial responsibility required.

II. The Bond Rating Test: The responsible party (or designated operator) must have:

A. A most recent bond rating of not lower than BBB minus (investment grade) as issued by Standard and Poors or the equivalent rating as issued by either Moody's or Duff & Phelps;

and

B. Owner's equity minus intangible assets (i.e., tangible net worth) or tangible net worth plus certifications of pollution liability insurance equal to the amount of financial responsibility required.

III. The Mutual Loss Membership Test: The responsible party must provide:

A. Evidence of financial responsibility in the aggregate amount of $35 million through one or more of the following:
   1. certifications of commercial pollution liability insurance; or
   2. tangible net worth; or
   3. net reserve value based on an independent reserve report, calculated in a manner acceptable to the MMS, which shows total reserve value less liabilities; or
   4. identifiable assets.

and

B. Evidence of membership/participation in an MMS-approved mutual loss funding mechanism.

IV. General

A. Certificates of commercial pollution liability insurance must be submitted in a form and from insurers acceptable to the MMS. The certificates must contain clauses indicating the Oil Spill Liability Trust Fund as a loss payee.

B. The information required herein shall be submitted by the chief financial officer or equivalent officer. Where appropriate, such information shall be supported by audited financial statements.

solvency requirements as a guarantor would. Offshore Oil Pollution Liability Association Ltd. (OPOL), the insurance mechanism used by North Sea producers, may also offer a model. OPOL, established in 1974 by offshore operators in the U.K. is (1) a conduit for the settlement of pollution claims arising from discharges or escapes of oil in offshore operations and (2) a guarantor of claims brought against a member operator. Liability against a member operator is strict and capped at $100 million per incident and $200 million per year. While each member pays its individual pollution liability obligations, the organization as a whole stands behind the obligations of a non-performing member. The cooperative "guarantee" has never been tapped.

The second alternative funding mechanism would be an industry captive insurance company. Such an insurance company would have to be capitalized and domiciled in the United States and meet the insurer solvency requirements of its domicile state. Examples of these two mechanisms are outlined in later sections.

Surety bonds have only recently become a possible alternative for OPA COFRs, with the recent announcement of a new consortium of bonding companies formed to provide COFRs to vessels under the Coast Guard's new rules. Whether a parallel facility would be viable for offshore operators remains to be seen. In any event, the surety bond will be a solution only to the largest, most creditworthy firms. The surety company seeks to avoid risk by issuing bonds only to firms that can cover their liabilities, i.e., firms that can pay the costs and damages of a spill without access to the bond. The same offshore operators that can meet such a criterion are also likely the ones that can most easily self-insure.

The Proposed Self-Insurance Test

An operator electing to establish financial responsibility through self-insurance must meet one of the following three tests: (1) the "ratio" test, (2) the "bond rating" test, or (3) the "mutual loss membership" test. By design, different kinds of companies will qualify for different tests. Large companies, for instance, are likely to qualify for the ratio test, a more traditional comparison of liabilities to net worth and cash flow to liabilities. The bond rating test uses credit-worthiness ratings from Standard & Poors and similar organizations to identify "investment grade" companies. While such an approach gives the MMS an independent confirmation of an operator's financial strength, self-insurance via the bond rating test is unlikely to be available to privately held firms that do not access public debt markets. The ratios used in the self-insurance tests are representative of normal coverage and leverage ratios used in credit analysis. The minimum ratio levels are set at what are generally considered minimums for investment grade rating of publicly issued debt. The MMS may wish to consult with several of the bond rating organizations about investment grade ratio levels. Since the bond rating test would be based on public debt ratings by the rating organizations, the ratio test is an attempt to use the same criteria for companies without public debt. The last test, evidence of $35 million plus membership in an MMSapproved mutual loss funding mechanism, is designed to allow smaller firms to qualify for self-insurance. These tests are outlined in the box entitled "The Self-Insurance Test."

How a mutual loss funding mechanism might work is sketched below. There are other equally workable structures for such a concept. Any new mechanisms will require careful consultation in its development, with potential beneficiaries, possible underwriters, and regulators.

Companies unable to provide evidence of $150 million responsibility but at least $35 million of financial responsibility would be required to join a newly established mutual association which would cooperatively pay claims. Each company would commit to a certain loss participation percentage (call), for a total mutual "fund" of $115 million ($150 million required for each responsible party minus $35 million individually self-insured).

The exact amount of the call would vary depending on the number of mutual members. If approximately 20 companies can self-insure the entire $150 million, some 110 offshore operators could be left to join the mutual. If all did so, the required loss participation would be about $1 million, an insurance amount obtainable by the companies in offshore waters. Call requirements could be supported by letters of credit or insurance. (Joining the mutual is only an integral requirement once an operator has opted to self-insure with the "Mutual Loss Membership Test.")

The $35 million base level of conventional self-insurance has been chosen because there has been widespread acceptance of the current $35 million COFR system at least in federal waters. There are many new operators who previously did not have to show financial responsibility under OCSLA, and whether all of these newly impacted state operators will be able to qualify for $35 million self-insurance is uncertain. Without flexible criteria, however, many are likely to be unable to qualify. In fact, without flexible self-insurance criteria, numerous OCS operators would be unable to show evidence of $35 million financial responsibility. (Under OCSLA, these OCS operators relied on insurance to backstop their showing of financial responsibility.)

The plan contemplates that the "assets" of the mutual be the pledges of its members. If some administrative funding is needed on an ongoing basis, members would pay a separate moderate fee, perhaps annually. The administration of the mutual could be managed by a federal agency or by a contractor.

Payments from the mutual would not begin until costs and damages exceeded $35 million (or put another way, until liabilities were larger than those paid in any previous Gulf of Mexico spill). Because liabilities for offshore spills are likely to be well under OPA's $150 million financial responsibility amount, especially if the circumstances of the spill keep the liability limits intact, payments from the mutual are likely to be modest, if necessary at all.

By regulation, the MMS would have to allow entry in the mutual to qualify as self-insurance. The mutual would not be a guarantor.

Captive Insurance Company

Traditional insurers have vociferously resisted providing certification for financial responsibility requirements under OPA. This is because, in part, a for-profit insurer receives premiums from several sources/policies/types of coverage, and severe losses from any one insured/coverage could severely impact their ability to provide reserves for other insureds/coverages.

However, a captive insurer formed specifically for OPA certification would not be concerned about other non-related coverages. Its assets would be pledged solely for offshore oil spills and therefore could trade within the current strict framework of the act. The necessary capitalization amounts for such a facility likely would be a multiple of the guarantee amount ($150 million), but would depend on a few variables, including what capitalization levels the MMS and captive domicile regulators would accept for the number of companies uti-

TABLE 5-2

COASTAL STATE REQUIREMENTS FOR FACILITIES TO SHOW FINANCIAL RESPONSIBILITY FOR OIL SPILL LIABILITY

OPA Only	$100 Million	$50 Million	Other	None
PRODUCING STATES				
Florida*	California	Alaska		Alabama
Louisiana*				Mississippi
Texas*				
NON-PRODUCING STATES				
Oregon	Washington	Delaware	South Carolina	Maine
		New York	Virginia	Maryland
			New Jersey	Massachusetts
			New Hampshire	North Carolina
				Rhode Island

*Awaiting federal implementation.

lizing this facility and the actual exposure (dollar amount) a spill in OCS waters could cause.

Different domiciles will have different forms of capitalization. Some flexibility comes from the fact that an industry captive would not necessarily have to capitalize with cash: Vermont allows a letter of credit, for instance. Letters of credit from all parties interested in the facility could be pooled to reach the capitalization amount (for example, 75 companies with $4 million letters of credit, each amassing $300 million capitalization). A captive would not necessarily have to be formed to insure the OPA limit of liability. Such a captive could be formed strictly for financial guarantee purposes—it could be a warranty of entrance into such a facility that actual insurance (of a predetermined amount) would be carried by each member for their own account and that the captive would always be reimbursed (either by the member or as an insured loss payee) for expenses of the captive associated with its being a guarantor under the Act.

It is important to note that the MMS is well versed in the captive or alternative risk transfer industry. The MMS should be open to dialogue on the formation of such a facility, its actual capitalization needs as determined by the actual oil spill costs and damages historically incurred in offshore operations, as well as the number of participants/limits of liability offered. Additionally, several U.S. states have captive domicile laws precluding the need to go to an out-of-country location and incur high federal excise taxes.

Recommendation

The MMS should:

- ***Structure its self-insurance criteria to allow both traditional tests of a responsible party's ability to pay as well as new mechanisms such as the inclusion of pollution liability insur-***

ance policies, inclusion of third-party proved reserve valuations in the net worth calculation, and membership in a newly formed mutual loss funding mechanism.

STATE REQUIREMENTS AND EVIDENCE OF FINANCIAL RESPONSIBILITY

The MMS has requested comments on the relationship between state financial responsibility requirements and OPA requirements. Specifically, the MMS has asked to what extent offshore financial responsibility may be deferred to a state program and what coordination mechanisms can be established between the MMS and states. The relationship between the MMS and the states should be one that enhances government coordination and reduces the regulatory burden on affected owners and operators. OPA does not prohibit states from adopting separate financial responsibility requirements. Nor does OPA prohibit the MMS from incorporating the evidence of financial responsibility provided to a state for OPA compliance. The proof provided to a state should be credited toward the proof required by the MMS.

One purpose of financial responsibility requirements is to ensure prompt payment of claims arising from an unauthorized discharge of oil. The concept of one certificate for financial responsibility, encompassing evidence submitted to both the state and the MMS, makes sense from a claimant's perspective and reduces the economic burden on offshore owners and operators. A coordinated, unified system for evidence of financial responsibility provided to either a state or the MMS would simplify a potentially complex damage awards scheme. There are no compelling reasons to require offshore facilities, with their safe operating record, to duplicate financial responsibility requirements. Also offshore owners and operators should not incur additional costs in satisfying the mandates of distinct, uncoordinated financial responsibility requirements.

An example of state-federal coordination is in contingency planning where states are accepting federal contingency plans to satisfy state law requirements. The purpose of contingency planning is to have a single plan for use in spill response. Even though OPA has not preempted state contingency plan requirements, emergency managers know that having two or three contingency plans at each facility will inevitably create confusion and defeat the purpose of coordinated, integrated spill response. Similar coordination is required in the financial responsibility requirements of OPA and state statutes.

Table 5-2 reviews state financial responsibility requirements imposed on facilities. This discussion will focus on producing coastal states.

- Three states, Florida, Louisiana, and Texas, do not require any proof of financial responsibility in addition to OPA requirements. In these states, once a facility is in compliance with federal law, they are deemed in compliance with state law. Each is awaiting implementation of the federal requirement before moving forward with its own implementing regulations. The regulations apply solely to offshore locations: open bays, territorial seas, and those facilities located on waterfronts or tidally influenced coastal waters. (Oregon also follows OPA.)
- Two offshore production states, Alabama and Mississippi, do not impose financial responsibility requirements. According to Dwight's Energydata and the regulatory agencies in the states themselves,

Alabama and Mississippi currently have no offshore oil production. These states are currently host to offshore gas production. (Maine, Maryland, Massachusetts, North Carolina, and Rhode Island also impose no requirement.)

- California sets a maximum financial responsibility for facilities at $100 million. It calculates the actual amount based on "reasonable Worst Case Discharges," taking into account location and capacity to control and mitigate a spill. (Washington follows a similar route.)
- Alaska imposes a $50 million level for financial responsibility on facilities: offshore exploration and production facilities, pipelines, and large crude oil transfer terminals. It imposes a lower requirement on onshore exploration and production facilities. (Delaware and New York also use a $50 million requirement.)
- Four non-producing coastal states (South Carolina, Virginia, New Jersey, and New Hampshire) impose a variety of lower financial requirements for facilities.

The MMS requirement for evidence of financial responsibility may encompass offshore facilities operating in state territorial seas. These offshore facilities are not currently required to submit evidence of financial responsibility to any federal agency. They do, however, comply with state laws regulating offshore operations. Since the states already have data about their offshore facilities, and a good understanding of current conditions in state waters, it would be more efficient to allow the states to implement OPA financial responsibility requirements. The states are authorized to enforce the federal financial responsibility requirements in state waters (OPA § 1019). Through agreements with the MMS, they could administer the final MMS rules regarding proof of financial responsibility. States like Louisiana and Texas have statutes that allow proof of compliance with MMS rules to satisfy state financial responsibility.

The MMS could reduce its own administrative burden by encouraging states to administer OPA's proof of financial responsibility requirements. The states are in a better position to assess the risks posed by offshore facilities in state waters because states have more readily available information about these facilities. The MMS should offer some financial incentive to the states to undertake the administration of this requirement.

Recommendation

The MMS should:

- ***Allow offshore facilities that have met a state's financial responsibility requirements to credit that amount toward the MMS requirement***
- ***Encourage states, which have more knowledge and information about offshore facilities in state waters, to administer OPA proof of financial responsibility requirements.***

APPENDICES

The Secretary of Energy
Washington, DC 20585

October 8, 1993

Mr. Ray L. Hunt
Chairman
National Petroleum Council
1625 K Street, N.W.
Washington, DC 20006

Dear Mr. Hunt:

Recently the Department of the Interior's Minerals Management Service issued a proposal to implement the financial responsibility requirements of the Oil Pollution Act of 1990. The Administration would like to receive a broad range of public comments and views on the proposal.

I am interested in learning the views of the National Petroleum Council from an energy production perspective. In particular, I would like to receive an analysis of the impacts the financial responsibility proposal may have on domestic energy exploration, development and production, as well as recommendations on ways the goals of the legislation could be met while minimizing adverse economic impacts, if any, on the domestic petroleum industry. Please provide the analysis to me by December 1, 1993.

Thank you for your continued assistance on issues of importance to the energy industry.

Sincerely,

Hazel R. O'Leary

cc: The Honorable John Breaux
United States Senate

DESCRIPTION OF THE NATIONAL PETROLEUM COUNCIL

In May 1946, the President stated in a letter to the Secretary of the Interior that he had been impressed by the contribution made through government/industry cooperation to the success of the World War II petroleum program. He felt that it would be beneficial if this close relationship were to be continued and suggested that the Secretary of the Interior establish an industry organization to advise the Secretary on oil and natural gas matters.

Pursuant to this request, Interior Secretary J. A. Krug established the National Petroleum Council on June 18, 1946. In October 1977, the Department of Energy was established and the Council was transferred to the new department.

The purpose of the NPC is solely to advise, inform, and make recommendations to the Secretary of Energy on any matter, requested by the Secretary, relating to oil and natural gas or the oil and gas industries. Matters that the Secretary of Energy would like to have considered by the Council are submitted in the form of a letter outlining the nature and scope of the study. This request is then referred to the NPC Agenda Committee, which makes a recommendation to the Council. The Council reserves the right to decide whether it will consider any matter referred to it.

Examples of recent major studies undertaken by the NPC at the request of the Secretary of Energy include:

- *U.S. Arctic Oil & Gas* (1981)
- *Environmental Conservation—The Oil & Gas Industries* (1982)
- *Third World Petroleum Development: A Statement of Principles* (1982)
- *Enhanced Oil Recovery* (1984)
- *The Strategic Petroleum Reserve* (1984)
- *U.S. Petroleum Refining* (1986)
- *Factors Affecting U.S. Oil & Gas Outlook* (1987)
- *Integrating R&D Efforts* (1988)
- *Petroleum Storage & Transportation* (1989)
- *Industry Assistance to Government* (1991)
- *Short-Term Petroleum Outlook* (1991)
- *The Potential for Natural Gas in the United States* (1992)
- *U.S. Petroleum Refining—Meeting Requirements for Cleaner Fuels and Refineries* (1993)
- *Marginal Wells* (1994).

The NPC does not concern itself with trade practices, nor does it engage in any of the usual trade association activities. The Council is subject to the provisions of the Federal Advisory Committee Act of 1972.

Members of the National Petroleum Council are appointed by the Secretary of Energy and represent all segments of the oil and gas industries and related interests. The NPC is headed by a Chairman and a Vice Chairman, who are elected by the Council. The Council is supported entirely by voluntary contributions from its members.

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APPENDIX C
OIL POLLUTION ACT OF 1990

Public Law 101-380
101st Congress

An Act

Aug. 18, 1990
[H.R. 1465]

To establish limitations on liability for damages resulting from oil pollution, to establish a fund for the payment of compensation for such damages, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Oil Pollution Act of 1990.
Maritime affairs.
Environmental protection.
33 USC 2701 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Oil Pollution Act of 1990".

SEC. 2. TABLE OF CONTENTS.

The contents of this Act are as follows:

TITLE IX—AMENDMENTS TO OIL SPILL LIABILITY TRUST FUND, ETC

TITLE I—OIL POLLUTION LIABILITY AND COMPENSATION

33 USC 2701.

Sec. 1001. DEFINITIONS.

For the purposes of this Act, the term—

(1) "act of God" means 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;

(2) "barrel" means 42 United States gallons at 60 degrees fahrenheit;

(3) "claim" means a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident;

(4) "claimant" means any person or government who presents a claim for compensation under this title;

(5) "damages" means damages specified in section 1002(b) of this Act, and includes the cost of assessing these damages;

(6) "deepwater port" is a facility licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524);

(7) "discharge" means any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping;

(8) "exclusive economic zone" means the zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the areas referred to as "eastern special areas" in Article 3(1) of the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, signed June 1, 1990;

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

(10) "foreign offshore unit" means a facility which is located, in whole or in part, in the territorial sea or on the continental shelf of a foreign country and which is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the seabed beneath the foreign country's territorial sea or from the foreign country's continental shelf;

(11) "Fund" means the Oil Spill Liability Trust Fund, established by section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509);

(12) "gross ton" has the meaning given that term by the Secretary under part J of title 46, United States Code;

(13) "guarantor" means any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this Act;

(14) "incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil;

(15) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and has governmental authority over lands belonging to or controlled by the tribe;

(16) "lessee" means a person holding a leasehold interest in an oil or gas lease on lands beneath navigable waters (as that term is defined in section 2(a) of the Submerged Lands Act (43 U.S.C. 1301(a))) or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.);

(17) "liable" or "liability" shall be construed to be the standard of liability which obtains under section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321);

(18) "mobile offshore drilling unit" means a vessel (other than a self-elevating lift vessel) capable of use as an offshore facility;

(19) "National Contingency Plan" means the National Contingency Plan prepared and published under section 311(d) of the Federal Water Pollution Control Act, as amended by this Act, or revised under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9605);

(20) "natural resources" includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government;

(21) "navigable waters" means the waters of the United States, including the territorial sea;

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

(23) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act;

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

(25) the term "Outer Continental Shelf facility" means an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf;

(26) "owner or operator" means (A) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(27) "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body;

(28) "permittee" means a person holding an authorization, license, or permit for geological exploration issued under section 11 of the Outer Continental Shelf Lands Act (43 U.S.C. 1340) or applicable State law;

(29) "public vessel" means a vessel owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce;

(30) "remove" or "removal" means 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;

(31) "removal costs" means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident;

(32) "responsible party" means the following:

(A) VESSELS.—In the case of a vessel, any person owning, operating, or demise chartering the vessel.

(B) ONSHORE FACILITIES.—In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, 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.

(C) OFFSHORE FACILITIES.—In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(D) DEEPWATER PORTS.—In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee.

(E) PIPELINES.—In the case of a pipeline, any person owning or operating the pipeline.

(F) ABANDONMENT.—In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.

(33) "Secretary" means the Secretary of the department in which the Coast Guard is operating;

(34) "tank vessel" means a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that—

(A) is a vessel of the United States;

(B) operates on the navigable waters; or

(C) transfers oil or hazardous material in a place subject to the jurisdiction of the United States;

(35) "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of 3 miles;

(36) "United States" and "State" mean the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession of the United States; and

(37) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water, other than a public vessel.

SEC. 1002. ELEMENTS OF LIABILITY.

33 USC 2702.

(a) IN GENERAL.—Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) that result from such incident.

(b) COVERED REMOVAL COSTS AND DAMAGES.—

(1) REMOVAL COSTS.—The removal costs referred to in subsection (a) are—

(A) all removal costs incurred by the United States, a State, or an Indian tribe under subsection (c), (d), (e), or (l) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, under the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.), or under State law; and

State and local governments. Indians.

(B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

(2) DAMAGES.—The damages referred to in subsection (a) are the following:

(A) NATURAL RESOURCES.—Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.

(B) REAL OR PERSONAL PROPERTY.—Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.

(C) SUBSISTENCE USE.—Damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.

(D) REVENUES.—Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.

(E) PROFITS AND EARNING CAPACITY.—Damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.

(F) PUBLIC SERVICES.—Damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.

(c) EXCLUDED DISCHARGES.—This title does not apply to any discharge—

(1) permitted by a permit issued under Federal, State, or local law;

(2) from a public vessel; or

(3) from an onshore facility which is subject to the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.).

(d) LIABILITY OF THIRD PARTIES.—

(1) IN GENERAL.—

(A) THIRD PARTY TREATED AS RESPONSIBLE PARTY.—Except as provided in subparagraph (B), in any case in which a responsible party establishes that a discharge or threat of a discharge and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties described in section 1003(a)(3) (or solely by such an act or omission in combination with an act of God or an act of war), the third party or parties shall be treated as the responsible party or parties for purposes of determining liability under this title.

(B) SUBROGATION OF RESPONSIBLE PARTY.—If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party—

(i) in accordance with section 1013, shall pay removal costs and damages to any claimant; and

(ii) shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.

(2) LIMITATION APPLIED.—

(A) OWNER OR OPERATOR OF VESSEL OR FACILITY.—If the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 1004 as applied with respect to the vessel or facility.

(B) OTHER CASES.—In any other case, the liability of a third party or parties shall not exceed the limitation which would have been applicable to the responsible party of the vessel or facility from which the discharge actually occurred if the responsible party were liable.

SEC. 1003. DEFENSES TO LIABILITY. 33 USC 2703.

(a) COMPLETE DEFENSES.—A responsible party is not liable for removal costs or damages under section 1002 if the responsible party establishes, by a preponderance of the evidence, that the discharge or substantial threat of a discharge of oil and the resulting damages or removal costs were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party, other than 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), if the responsible party establishes, by a preponderance of the evidence, that the responsible party—

(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions; or

(4) any combination of paragraphs (1), (2), and (3).

(b) DEFENSES AS TO PARTICULAR CLAIMANTS.—A responsible party is not liable under section 1002 to a claimant, to the extent that the incident is caused by the gross negligence or willful misconduct of the claimant.

(c) LIMITATION ON COMPLETE DEFENSE.—Subsection (a) does not apply with respect to a responsible party who fails or refuses—

(1) to report the incident as required by law if the responsible party knows or has reason to know of the incident;

(2) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(3) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

SEC. 1004. LIMITS ON LIABILITY. 33 USC 2704.

(a) GENERAL RULE.—Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002

and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed—

(1) for a tank vessel, the greater of—

(A) $1,200 per gross ton; or

(B)(i) in the case of a vessel greater than 3,000 gross tons, $10,000,000; or

(ii) in the case of a vessel of 3,000 gross tons or less, $2,000,000;

(2) for any other vessel, $600 per gross ton or $500,000, whichever is greater;

(3) for an offshore facility except a deepwater port, the total of all removal costs plus $75,000,000; and

(4) for any onshore facility and a deepwater port, $350,000,000.

(b) DIVISION OF LIABILITY FOR MOBILE OFFSHORE DRILLING UNITS.—

(1) TREATED FIRST AS TANK VESSEL.—For purposes of determining the responsible party and applying this Act and except as provided in paragraph (2), a mobile offshore drilling unit which is being used as an offshore facility is deemed to be a tank vessel with respect to the discharge, or the substantial threat of a discharge, of oil on or above the surface of the water.

(2) TREATED AS FACILITY FOR EXCESS LIABILITY.—To the extent that removal costs and damages from any incident described in paragraph (1) exceed the amount for which a responsible party is liable (as that amount may be limited under subsection (a)(1)), the mobile offshore drilling unit is deemed to be an offshore facility. For purposes of applying subsection (a)(3), the amount specified in that subsection shall be reduced by the amount for which the responsible party is liable under paragraph (1).

(c) EXCEPTIONS.—

(1) ACTS OF RESPONSIBLE PARTY.—Subsection (a) does not apply if the incident was proximately caused by—

(A) gross negligence or willful misconduct of, or

(B) the violation of an applicable Federal safety, construction, or operating regulation by,

the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).

(2) FAILURE OR REFUSAL OF RESPONSIBLE PARTY.—Subsection (a) does not apply if the responsible party fails or refuses—

(A) to report the incident as required by law and the responsible party knows or has reason to know of the incident;

(B) to provide all reasonable cooperation and assistance requested by a responsible official in connection with removal activities; or

(C) without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.).

(3) OCS FACILITY OR VESSEL.—Notwithstanding the limitations established under subsection (a) and the defenses of section 1003, all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

(d) ADJUSTING LIMITS OF LIABILITY.—

(1) ONSHORE FACILITIES.—Subject to paragraph (2), the President may establish by regulation, with respect to any class or category of onshore facility, a limit of liability under this section of less than $350,000,000, but not less than $8,000,000, taking into account size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks posed by the class or category of facility.

(2) DEEPWATER PORTS AND ASSOCIATED VESSELS.—

(A) STUDY.—The Secretary shall conduct a study of the relative operational and environmental risks posed by the transportation of oil by vessel to deepwater ports (as defined in section 3 of the Deepwater Port Act of 1974 (33 U.S.C. 1502)) versus the transportation of oil by vessel to other ports. The study shall include a review and analysis of offshore lightering practices used in connection with that transportation, an analysis of the volume of oil transported by vessel using those practices, and an analysis of the frequency and volume of oil discharges which occur in connection with the use of those practices.

(B) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall submit to the Congress a report on the results of the study conducted under subparagraph (A).

(C) RULEMAKING PROCEEDING.—If the Secretary determines, based on the results of the study conducted under this subparagraph (A), that the use of deepwater ports in connection with the transportation of oil by vessel results in a lower operational or environmental risk than the use of other ports, the Secretary shall initiate, not later than the 180th day following the date of submission of the report to the Congress under subparagraph (B), a rulemaking proceeding to lower the limits of liability under this section for deepwater ports as the Secretary determines appropriate. The Secretary may establish a limit of liability of less than $350,000,000, but not less than $50,000,000, in accordance with paragraph (1).

(3) PERIODIC REPORTS.—The President shall, within 6 months after the date of the enactment of this Act, and from time to time thereafter, report to the Congress on the desirability of adjusting the limits of liability specified in subsection (a). President of U.S.

(4) ADJUSTMENT TO REFLECT CONSUMER PRICE INDEX.—The President shall, by regulations issued not less often than every 3 years, adjust the limits of liability specified in subsection (a) to reflect significant increases in the Consumer Price Index. Regulations.

SEC. 1005. INTEREST. 33 USC 2705.

(a) GENERAL RULE.—The responsible party or the responsible party's guarantor is liable to a claimant for interest on the amount paid in satisfaction of a claim under this Act for the period described in subsection (b).

(b) PERIOD.—

(1) IN GENERAL.—Except as provided in paragraph (2), the period for which interest shall be paid is the period beginning on the 30th day following the date on which the claim is presented to the responsible party or guarantor and ending on the date on which the claim is paid.

(2) EXCLUSION OF PERIOD DUE TO OFFER BY GUARANTOR.—If the guarantor offers to the claimant an amount equal to or greater than that finally paid in satisfaction of the claim, the period described in paragraph (1) does not include the period beginning on the date the offer is made and ending on the date the offer is accepted. If the offer is made within 60 days after the date on which the claim is presented under section 1013(a), the period described in paragraph (1) does not include any period before the offer is accepted.

(3) EXCLUSION OF PERIODS IN INTERESTS OF JUSTICE.—If in any period a claimant is not paid due to reasons beyond the control of the responsible party or because it would not serve the interests of justice, no interest shall accrue under this section during that period.

(4) CALCULATION OF INTEREST.—The interest paid under this section shall be calculated at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days included within the period for which interest must be paid to the claimant, as published in the Federal Reserve Bulletin.

(5) INTEREST NOT SUBJECT TO LIABILITY LIMITS.—

(A) IN GENERAL.—Interest (including prejudgment interest) under this paragraph is in addition to damages and removal costs for which claims may be asserted under section 1002 and shall be paid without regard to any limitation of liability under section 1004.

(B) PAYMENT BY GUARANTOR.—The payment of interest under this subsection by a guarantor is subject to section 1016(g).

33 USC 2706.

SEC. 1006. NATURAL RESOURCES.

(a) LIABILITY.—In the case of natural resource damages under section 1002(b)(2)(A), liability shall be—

(1) to the United States Government for natural resources belonging to, managed by, controlled by, or appertaining to the United States;

State and local governments.

(2) to any State for natural resources belonging to, managed by, controlled by, or appertaining to such State or political subdivision thereof;

Indians.

(3) to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such Indian tribe; and

(4) in any case in which section 1007 applies, to the government of a foreign country for natural resources belonging to, managed by, controlled by, or appertaining to such country.

(b) DESIGNATION OF TRUSTEES.—

President of U.S. Claims.

(1) IN GENERAL.—The President, or the authorized representative of any State, Indian tribe, or foreign government, shall act on behalf of the public, Indian tribe, or foreign country as trustee of natural resources to present a claim for and to recover damages to the natural resources.

(2) FEDERAL TRUSTEES.—The President shall designate the Federal officials who shall act on behalf of the public as trustees for natural resources under this Act.

(3) STATE TRUSTEES.—The Governor of each State shall designate State and local officials who may act on behalf of the public as trustee for natural resources under this Act and shall notify the President of the designation.

(4) INDIAN TRIBE TRUSTEES.—The governing body of any Indian tribe shall designate tribal officials who may act on behalf of the tribe or its members as trustee for natural resources under this Act and shall notify the President of the designation.

(5) FOREIGN TRUSTEES.—The head of any foreign government may designate the trustee who shall act on behalf of that government as trustee for natural resources under this Act.

(c) FUNCTIONS OF TRUSTEES.—

(1) FEDERAL TRUSTEES.—The Federal officials designated under subsection (b)(2)—

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the natural resources under their trusteeship;

(B) may, upon request of and reimbursement from a State or Indian tribe and at the Federal officials' discretion, assess damages for the natural resources under the State's or tribe's trusteeship; and

(C) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(2) STATE TRUSTEES.—The State and local officials designated under subsection (b)(3)—

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(3) INDIAN TRIBE TRUSTEES.—The tribal officials designated under subsection (b)(4)—

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(4) FOREIGN TRUSTEES.—The trustees designated under subsection (b)(5)—

(A) shall assess natural resource damages under section 1002(b)(2)(A) for the purposes of this Act for the natural resources under their trusteeship; and

(B) shall develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.

(5) NOTICE AND OPPORTUNITY TO BE HEARD.—Plans shall be developed and implemented under this section only after ade-

quate public notice, opportunity for a hearing, and consideration of all public comment.

(d) MEASURE OF DAMAGES.—

(1) IN GENERAL.—The measure of natural resource damages under section 1002(b)(2)(A) is—

(A) the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

(B) the diminution in value of those natural resources pending restoration; plus

(C) the reasonable cost of assessing those damages.

(2) DETERMINE COSTS WITH RESPECT TO PLANS.—Costs shall be determined under paragraph (1) with respect to plans adopted under subsection (c).

(3) NO DOUBLE RECOVERY.—There shall be no double recovery under this Act for natural resource damages, including with respect to the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition for the same incident and natural resource.

President of U.S.

(e) DAMAGE ASSESSMENT REGULATIONS.—

(1) REGULATIONS.—The President, acting through the Under Secretary of Commerce for Oceans and Atmosphere and in consultation with the Administrator of the Environmental Protection Agency, the Director of the United States Fish and Wildlife Service, and the heads of other affected agencies, not later than 2 years after the date of the enactment of this Act, shall promulgate regulations for the assessment of natural resource damages under section 1002(b)(2)(A) resulting from a discharge of oil for the purpose of this Act.

(2) REBUTTABLE PRESUMPTION.—Any determination or assessment of damages to natural resources for the purposes of this Act made under subsection (d) by a Federal, State, or Indian trustee in accordance with the regulations promulgated under paragraph (1) shall have the force and effect of a rebuttable presumption on behalf of the trustee in any administrative or judicial proceeding under this Act.

(f) USE OF RECOVERED SUMS.—Sums recovered under this Act by a Federal, State, Indian, or foreign trustee for natural resource damages under section 1002(b)(2)(A) shall be retained by the trustee in a revolving trust account, without further appropriation, for use only to reimburse or pay costs incurred by the trustee under subsection (c) with respect to the damaged natural resources. Any amounts in excess of those required for these reimbursements and costs shall be deposited in the Fund.

(g) COMPLIANCE.—Review of actions by any Federal official where there is alleged to be a failure of that official to perform a duty under this section that is not discretionary with that official may be had by any person in the district court in which the person resides or in which the alleged damage to natural resources occurred. The court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party. Nothing in this subsection shall restrict any right which any person may have to seek relief under any other provision of law.

33 USC 2707.

SEC. 1007. RECOVERY BY FOREIGN CLAIMANTS.

(a) REQUIRED SHOWING BY FOREIGN CLAIMANTS.—

(1) IN GENERAL.—In addition to satisfying the other requirements of this Act, to recover removal costs or damages resulting from an incident a foreign claimant shall demonstrate that—

(A) the claimant has not been otherwise compensated for the removal costs or damages; and

(B) recovery is authorized by a treaty or executive agreement between the United States and the claimant's country, or the Secretary of State, in consultation with the Attorney General and other appropriate officials, has certified that the claimant's country provides a comparable remedy for United States claimants.

(2) EXCEPTIONS.—Paragraph (1)(B) shall not apply with respect to recovery by a resident of Canada in the case of an incident described in subsection (b)(4). Canada.

(b) DISCHARGES IN FOREIGN COUNTRIES.—A foreign claimant may make a claim for removal costs and damages resulting from a discharge, or substantial threat of a discharge, of oil in or on the territorial sea, internal waters, or adjacent shoreline of a foreign country, only if the discharge is from—

(1) an Outer Continental Shelf facility or a deepwater port;

(2) a vessel in the navigable waters;

(3) a vessel carrying oil as cargo between 2 places in the United States; or

(4) a tanker that received the oil at the terminal of the pipeline constructed under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.), for transportation to a place in the United States, and the discharge or threat occurs prior to delivery of the oil to that place.

(c) FOREIGN CLAIMANT DEFINED.—In this section, the term "foreign claimant" means—

(1) a person residing in a foreign country;

(2) the government of a foreign country; and

(3) an agency or political subdivision of a foreign country.

SEC. 1008. RECOVERY BY RESPONSIBLE PARTY. 33 USC 2708.

(a) IN GENERAL.—The responsible party for a vessel or facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, may assert a claim for removal costs and damages under section 1013 only if the responsible party demonstrates that—

(1) the responsible party is entitled to a defense to liability under section 1003; or

(2) the responsible party is entitled to a limitation of liability under section 1004.

(b) EXTENT OF RECOVERY.—A responsible party who is entitled to a limitation of liability may assert a claim under section 1013 only to the extent that the sum of the removal costs and damages incurred by the responsible party plus the amounts paid by the responsible party, or by the guarantor on behalf of the responsible party, for claims asserted under section 1013 exceeds the amount to which the total of the liability under section 1002 and removal costs and damages incurred by, or on behalf of, the responsible party is limited under section 1004.

SEC. 1009. CONTRIBUTION. 33 USC 2709.

A person may bring a civil action for contribution against any other person who is liable or potentially liable under this Act or

another law. The action shall be brought in accordance with section 1017.

33 USC 2710.

SEC. 1010. INDEMNIFICATION AGREEMENTS.

(a) AGREEMENTS NOT PROHIBITED.—Nothing in this Act prohibits any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this Act.

(b) LIABILITY NOT TRANSFERRED.—No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer liability imposed under this Act from a responsible party or from any person who may be liable for an incident under this Act to any other person.

(c) RELATIONSHIP TO OTHER CAUSES OF ACTION.—Nothing in this Act, including the provisions of subsection (b), bars a cause of action that a responsible party subject to liability under this Act, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person.

President of U.S. State and local governments. 33 USC 2711.

SEC. 1011. CONSULTATION ON REMOVAL ACTIONS.

The President shall consult with the affected trustees designated under section 1006 on the appropriate removal action to be taken in connection with any discharge of oil. For the purposes of the National Contingency Plan, removal with respect to any discharge shall be considered completed when so determined by the President in consultation with the Governor or Governors of the affected States. However, this determination shall not preclude additional removal actions under applicable State law.

President of U.S. 33 USC 2712.

SEC. 1012. USES OF THE FUND.

(a) USES GENERALLY.—The Fund shall be available to the President for—

(1) the payment of removal costs, including the costs of monitoring removal actions, determined by the President to be consistent with the National Contingency Plan—

(A) by Federal authorities; or

(B) by a Governor or designated State official under subsection (d);

(2) the payment of costs incurred by Federal, State, or Indian tribe trustees in carrying out their functions under section 1006 for assessing natural resource damages and for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of damaged resources determined by the President to be consistent with the National Contingency Plan;

(3) the payment of removal costs determined by the President to be consistent with the National Contingency Plan as a result of, and damages resulting from, a discharge, or a substantial threat of a discharge, of oil from a foreign offshore unit;

(4) the payment of claims in accordance with section 1013 for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompensated damages;

(5) the payment of Federal administrative, operational, and personnel costs and expenses reasonably necessary for and incidental to the implementation, administration, and enforcement of this Act (including, but not limited to, sections 1004(d)(2), 1006(e), 4107, 4110, 4111, 4112, 4117, 5006, 8103, and

title VII) and subsections (b), (c), (d), (j), and (l) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act, with respect to prevention, removal, and enforcement related to oil discharges, provided that—

(A) not more than $25,000,000 in each fiscal year shall be available to the Secretary for operating expenses incurred by the Coast Guard; Uniformed services.

(B) not more than $30,000,000 each year through the end of fiscal year 1992 shall be available to establish the National Response System under section 311(j) of the Federal Water Pollution Control Act, as amended by this Act, including the purchase and prepositioning of oil spill removal equipment; and

(C) not more than $27,250,000 in each fiscal year shall be available to carry out title VII of this Act.

(b) DEFENSE TO LIABILITY FOR FUND.—The Fund shall not be available to pay any claim for removal costs or damages to a particular claimant, to the extent that the incident, removal costs, or damages are caused by the gross negligence or willful misconduct of that claimant.

(c) OBLIGATION OF FUND BY FEDERAL OFFICIALS.—The President may promulgate regulations designating one or more Federal officials who may obligate money in accordance with subsection (a).

(d) ACCESS TO FUND BY STATE OFFICIALS.—

(1) IMMEDIATE REMOVAL.—In accordance with regulations promulgated under this section, the President, upon the request of the Governor of a State or pursuant to an agreement with a State under paragraph (2), may obligate the Fund for payment in an amount not to exceed $250,000 for removal costs consistent with the National Contingency Plan required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge, of oil.

(2) AGREEMENTS.—

(A) IN GENERAL.—The President shall enter into an agreement with the Governor of any interested State to establish procedures under which the Governor or a designated State official may receive payments from the Fund for removal costs pursuant to paragraph (1).

(B) TERMS.—Agreements under this paragraph—

(i) may include such terms and conditions as may be agreed upon by the President and the Governor of a State;

(ii) shall provide for political subdivisions of the State to receive payments for reasonable removal costs; and

(iii) may authorize advance payments from the Fund to facilitate removal efforts.

(e) REGULATIONS.—The President shall—

(1) not later than 6 months after the date of the enactment of this Act, publish proposed regulations detailing the manner in which the authority to obligate the Fund and to enter into agreements under this subsection shall be exercised; and

(2) not later than 3 months after the close of the comment period for such proposed regulations, promulgate final regulations for that purpose.

(f) RIGHTS OF SUBROGATION.—Payment of any claim or obligation by the Fund under this Act shall be subject to the United States

COTP Zone Boundaries:

This rulemaking establishes boundaries of the COTPs out through the EEZ and makes minor adjustments to the inshore boundaries.

Status: Final Rule was published in Federal Register on October 4, 1993 (58 Fed. Reg. 51726). Project complete.

MARPOL Regulation #26:

MARPOL Regulation 26 requires certain oil tankers and other ships to carry an approved oil pollution emergency response plan onboard. In response to this requirement, the USCG issued informal guidance to the industry on March 5, 1993 in the form of NVIC 2-93.

Status: NPRM published February 17, 1994.

Projected Completion Date: September 1994.

EPA's Proposed Rule—Nontransportation-Related Onshore Facilities Oil Spill Response Plans; 58 Fed. 8824 (February 17, 1993). A final rule is expected by July 1994.

Minerals Management Service Interim Final Rule—Spill Response Plans for Offshore Facilities Including State Submerged Lands and Pipelines; 58 Fed. Reg. 7480 (February 8, 1993). Effective date February 18, 1993, with interim rule to expire on February 18, 1995 or when superseded by final rule.

§ 4301(b) FWPCA Penalties:

Creates new "class II" FWPCA civil penalties.

Status: Final rule published March 30, 1994.

§ 4305 Inspection and Entry:

Provides the USCG with authority to inspect and enter facilities and to review relevant records.

Status: Policy guidance is being drafted. No rulemaking will result.

§ 5002 Terminal and Tanker Oversight and Monitoring:

Citizens' committees were created to oversee and monitor terminals and tankers in PWS and Cook Inlet, AK.

Status: PWS and Cook Inlet Regional Citizens' Advisory Council (RCACs) recertified through spring 1994. Project complete.

§ 6003(e) Outer Banks Protection:

Requires the Department of the Interior to establish the Environmental Sciences Review Panel and conduct certain studies.

Status: Benthic study is complete and socioeconomic study is on-going.

46 U.S.C. 3703 Oil Spill Response Vessels:

Formalizes the requirements for the inspection and certification of oil spill response vessel as noted in G-MVI policy letter #03-92.

Status: NPRM is being drafted.

Projected Publication Date: August 1994.

§ 4202(b)(1)(a) Appointment of Area Committee Members; Area Committee Responsibilities:

This section of the Act requires appointment of area committees and preparation of area committee plans.

Status: A final notice of policy on area committee appointment and responsibilities was published July 15, 1993 (58 FR 38156). Project complete.

§ 4202(b)(3) District Response Groups:

This section of the Act requires formation of District Response Groups and District Response Advisory Teams.

Status: Groups and teams have been formed. Equipment is being sent to 19 sites around the country.

§ 4202(b)(4) Vessel Response Plans:

Requires owners/operators of tank vessels to prepare and submit a response plan for a worst case discharge of oil. The USCG issued guidance to the industry and published an Interim Final Rule that is currently in effect. Over 1,600 plans covering more than 6,000 vessels have been submitted to the USCG in compliance with the IFR requirements.

Status: The USCG is giving these plans a detailed review. Comments from the IFR are being reviewed in preparation for issuing the Final Rule.

§ 4202(b)(4) Facility Response Plans:

Requires the owners/operators of marine transportation-related onshore facilities to prepare and submit a response plan for a worst case discharge of oil. The USCG issued guidance to the industry and published an Interim Final Rule that is currently in effect. Plans covering over 3,500 facilities have been submitted to the USCG as required in the IFR.

Status: The USCG is giving the submitted plans a detailed review. Comments from the IFR are being reviewed in preparation for issuing the Final Rule.

Other Rulemaking Actions:

DOT's Research and Special Programs Administration (RSPA) Interim Final Rule—Oil Spill Prevention and Response Plans (for tank trucks, railroad tank cars, and portable tanks); 58 Fed. Reg. 6864 (February 2, 1993).

DOT's Research and Special Programs Administration (RSPA) Office of Pipeline Safety (OPS) Interim Final Rule—Response Plans for Onshore Oil Pipelines; 58 Fed. Reg. 244 (January 5, 1993). A final rule is expected by July/August 1994.

§ 4201(c) Revision of NCP:

OPA required preparation of a National Contingency Plan (NCP) for removal of oil and hazardous substances. The Plan must assign duties and responsibilities among Federal departments and agencies in coordination with State and local agencies. The NCP must also address Coast Guard strike teams. The USCG has completed its section and submitted it to the EPA, which is the lead agency for the NCP.

Status: NPRM was published October 22, 1993.

§ 4202(a) (FWPCA 1321(j)(6)) Removal Equipment Requirements and Inspection:

Requires the inspection of containment booms, skimmers, vessels, and other major equipment used to remove discharges. Also requires carriage of appropriate removal equipment. To ease compliance verification for the Federal government, the USCG is working together with the American Society for Testing and Materials to develop consensus standards for terminology, guidelines, recommended practices, equipment test methods, materials, and design specifications for spill response equipment.

Status: Seventeen standards are in the process of development, revision, or balloting.

§ 4202(a) Contractor Classification:

Although not specifically required by OPA, national guidelines for classifying Oil Spill Removal Organizations (OSROs) would benefit plan preparers, USCG review, and OSROs' ability to evaluate their own capability.

Status: On December 12, 1992, the USCG issued Navigational and Vessel Inspection Circular (NVIC) 12-92 which provided voluntary guidelines. No regulations are needed. The USCG is currently receiving and reviewing OSRO applications.

§ 4202(a)(5)(B)(i) Tank Vessel Response Plans: Hazardous Substances:

Requires owners or operators of tank vessels carrying hazardous substances to submit a response plan for worst case discharges.

Status: Project is in its preliminary stages.

Projected Publication Date: ANPRM, December 1994.

§ 4202(a)(5)(B)(i)(ii)(iii) Facility Response Plans: Hazardous Substance:

Requires owners or operators or onshore marine transportation-related facilities to submit a response plan for worst case discharges of hazardous substances.

Projected Publication Date: ANPRM, December 1994.

§ 4115(b) Existing Tank Vessel Requirements:

Requires additional structural and operational measures for single-hull vessels until the phase-out date, to reduce pollution.

Status: USCG has broken this project into three phases.

Projected Publication Date: August 1994 to October 1995.

§ 4115(d)/1004 Lightering Requirements:

Requires evidence of financial responsibility and compliance with the FWPCA and regulations issued under it for offshore lightering. Clarifies existing applicability of pollution prevention regulations to certain offshore lightering operations.

Status: Final Rule published September 15, 1993. Project complete.

§ 4115(e)(1) Alternative Vessel Design:

The Secretary of Transportation conducted a study of potential structural and operational tank vessel requirements as required by OPA.

Status: The Secretary's report was submitted to Congress on January 4, 1993. Project complete.

§ 4116(c) Escorts for Certain Tankers:

Designates certain U.S. waters (PWS, Rosario Strait and Puget Sound, WA) where at least two towing vessels must escort single hull tankers greater than 5000 GT.

Status: Final Rule is being drafted.

Projected Completion Date: August 1994.

§ 4116(c) Escorts for Certain Tankers; Other Geographic Areas:

Designates certain U.S. waters other than PWS, Rosario Strait and Puget Sound, WA, where at least two towing vessels must escort single hull tankers greater than 5000 GT.

Status: USCG is reviewing public comments.

Projected Publication Date: NPRM, October 1994.

§ 4201 Delegation of Authority:

Redesignates and revises certain regulations relating to delegation of authority.

Status: Final Rule is being drafted.

§ 4113 (a&b) Use of Liners:

EPA is determining if liners should be used to prevent leaking at onshore facilities located near navigable waters that are used for the bulk storage of oil.

Status: EPA will make recommendations in a report which is currently being drafted. Next action undetermined.

§ 4114(a) Autopilot and Unattended Engine Room (35&35a) and § 4116(b) Second Licensed Officer on the Bridge:

Establishes tanker navigation regulations which govern the use of autopilots and establish minimum bridge manning levels.

Status: Final Rule became effective July 9, 1993. The effective date for the portion of the rule that governs the use of INS in certain sections of the navigable waters of the U.S. has been suspended because adequate technology does not currently exist. A new rulemaking will be initiated when appropriate technology is available. Project complete.

§ 4114(b) through (e) Manning Standards for U.S. Tank Vessels:

OPA requires the USCG to maintain "computerized" vessel manning records. The USCG has revised its recordkeeping procedures to meet this requirement of the Act.

Status: Project complete.

§ 4115(a) Research in Tanker Groundings:

This non-mandated study is being conducted by the USCG to determine if regulations are needed to implement this section of the Act. This study explores the behavior of tanker structures during groundings.

Status: Research is being conducted at MIT and scheduled for completion in December 1995.

§ 4115(a) Establishment of Double Hull Requirements:

This section of OPA establishes a double hull requirement for tank vessels. However, the Act does not define what constitutes a double hull. The USCG published an IFR on August 12, 1992 setting forth standards. That IFR is currently effective. To determine the most effective structural requirements for double hulls, the USCG initiated non-mandated studies to evaluate configurations, construction and structural systems of double hulls. Completed studies have been presented to IMO as papers.

Status: An IFR was published on August 12, 1992. Comments on the IFR are being evaluated, and a Final Rule is being reviewed.

§ 4106(b) Reporting Marine Casualties:

Requires that oil and hazardous materials discharges be reported to the U.S. Coast Guard. Adds "significant harm to the environment" to the list of reportable marine casualties.

Status: Regulations are being developed.

Projected Publication Date: NPRM, September 1994.

§ 4107(a) Vessel Traffic Service Authority:

Establishes the requirements and procedures that allow the Secretary to make participation in appropriate VTS mandatory.

Status: Final Rule published July 15, 1994.

§ 4109 Periodic Gauging of Plating Thickness:

Establishes minimum plating thickness standards for tank vessels and requires periodic gauging of vessels over 30 years old.

Status: Final Rule was published in the Federal Register October 8, 1993 (58 FR 52599). Project Complete.

§ 4110(b)(1) Overfill Devices:

Requires devices and standards to warn of tank overfills on oil cargo vessels.

Status: Interim Final Regulation is being drafted.

Projected Publication Date: August 1994.

§ 4110(b)(2) Tank Level or Pressure Monitoring Devices:

Requires tank level or pressure monitoring devices be used for leak detection.

Status: NPRM has been drafted.

§ 4111 Study on Tanker Navigation Safety Standards:

Requires the Secretary to report on the adequacy of existing laws and regulations to ensure the safe navigation of vessels transporting oil.

Status: Study is being conducted in 12 parts. The entire project will be complete in September 1995. Congress to review periodic reports as sub-studies are completed.

§§ 3004/4202(a)(6)(a) National And International Inventories of Removal Equipment and Personnel:

Computer database of oil spill removal resources is online.

§ 4101(a) and (b) Review of Drug Abuse in Issuing Licenses, Certificates of Registry, and Merchant Mariner's Documents:

Requires merchant marine credential candidate applicants to be tested for the use of dangerous drugs.

Status: NPRM published March 4, 1994. Comment period closed May 3, 1994.

§ 4102(e) Criminal Record Review and § 4105 Access to National Driver Register:

Provides discretionary authority to review the criminal record of each merchant mariner credential applicant. It also requires applicants to make available information in the National Driver Register.

Status: OMB has waived review of the NPRM. Projected publication August 1994.

§ 4102(b,c,&d) Term of Validity for Certificates of Registry and Merchant Mariners' Documents:

Established a five-year term of validity and provides a schedule for the expiration of existing certificates of registry and merchant mariners' documents.

Status: NPRM was published September 16, 1993.

Projected Completion Date: August 1994.

§ 4103 Suspension and Revocation of Licenses, Certificates of Registry, and Merchant Mariners' Documents for Alcohol and Drug Abuse:

Makes certain traffic offenses chargeable under suspension and revocation proceedings.

Status: NPRM being drafted.

Projected Publication Date: August 1994.

§ 4106(a) Manning and Crew Standards for Foreign Tank Vessels:

Revises the requirements for evaluating manning and crew standards of foreign countries which operate in U.S. waters.

Status: Regulations are being developed.

Projected Publication Date: NPRM, October 1994.

§ 1012(d&e) Access to the Oil Spill Liability Trust Fund by State Officials:

Addresses the manner in which the Fund may be obligated upon the request of the Governor of a State or pursuant to an agreement with a state for payment of removal costs.

Status: First-phase IFR published November 13, 1992. Second-phase NPRM, which awaits review by OMB, will address specific agreements with states.

Projected Publication Date: August 1994.

§ 1013(e) Claims Procedures and § 1014(b) Designation of Source and Advertisement:

Addresses the presentation, filing, processing, settlement and adjudication of claims against the Fund, as well as the advertisement of designation and the notification of claims procedures.

Status: Final Rule is on hold pending resolution of whether Federal Trustees can be paid through the provisions of section 1013(e).

§ 1016(a) Financial Responsibility for Vessels:

Requires vessel owners and operators to demonstrate and maintain evidence of financial responsibility meeting the limits of liability established by the OPA.

Status: NPRM published September 26, 1991. A notice of availability of the preliminary RIA was published July 21, 1993. Interim Final Rule published July 1994.

§ 1016(c) Financial Responsibility for Offshore Facilities:

Minerals Management Service Advanced Notice of Proposed Rulemaking – Oil Spill Financial Responsibility for Offshore Facilities Including State Submerged Lands and Pipelines; 58 Fed. Reg. 44,797 (August 25, 1993).

§ 3002 U.S.-Canada Great Lakes Oil Spill Cooperation and § 3003 U.S.-Canada Lake Champlain Oil Spill Cooperation:

Requires the Department of State to review international agreements and treaties with the Government of Canada regarding the prevention of oil discharges, assurance of removal of oil, and full compensation to those injured by a discharge on the Great Lakes and Lake Champlain.

Status: Discussions ongoing between U.S. and Canada.

The following is a list of the status of many studies, reports and rulemaking actions being undertaken pursuant to the OPA including certain Advance Notices of Proposed Rulemaking (ANPR), Interim Final Rules (IFR), and Notices of Proposed Rulemaking (NPRM).[1] The following actions are identified by the statutory section affected.

§ 1004(d)(2)(A) and (B) Deep Water Ports Study:

Requires the Secretary to conduct an operational and environmental risk study regarding deepwater ports and report the findings to Congress.

Status: The study has been completed and delivered to Congress.

§ 1006 Natural Resources:

Advance Notice of Proposed Rulemaking (57 Fed. Reg. 8964 (March 13, 1992))—National Oceanic and Atmospheric Administration (NOAA) provided a status report concerning the natural resource damage assessment regulations being developed under OPA § 1006 and sought additional comments. Included in this process was the establishment of a Contingent Valuation Panel of experts to evaluate the use of Contingent Valuation Methodology (CVM) in determining non-use values and to provide comments to NOAA. The report by the Panel was submitted to NOAA and published in the Federal Register. (58 Fed. Reg. 4602 (January 15, 1993)). NOAA then proposed regulations authorizing the inclusion of nonuse values using CVM. (59 Fed. Reg. 1061 (January 7, 1994).)

§ 1012(a) & § 6002(b) Access to the Oil Spill Liability Trust Fund by Federal Agencies:

Addresses costs incurred by Federal authorities for removal activities or by natural resource trustees initiating damage assessments to be paid by the Fund.

Status: NPRM is awaiting review by OMB.

Projected Publication Date: August 1994.

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[1] Sources: Coast Guard rulemaking information from *Oil Pollution Act of 1990 Update*, U.S. Coast Guard, Office of Marine Safety, Security and Environmental Protection, pgs 17-22 (July15, 1994). The other rulemaking information was obtained from various sources including the Federal Register.

APPENDIX D

STATUS OF STUDIES, REPORTS, AND RULEMAKING ACTIONS PURSUANT TO OPA

Acts or section 6002(b) of the Oil Pollution Act of 1990, only for purposes of making expenditures—

"(A) for the payment of removal costs and other costs, expenses, claims, and damages referred to in section 1012 of such Act,

"(B) to carry out sections 5 and 7 of the Intervention on the High Seas Act relating to oil pollution or the substantial threat of oil pollution,

"(C) for the payment of liabilities incurred by the revolving fund established by section 311(k) of the Federal Water Pollution Control Act,

"(D) to carry out subsections (b), (c), (d), (j), and (l) of section 311 of the Federal Water Pollution Control Act with respect to prevention, removal, and enforcement related to oil discharges (as defined in such section),

"(E) for the payment of liabilities incurred by the Deepwater Port Liability Fund, and

"(F) for the payment of liabilities incurred by the Offshore Oil Pollution Compensation Fund."

(c) INCREASE IN EXPENDITURES PERMITTED PER INCIDENT.—
26 USC 9509. Subparagraph (A) of section 9509(c)(2) of such Code is amended—

(1) by striking "$500,000,000" each place it appears and inserting "$1,000,000,000", and

(2) by striking "$250,000,000" and inserting "$500,000,000".

(d) INCREASE IN BORROWING AUTHORITY.—

(1) INCREASE IN BORROWING PERMITTED.—Paragraph (2) of section 9509(d) of such Code is amended by striking "$500,000,000" and inserting "$1,000,000,000".

(2) CHANGE IN FINAL REPAYMENT DATE.—Subparagraph (B) of section 9509(d)(3) of such Code is amended by striking "December 31, 1991" and inserting "December 31, 1994".

(e) OTHER CHANGES.—

(1) Paragraph (2) of section 9509(e) of such Code is amended by striking "Comprehensive Oil Pollution Liability and Compensation Act" and inserting "Oil Pollution Act of 1990".

(2) Subparagraph (B) of section 9509(c)(2) of such Code is amended by striking "described in paragraph (1)(A)(i)" and inserting "of removal costs".

(3) Subsection (f) of section 9509 of such Code is amended to read as follows:

"(f) REFERENCES TO OIL POLLUTION ACT OF 1990.—Any reference in this section to the Oil Pollution Act of 1990 or any other Act referred to in a subparagraph of subsection (c)(1) shall be treated as a reference to such Act as in effect on the date of the enactment of this subsection."

SEC. 9002. CHANGES RELATING TO OTHER FUNDS.

(a) REPEAL OF PROVISION RELATING TO TRANSFERS TO OIL SPILL LIABILITY FUND.—Subsection (d) of section 4612 of the Internal
26 USC 4612. Revenue Code of 1986 is amended by striking the last sentence.

(b) CREDIT AGAINST OIL SPILL RATE ALLOWED ON AFFILIATED GROUP BASIS.—Subsection (d) of section 4612 of such Code is amended by adding at the end thereof the following new sentence: "For purposes of this subsection, all taxpayers which would be members of the same affiliated group (as defined in section 1504(a)) if section 1504(a)(2) were applied by substituting '100 percent' for '80 percent' shall be treated as 1 taxpayer."

Approved August 18, 1990.

LEGISLATIVE HISTORY—H.R. 1465 (H.R. 3027) (S. 686):

HOUSE REPORTS: No. 101-241, Pt. 1 (Comm. on Public Works and Transportation) and Pt. 2 (Comm. on Science, Space, and Technology), both accompanying H.R. 3027; No. 101-242, Pt. 1 (Comm. on Public Works and Transportation), Pt. 2 (Comm. on Merchant Marine and Fisheries), Pt. 3 (Comm. on Science, Space, and Technology), Pt. 4 (Comm. on Public Works and Transportation), and Pt. 5 (Comm. on Merchant Marine and Fisheries); and No. 101-653 (Comm. of Conference).

SENATE REPORTS: No. 101-94 accompanying S. 686 (Comm. on Environment and Public Works).

CONGRESSIONAL RECORD:

Vol. 135 (1989): Aug. 3, 4, S. 686 considered and passed Senate.
Nov. 2, 8, 9, H.R. 1465 considered and passed House.
Nov. 19, considered and passed Senate, amended, in lieu of S. 686.

Vol. 136 (1990): Aug. 2, Senate agreed to conference report.
Aug. 3, House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 26 (1990):
Aug. 18, Presidential statement.

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"(2) Nothing in this section shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.".

Subtitle C—Provisions Applicable to Alaska Natives

SEC. 8301. LAND CONVEYANCES.

The Alaska National Interest Lands Conservation Act (Public Law 96-487) is amended by adding the following after section 1437:

Claims.
43 USC 1642.

"SEC. 1438. Solely for the purpose of bringing claims that arise from the discharge of oil, the Congress confirms that all right, title, and interest of the United States in and to the lands validly selected pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) by Alaska Native corporations are deemed to have vested in the respective corporations as of March 23, 1989. This section shall take effect with respect to each Alaska Native corporation only upon its irrevocable election to accept an interim conveyance of such land and notice of such election has been formally transmitted to the Secretary of the Interior.".

SEC. 8302. IMPACT OF POTENTIAL SPILLS IN THE ARCTIC OCEAN ON ALASKA NATIVES.

Section 1005 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3145) is amended—

(1) by amending the heading to read as follows:

"WILDLIFE RESOURCES PORTION OF STUDY AND IMPACT OF POTENTIAL OIL SPILLS IN THE ARCTIC OCEAN";

(2) by inserting "(a)" after "SEC. 1005."; and

(3) by adding at the end the following:

"(b)(1) The Congress finds that—

Canada.

"(A) Canada has discovered commercial quantities of oil and gas in the Amalagak region of the Northwest Territory;

"(B) Canada is exploring alternatives for transporting the oil from the Amalagak field to markets in Asia and the Far East;

"(C) one of the options the Canadian Government is exploring involves transshipment of oil from the Amalagak field across the Beaufort Sea to tankers which would transport the oil overseas;

"(D) the tankers would traverse the American Exclusive Economic Zone through the Beaufort Sea into the Chuckchi Sea and then through the Bering Straits;

"(E) the Beaufort and Chuckchi Seas are vital to Alaska's Native people, providing them with subsistence in the form of walrus, seals, fish, and whales;

"(F) the Secretary of the Interior has conducted Outer Continental Shelf lease sales in the Beaufort and Chuckchi Seas and oil and gas exploration is ongoing;

"(G) an oil spill in the Arctic Ocean, if not properly contained and cleaned up, could have significant impacts on the indigenous people of Alaska's North Slope and on the Arctic environment; and

"(H) there are no international contingency plans involving our two governments concerning containment and cleanup of an oil spill in the Arctic Ocean.

"(2)(A) The Secretary of the Interior, in consultation with the Governor of Alaska, shall conduct a study of the issues of recovery of damages, contingency plans, and coordinated actions in the event of an oil spill in the Arctic Ocean.

"(B) The Secretary shall, no later than January 31, 1991, transmit a report to the Congress on the findings and conclusions reached as the result of the study carried out under this subsection.

Reports.

"(c) The Congress calls upon the Secretary of State, in consultation with the Secretary of the Interior, the Secretary of Transportation, and the Governor of Alaska, to begin negotiations with the Foreign Minister of Canada regarding a treaty dealing with the complex issues of recovery of damages, contingency plans, and coordinated actions in the event of an oil spill in the Arctic Ocean.

Canada.
International agreements.

"(d) The Secretary of State shall report to the Congress on the Secretary's efforts pursuant to this section no later than June 1, 1991.".

Reports.

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

SEC. 9001. AMENDMENTS TO OIL SPILL LIABILITY TRUST FUND.

(a) TRANSFERS TO TRUST FUND.—Subsection (b) of section 9509 of the Internal Revenue Code of 1986 is amended by striking all that follows paragraph (1) and inserting the following:

26 USC 9509.

"(2) amounts recovered under the Oil Pollution Act of 1990 for damages to natural resources which are required to be deposited in the Fund under section 1006(f) of such Act,

"(3) amounts recovered by such Trust Fund under section 1015 of such Act,

"(4) amounts required to be transferred by such Act from the revolving fund established under section 311(k) of the Federal Water Pollution Control Act,

"(5) amounts required to be transferred by the Oil Pollution Act of 1990 from the Deepwater Port Liability Fund established under section 18(f) of the Deepwater Port Act of 1974,

"(6) amounts required to be transferred by the Oil Pollution Act of 1990 from the Offshore Oil Pollution Compensation Fund established under section 302 of the Outer Continental Shelf Lands Act Amendments of 1978,

"(7) amounts required to be transferred by the Oil Pollution Act of 1990 from the Trans-Alaska Pipeline Liability Fund established under section 204 of the Trans-Alaska Pipeline Authorization Act, and

"(8) any penalty paid pursuant to section 311 of the Federal Water Pollution Control Act, section 309(c) of such Act (as a result of violations of such section 311), the Deepwater Port Act of 1974, or section 207 of the Trans-Alaska Pipeline Authorization Act."

(b) EXPENDITURES FROM TRUST FUND.—Paragraph (1) of section 9509(c) of such Code is amended to read as follows:

"(1) EXPENDITURE PURPOSES.—Amounts in the Oil Spill Liability Trust Fund shall be available, as provided in appropriation

(2) TERMINATION.—The Task Force shall cease to exist on the date on which the final report is provided pursuant to subsection (b)(5).

Safety.

(3) FUNCTIONS LIMITATION.—With respect to safety, operations, and other matters related to the pipeline facilities (as such term is defined in section 202(4) of the Hazardous Liquid Pipeline Safety Act of 1979) of the TAPS, the Task Force shall not perform any functions which are the responsibility of the Secretary of Transportation under the Hazardous Liquid Pipeline Safety Act of 1979, as amended. The Secretary may use the information gathered by and reports issued by the Task Force in carrying out the Secretary's responsibilities under that Act.

(4) POWERS.—The Task Force may, to the extent necessary to carry out its responsibilities, conduct investigations, make reports, issue subpoenas, require the production of relevant documents and records, take depositions, and conduct directly or, by contract, or otherwise, research, testing, and demonstration activities.

(5) EXAMINATION OF RECORDS AND PROPERTIES.—The Task Force, and the employees and agents it so designates, are authorized, upon presenting appropriate credentials to the person in charge, to enter upon, inspect, and examine, at reasonable times and in a reasonable manner, the records and properties of persons to the extent such records and properties are relevant to determining whether such persons have acted or are acting in compliance with applicable laws and agreements.

(6) FOIA.—The information gathered by the Task Force pursuant to subsection (b) shall not be subject to section 552 of title 5, United States Code (commonly referred to as the "Freedom of Information Act"), until its final report is issued pursuant to subsection (b)(6).

Subtitle B—Penalties

SEC. 8201. AUTHORITY OF THE SECRETARY OF THE INTERIOR TO IMPOSE PENALTIES ON OUTER CONTINENTAL SHELF FACILITIES.

Section 24(b) of the Outer Continental Shelf Lands Act (43 U.S.C. 1350(b)) is amended—

(1) by striking out "If any" and inserting in lieu thereof "(1) Except as provided in paragraph (2), if any";

(2) by striking out "$10,000" and inserting in lieu thereof "$20,000";

Regulations.

(3) by adding at the end of paragraph (1) the following new sentence: "The Secretary shall, by regulation at least every 3 years, adjust the penalty specified in this paragraph to reflect any increases in the Consumer Price Index (all items, United States city average) as prepared by the Department of Labor."; and

(4) by adding at the end the following new paragraph:

"(2) If a failure described in paragraph (1) constitutes or constituted a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), property, any mineral deposit, or the marine, coastal, or human environment, a civil penalty may be assessed without regard to the requirement of expiration of a period allowed for corrective action.".

SEC. 8202. TRANS-ALASKA PIPELINE SYSTEM CIVIL PENALTIES.

The Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.) is amended by adding at the end thereof the following new section:

"CIVIL PENALTIES

"SEC. 207. (a) PENALTY.—Except as provided in subsection (c)(4), the Secretary of the Interior may assess and collect a civil penalty under this section with respect to any discharge of oil— 43 USC 1656.

"(1) in transit from fields or reservoirs supplying oil to the trans-Alaska pipeline; or

"(2) during transportation through the trans-Alaska pipeline or handling at the terminal facilities, that causes damage to, or threatens to damage, natural resources or public or private property.

"(b) PERSONS LIABLE.—In addition to the person causing or permitting the discharge, the owner or owners of the oil at the time the discharge occurs shall be jointly, severally, and strictly liable for the full amount of penalties assessed pursuant to this section, except that the United States and the several States, and political subdivisions thereof, shall not be liable under this section.

"(c) AMOUNT.—(1) The amount of the civil penalty shall not exceed $1,000 per barrel of oil discharged.

"(2) In determining the amount of civil penalty under this section, the Secretary shall consider the seriousness of the damages from the discharge, the cause of the discharge, any history of prior violations of applicable rules and laws, and the degree of success of any efforts by the violator to minimize or mitigate the effects of such discharge.

"(3) The Secretary may reduce or waive the penalty imposed under this section if the discharge was solely caused by an act of war, act of God, or third party action beyond the control of the persons liable under this section.

"(4) No civil penalty assessed by the Secretary pursuant to this section shall be in addition to a penalty assessed pursuant to section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)).

"(d) PROCEDURES.—A civil penalty may be assessed and collected under this section only after notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code. In any proceeding for the assessment of a civil penalty under this section, the Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents and may promulgate rules for discovery procedures. Any person who requested a hearing with respect to a civil penalty under this subsection and who is aggrieved by an order assessing the civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued.

"(e) STATE LAW.—(1) Nothing in this section shall be construed or interpreted as preempting any State or political subdivision thereof from imposing any additional liability or requirements with respect to the discharge, or threat of discharge, of oil or other pollution by oil.

the Environmental Protection Agency, and one by the Secretary of Transportation.

(ii) Three members nominated by the Governor of the State of Alaska, one of whom shall be an employee of the Alaska Department of Natural Resources and one of whom shall be an employee of the Alaska Department of Environmental Conservation.

(iii) One member nominated by the Office of Technology Assessment.

(B) Any member appointed to fill a vacancy occurring before the expiration of the term for which his or her predecessor was appointed shall be appointed only for the remainder of such term. A member may serve after the expiration of his or her term until a successor, if applicable, has taken office.

(2) COCHAIRMEN.—The President shall appoint a Federal cochairman from among the Federal members of the Task Force appointed pursuant to paragraph (1)(A) and the Governor shall designate a State cochairman from among the State members of the Task Force appointed pursuant to paragraph (1)(B).

(3) COMPENSATION.—Members shall, to the extent approved in appropriations Acts, receive the daily equivalent of the minimum annual rate of basic pay in effect for grade GS-15 of the General Schedule for each day (including travel time) during which they are engaged in the actual performance of duties vested in the Task Force, except that members who are State, Federal, or other governmental employees shall receive no compensation under this paragraph in addition to the salaries they receive as such employees.

(4) STAFF.—The cochairman of the Task Force shall appoint a Director to carry out administrative duties. The Director may hire such staff and incur such expenses on behalf of the Task Force for which funds are available.

(5) RULE.—Employees of the Task Force shall not, by reason of such employment, be considered to be employees of the Federal Government for any purpose.

(b) DUTIES OF THE TASK FORCE.—

(1) AUDIT.—The Task Force shall conduct an audit of the Trans-Alaska Pipeline System (hereinafter referred to as "TAPS") including the terminal at Valdez, Alaska, and other related onshore facilities, make recommendations to the President, the Congress, and the Governor of Alaska.

(2) COMPREHENSIVE REVIEW.—As part of such audit, the Task Force shall conduct a comprehensive review of the TAPS in order to specifically advise the President, the Congress, and the Governor of Alaska concerning whether—

(A) the holder of the Federal and State right-of-way is, and has been, in full compliance with applicable laws, regulations, and agreements;

(B) the laws, regulations, and agreements are sufficient to prevent the release of oil from TAPS and prevent other damage or degradation to the environment and public health;

(C) improvements are necessary to TAPS to prevent release of oil from TAPS and to prevent other damage or degradation to the environment and public health;

(D) improvements are necessary in the onshore oil spill response capabilities for the TAPS; and

(E) improvements are necessary in security for TAPS.

(3) CONSULTANTS.—(A) The Task Force shall retain at least one independent consulting firm with technical expertise in engineering, transportation, safety, the environment, and other applicable areas to assist the Task Force in carrying out this subsection.

Contracts.

(B) Contracts with any such firm shall be entered into on a nationally competitive basis, and the Task Force shall not select any firm with respect to which there may be a conflict of interest in assisting the Task Force in carrying out the audit and review. All work performed by such firm shall be under the direct and immediate supervision of a registered engineer.

(4) PUBLIC COMMENT.—The Task Force shall provide an opportunity for public comment on its activities including at a minimum the following:

(A) Before it begins its audit and review, the Task Force shall review reports prepared by other Government entities conducting reviews of TAPS and shall consult with those Government entities that are conducting ongoing investigations including the General Accounting Office. It shall also hold at least 2 public hearings, at least 1 of which shall be held in a community affected by the Exxon Valdez oil spill. Members of the public shall be given an opportunity to present both oral and written testimony.

Classified information.

(B) The Task Force shall provide a mechanism for the confidential receipt of information concerning TAPS, which may include a designated telephone hotline.

(5) TASK FORCE REPORT.—The Task Force shall publish a draft report which it shall make available to the public. The public will have at least 30 days to provide comments on the draft report. Based on its draft report and the public comments thereon, the Task Force shall prepare a final report which shall include its findings, conclusions, and recommendations made as a result of carrying out such audit. The Task Force shall transmit (and make available to the public), no later than 2 years after the date on which funding is made available under paragraph (7), its final report to the President, the Congress, and the Governor of Alaska.

(6) PRESIDENTIAL REPORT.—The President shall, within 90 days after receiving the Task Force's report, transmit a report to the Congress and the Governor of Alaska outlining what measures have been taken or will be taken to implement the Task Force's recommendations. The President's report shall include recommended changes, if any, in Federal and State law to enhance the safety and operation of TAPS.

(7) EARMARK.—Of amounts in the Fund, $5,000,000 shall be available, subject to appropriations, annually without fiscal year limitation to carry out the requirements of this section.

(c) GENERAL ADMINISTRATION AND POWERS OF THE TASK FORCE.—

(1) AUDIT ACCESS.—The Comptroller General of the United States, and any of his or her duly appointed representatives, shall have access, for purposes of audit and examination, to any books, documents, papers, and records of the Task Force that are pertinent to the funds received and expended by the Task Force.

are reserved under subparagraph (A) and certification by the Comptroller General of the United States that the claims arising from that incident have been paid, the excess amounts, if any, for that incident shall be disposed of as set forth under subparagraphs (A) and (B).

(D) AUTHORIZATION.—The amounts transferred and deposited in the Fund shall be available for the purposes of section 1012 of the Oil Pollution Act of 1990 after funding sections 5001 and 8103 to the extent that funds have not otherwise been provided for the purposes of such sections.

43 USC 1653 note.

(3) SAVINGS CLAUSE.—The repeal made by paragraph (1) shall have no effect on any right to recover or responsibility that arises from incidents subject to section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) occurring prior to the date of enactment of this Act.

(4) TAPS COLLECTION.—Paragraph (5) of section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) is amended by striking the period at the end of the second sentence and adding at the end the following: ", except that after the date of enactment of the Oil Pollution Act of 1990, the amount to be accumulated shall be $100,000,000 or the amount determined by the trustees and certified to the Congress by the Comptroller General as necessary to pay claims arising from incidents occurring prior to the date of enactment of that Act and administrative costs, whichever is less.".

43 USC 1653 note.

(5) EFFECTIVE DATE.—(A) The repeal by paragraph (1) shall be effective 60 days after the date on which the Comptroller General of the United States certifies to the Congress that—

(i) all claims arising under section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) have been resolved,

(ii) all actions for the recovery of amounts subject to section 204(c) of the Trans-Alaska Pipeline Authorization Act have been resolved, and

(iii) all administrative expenses reasonably necessary for and incidental to the implementation of section 204(c) of the Trans-Alaska Pipeline Authorization Act have been paid.

(B) Upon the effective date of the repeal pursuant to subparagraph (A), the trustees of the TAPS Fund shall be relieved of all responsibilities under section 204(c) of the Trans-Alaska Pipeline Authorization Act, but not any existing legal liability.

43 USC 1653 note.

(6) TUCKER ACT.—This subsection is intended expressly to preserve any and all rights and remedies of contributors to the TAPS Fund under section 1491 of title 28, United States Code (commonly referred to as the "Tucker Act").

(b) CAUSE OF ACCIDENT.—Section 204(c)(2) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)(2)) is amended by striking out "caused by" in the first sentence and inserting in lieu thereof "caused solely by".

(c) DAMAGES.—Section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)), as amended by this title, is further amended by adding at the end the following new paragraphs:

"(13) For any claims against the Fund, the term 'damages' shall include, but not be limited to—

"(A) the net loss of taxes, revenues, fees, royalties, rents, or other revenues incurred by a State or a political subdivision of a State due to injury, destruction, or loss of real property, personal property, or natural resources, or diminished economic activity due to a discharge of oil; and

"(B) the net cost of providing increased or additional public services during or after removal activities due to a discharge of oil, including protection from fire, safety, or health hazards, incurred by a State or political subdivision of a State.

"(14) Paragraphs (1) through (13) shall apply only to claims arising from incidents occurring before the date of enactment of the Trans-Alaska Pipeline System Reform Act of 1990. The Oil Pollution Act of 1990 shall apply to any incident, or any claims arising from an incident, occurring on or after the date of the enactment of that Act.".

(d) PAYMENT OF CLAIMS BY FUND.—Section 204(c)(3) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)(3)) is amended by adding at the end the following: "The Fund shall expeditiously pay claims under this subsection, including such $14,000,000, if the owner or operator of a vessel has not paid any such claim within 90 days after such claim has been submitted to such owner or operator. Upon payment of any such claim, the Fund shall be subrogated under applicable State and Federal laws to all rights of any person entitled to recover under this subsection. In any action brought by the Fund against an owner or operator or an affiliate thereof to recover amounts under this paragraph, the Fund shall be entitled to recover prejudgment interest, costs, reasonable attorney's fees, and, in the discretion of the court, penalties.".

(e) OFFICERS OR TRUSTEES.—Section 204(c)(4) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)(4)) is amended—

(1) by inserting "(A)" after "(4)"; and

(2) by adding at the end the following:

"(B) No present or former officer or trustee of the Fund shall be subject to any liability incurred by the Fund or by the present or former officers or trustees of the Fund, other than liability for gross negligence or willful misconduct.

"(C)(i) Subject to clause (ii), each officer and each trustee of the Fund—

"(I) shall be indemnified against all claims and liabilities to which he or she has or shall become subject by reason of serving or having served as an officer or trustee, or by reason of any action taken, omitted, or neglected by him or her as an officer or trustee; and

"(II) shall be reimbursed for all attorney's fees reasonably incurred in connection with any claim or liability.

"(ii) No officer or trustee shall be indemnified against, or be reimbursed for, any expenses incurred in connection with, any claim or liability arising out of his or her gross negligence or willful misconduct.".

SEC. 8103. PRESIDENTIAL TASK FORCE.

43 USC 1651 note.

(a) ESTABLISHMENT OF TASK FORCE.—

(1) ESTABLISHMENT AND MEMBERS.—(A) There is hereby established a Presidential Task Force on the Trans-Alaska Pipeline System (hereinafter referred to as the "Task Force") composed of the following members appointed by the President:

(i) Three members, one of whom shall be nominated by the Secretary of the Interior, one by the Administrator of

(9) FUNDING.—For each of the fiscal years 1991, 1992, 1993, 1994, and 1995, $6,000,000 of amounts in the Fund shall be available to carry out the regional research program in paragraph (8), such amounts to be available in equal amounts for the regional research program in each region; except that if the agencies represented on the Interagency Committee determine that regional research needs exist which cannot be addressed within such funding limits, such agencies may use their authority under paragraph (10) to make additional grants to meet such needs. For the purposes of this paragraph, the research program carried out by the Prince William Sound Oil Spill Recovery Institute established under section 5001, shall not be eligible to receive grants under this paragraph.

(10) GRANTS.—In carrying out the research and development program established under this subsection, the agencies represented on the Interagency Committee may enter into contracts and cooperative agreements and make grants to universities, research institutions, and other persons. Such contracts, cooperative agreements, and grants shall address research and technology priorities set forth in the oil pollution research plan under subsection (b).

(11) In carrying out research under this section, the Department of Transportation shall continue to utilize the resources of the Research and Special Programs Administration of the Department of Transportation, to the maximum extent practicable.

(d) INTERNATIONAL COOPERATION.—In accordance with the research plan submitted under subsection (b), the Interagency Committee shall coordinate and cooperate with other nations and foreign research entities in conducting oil pollution research, development, and demonstration activities, including controlled field tests of oil discharges.

(e) BIENNIAL REPORTS.—The Chairman of the Interagency Committee shall submit to Congress every 2 years on October 30 a report on the activities carried out under this section in the preceding 2 fiscal years, and on activities proposed to be carried out under this section in the current 2 fiscal year period.

(f) FUNDING.—Not to exceed $21,250,000 of amounts in the Fund shall be available annually to carry out this section except for subsection (c)(8). Of such sums—

(1) funds authorized to be appropriated to carry out the activities under subsection (c)(4) shall not exceed $5,000,000 for fiscal year 1991 or $3,500,000 for any subsequent fiscal year; and

(2) not less than $2,250,000 shall be available for carrying out the activities in subsection (c)(6) for fiscal years 1992, 1993, 1994, and 1995.

All activities authorized in this section, including subsection (c)(8), are subject to appropriations.

TITLE VIII—TRANS-ALASKA PIPELINE SYSTEM

Trans-Alaska Pipeline System Reform Act of 1990.

43 USC 1651 note.

SEC. 8001. SHORT TITLE.

This title may be cited as the "Trans-Alaska Pipeline System Reform Act of 1990".

Subtitle A—Improvements to Trans-Alaska Pipeline System

SEC. 8101. LIABILITY WITHIN THE STATE OF ALASKA AND CLEANUP EFFORTS.

(a) CAUSE OF ACCIDENT.—Section 204(a)(1) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(a)(1)) is amended by striking out "caused by" in the first sentence and inserting in lieu thereof "caused solely by".

(b) LIMITATION OF LIABILITY.—Section 204(a)(2) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(a)(2)) is amended by striking "$50,000,000" each place it occurs and inserting in lieu thereof "$350,000,000".

(c) CLEANUP EFFORTS.—Section 204(b) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(b)) is amended in the first sentence—

(1) by inserting after "any area" the following: "in the State of Alaska";

(2) by inserting after "any activities" the following: "related to the Trans-Alaska Pipeline System, including operation of the terminal,"; and

(3) by inserting after "other Federal" the first place it appears the following: "or State".

SEC. 8102. TRANS-ALASKA PIPELINE LIABILITY FUND.

(a) TERMINATION OF CERTAIN PROVISIONS.—

(1) REPEAL.—Section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)) is repealed, effective as provided in paragraph (5).

(2) DISPOSITION OF FUND BALANCE.— 43 USC 1653 note.

(A) RESERVATION OF AMOUNTS.—The trustees of the Trans-Alaska Pipeline Liability Fund (hereafter in this subsection referred to as the "TAPS Fund") shall reserve the following amounts in the TAPS Fund—

(i) necessary to pay claims arising under section 204(c) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653(c)); and

(ii) administrative expenses reasonably necessary for and incidental to the implementation of section 204(c) of that Act.

(B) DISPOSITION OF THE BALANCE.—After the Comptroller General of the United States certifies that the requirements of subparagraph (A) have been met, the trustees of the TAPS Fund shall dispose of the balance in the TAPS Fund after the reservation of amounts are made under subparagraph (A) by—

(i) rebating the pro rata share of the balance to the State of Alaska for its contributions as an owner of oil; and then

(ii) transferring and depositing the remainder of the balance into the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509).

(C) DISPOSITION OF THE RESERVED AMOUNTS.—After payment of all claims arising from an incident for which funds

Narragansett Bay where oil was discharged by the WORLD PRODIGY; the Houston Ship Channel where oil was discharged by the RACHEL B; the Delaware River, where oil was discharged by the PRESIDENTE RIVERA, and Huntington Beach, California, where oil was discharged by the AMERICAN TRADER.

(C) Research conducted under this paragraph by, or through, the United States Fish and Wildlife Service shall be directed and coordinated by the National Wetland Research Center.

(5) MARINE SIMULATION RESEARCH.—The program established under this subsection shall include research on the greater use and application of geographic and vessel response simulation models, including the development of additional data bases and updating of existing data bases using, among others, the resources of the National Maritime Research Center. It shall include research and vessel simulations for—

(A) contingency plan evaluation and amendment;

(B) removal and strike team training;

(C) tank vessel personnel training; and

(D) those geographic areas where there is a significant likelihood of a major oil discharge.

State listing.

(6) DEMONSTRATION PROJECTS.—The United States Coast Guard, in conjunction with other such agencies in the Department of Transportation as the Secretary of Transportation may designate, shall conduct 3 port oil pollution minimization demonstration projects, one each with (A) the Port Authority of New York and New Jersey, (B) the Ports of Los Angeles and Long Beach, California, and (C) the Port of New Orleans, Louisiana, for the purpose of developing and demonstrating integrated port oil pollution prevention and cleanup systems which utilize the information and implement the improved practices and technologies developed from the research, development, and demonstration program established in this section. Such systems shall utilize improved technologies and management practices for reducing the risk of oil discharges, including, as appropriate, improved data access, computerized tracking of oil shipments, improved vessel tracking and navigation systems, advanced technology to monitor pipeline and tank conditions, improved oil spill response capability, improved capability to predict the flow and effects of oil discharges in both the inner and outer harbor areas for the purposes of making infrastructure decisions, and such other activities necessary to achieve the purposes of this section.

New Jersey.

(7) SIMULATED ENVIRONMENTAL TESTING.—Agencies represented on the Interagency Committee shall ensure the long-term use and operation of the Oil and Hazardous Materials Simulated Environmental Test Tank (OHMSETT) Research Center in New Jersey for oil pollution technology testing and evaluations.

Grants.
Schools and colleges.

(8) REGIONAL RESEARCH PROGRAM.—(A) Consistent with the research plan in subsection (b), the Interagency Committee shall coordinate a program of competitive grants to universities or other research institutions, or groups of universities or research institutions, for the purposes of conducting a coordinated research program related to the regional aspects of oil pollution, such as prevention, removal, mitigation, and the effects of discharged oil on regional environments. For the purposes of this paragraph, a region means a Coast Guard district as set out in part 3 of title 33, Code of Federal Regulations (1989).

(B) The Interagency Committee shall coordinate the publication by the agencies represented on the Interagency Committee of a solicitation for grants under this subsection. The application shall be in such form and contain such information as may be required in the published solicitation. The applications shall be reviewed by the Interagency Committee, which shall make recommendations to the appropriate granting agency represented on the Interagency Committee for awarding the grant. The granting agency shall award the grants recommended by the Interagency Committee unless the agency decides not to award the grant due to budgetary or other compelling considerations and publishes its reasons for such a determination in the Federal Register. No grants may be made by any agency from any funds authorized for this paragraph unless such grant award has first been recommended by the Interagency Committee.

(C) Any university or other research institution, or group of universities or research institutions, may apply for a grant for the regional research program established by this paragraph. The applicant must be located in the region, or in a State a part of which is in the region, for which the project is proposed as part of the regional research program. With respect to a group application, the entity or entities which will carry out the substantial portion of the proposed research must be located in the region, or in a State a part of which is in the region, for which the project is proposed as part of the regional research program.

(D) The Interagency Committee shall make recommendations on grants in such a manner as to ensure an appropriate balance within a region among the various aspects of oil pollution research, including prevention, removal, mitigation, and the effects of discharged oil on regional environments. In addition, the Interagency Committee shall make recommendations for grants based on the following criteria:

(i) There is available to the applicant for carrying out this paragraph demonstrated research resources.

(ii) The applicant demonstrates the capability of making a significant contribution to regional research needs.

(iii) The projects which the applicant proposes to carry out under the grant are consistent with the research plan under subsection (b)(1)(F) and would further the objectives of the research and development program established in this section.

(E) Grants provided under this paragraph shall be for a period up to 3 years, subject to annual review by the granting agency, and provide not more than 80 percent of the costs of the research activities carried out in connection with the grant.

(F) No funds made available to carry out this subsection may be used for the acquisition of real property (including buildings) or construction of any building.

(G) Nothing in this paragraph is intended to alter or abridge the authority under existing law of any Federal agency to make grants, or enter into contracts or cooperative agreements, using funds other than those authorized in this Act for the purposes of carrying out this paragraph.

pursuant to subsection (c), and timetables for completing research tasks; and

(F) identify, in consultation with the States, regional oil pollution research needs and priorities for a coordinated, multidisciplinary program of research at the regional level.

Contracts.

(2) ADVICE AND GUIDANCE.—The Chairman, through the Department of Transportation, shall contract with the National Academy of Sciences to—

(A) provide advice and guidance in the preparation and development of the research plan; and

Reports.

(B) assess the adequacy of the plan as submitted, and submit a report to Congress on the conclusions of such assessment.

The National Institute of Standards and Technology shall provide the Interagency Committee with advice and guidance on issues relating to quality assurance and standards measurements relating to its activities under this section.

(c) OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM.—

(1) ESTABLISHMENT.—The Interagency Committee shall coordinate the establishment, by the agencies represented on the Interagency Committee, of a program for conducting oil pollution research and development, as provided in this subsection.

(2) INNOVATIVE OIL POLLUTION TECHNOLOGY.—The program established under this subsection shall provide for research, development, and demonstration of new or improved technologies which are effective in preventing or mitigating oil discharges and which protect the environment, including—

(A) development of improved designs for vessels and facilities, and improved operational practices;

(B) research, development, and demonstration of improved technologies to measure the ullage of a vessel tank, prevent discharges from tank vents, prevent discharges during lightering and bunkering operations, contain discharges on the deck of a vessel, prevent discharges through the use of vacuums in tanks, and otherwise contain discharges of oil from vessels and facilities;

(C) research, development, and demonstration of new or improved systems of mechanical, chemical, biological, and other methods (including the use of dispersants, solvents, and bioremediation) for the recovery, removal, and disposal of oil, including evaluation of the environmental effects of the use of such systems;

Texas.

(D) research and training, in consultation with the National Response Team, to improve industry's and Government's ability to quickly and effectively remove an oil discharge, including the long-term use, as appropriate, of the National Spill Control School in Corpus Christi, Texas;

(E) research to improve information systems for decision-making, including the use of data from coastal mapping, baseline data, and other data related to the environmental effects of oil discharges, and cleanup technologies;

(F) development of technologies and methods to protect public health and safety from oil discharges, including the population directly exposed to an oil discharge;

(G) development of technologies, methods, and standards for protecting removal personnel, including training, adequate supervision, protective equipment, maximum exposure limits, and decontamination procedures;

(H) research and development of methods to restore and rehabilitate natural resources damaged by oil discharges;

(I) research to evaluate the relative effectiveness and environmental impacts of bioremediation technologies; and

(J) the demonstration of a satellite-based, dependent surveillance vessel traffic system in Narragansett Bay to evaluate the utility of such system in reducing the risk of oil discharges from vessel collisions and groundings in confined waters.

(3) OIL POLLUTION TECHNOLOGY EVALUATION.—The program established under this subsection shall provide for oil pollution prevention and mitigation technology evaluation including—

(A) the evaluation and testing of technologies developed independently of the research and development program established under this subsection;

(B) the establishment, where appropriate, of standards and testing protocols traceable to national standards to measure the performance of oil pollution prevention or mitigation technologies; and

(C) the use, where appropriate, of controlled field testing to evaluate real-world application of oil discharge prevention or mitigation technologies.

(4) OIL POLLUTION EFFECTS RESEARCH.—(A) The Committee shall establish a research program to monitor and evaluate the environmental effects of oil discharges. Such program shall include the following elements:

(i) The development of improved models and capabilities for predicting the environmental fate, transport, and effects of oil discharges.

(ii) The development of methods, including economic methods, to assess damages to natural resources resulting from oil discharges.

(iii) The identification of types of ecologically sensitive areas at particular risk to oil discharges and the preparation of scientific monitoring and evaluation plans, one for each of several types of ecological conditions, to be implemented in the event of major oil discharges in such areas.

(iv) The collection of environmental baseline data in ecologically sensitive areas at particular risk to oil discharges where such data are insufficient.

(B) The Department of Commerce in consultation with the Environmental Protection Agency shall monitor and scientifically evaluate the long-term environmental effects of oil discharges if—

(i) the amount of oil discharged exceeds 250,000 gallons;

(ii) the oil discharge has occurred on or after January 1, 1989; and

(iii) the Interagency Committee determines that a study of the long-term environmental effects of the discharge would be of significant scientific value, especially for preventing or responding to future oil discharges.

State listing.

Areas for study may include the following sites where oil discharges have occurred: the New York/New Jersey Harbor area, where oil was discharged by an Exxon underwater pipeline, the T/B CIBRO SAVANNAH, and the M/V BT NAUTILUS;

(3) EXPENSES.—Each member of the Environmental Sciences Review Panel shall be reimbursed for actual travel expenses and shall receive per diem in lieu of subsistence for each day such member is engaged in the business of the Environmental Sciences Review Panel.

(4) TERMINATION.—The Environmental Sciences Review Panel shall be terminated after the submission of all findings and recommendations required under paragraph (2)(A).

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary of the Interior to carry out this section not to exceed $500,000 for fiscal year 1991, to remain available until expended.

SEC. 6004. COOPERATIVE DEVELOPMENT OF COMMON HYDROCARBON-BEARING AREAS.

(a) AMENDMENT TO OUTER CONTINENTAL SHELF LANDS ACT.—Section 5 of the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1334), is amended by adding a new subsection (j) as follows:

"(j) COOPERATIVE DEVELOPMENT OF COMMON HYDROCARBON-BEARING AREAS.—

"(1) FINDINGS.—

"(A) The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including—

"(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in economic waste, environmental damage, and damage to life and property;

"(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

"(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

"(2) PREVENTION OF HARMFUL EFFECTS.—The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.".

Louisiana. 43 USC 1334 note.

(b) EXCEPTION FOR WEST DELTA FIELD.—Section 5(j) of the Outer Continental Shelf Lands Act, as added by this section, shall not be applicable with respect to Blocks 17 and 18 of the West Delta Field offshore Louisiana.

(c) AUTHORIZATION OF APPROPRIATIONS.—There are hereby authorized to be appropriated such sums as may be necessary to provide compensation, including interest, to the State of Louisiana and its lessees, for net drainage of oil and gas resources as determined in the Third Party Factfinder Louisiana Boundary Study dated March 21, 1989. For purposes of this section, such lessees shall include those persons with an ownership interest in State of Louisiana leases SL10087, SL10088 or SL10187, or ownership interests in the production or proceeds therefrom, as established by assignment, contract or otherwise. Interest shall be computed for the period March 21, 1989 until the date of payment.

TITLE VII—OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM

SEC. 7001. OIL POLLUTION RESEARCH AND DEVELOPMENT PROGRAM. 33 USC 2761.

(a) INTERAGENCY COORDINATING COMMITTEE ON OIL POLLUTION RESEARCH.—

(1) ESTABLISHMENT.—There is established an Interagency Coordinating Committee on Oil Pollution Research (hereinafter in this section referred to as the "Interagency Committee").

(2) PURPOSES.—The Interagency Committee shall coordinate a comprehensive program of oil pollution research, technology development, and demonstration among the Federal agencies, in cooperation and coordination with industry, universities, research institutions, State governments, and other nations, as appropriate, and shall foster cost-effective research mechanisms, including the joint funding of research.

(3) MEMBERSHIP.—The Interagency Committee shall include representatives from the Department of Commerce (including the National Oceanic and Atmospheric Administration and the National Institute of Standards and Technology), the Department of Energy, the Department of the Interior (including the Minerals Management Service and the United States Fish and Wildlife Service), the Department of Transportation (including the United States Coast Guard, the Maritime Administration, and the Research and Special Projects Administration), the Department of Defense (including the Army Corps of Engineers and the Navy), the Environmental Protection Agency, the National Aeronautics and Space Administration, and the United States Fire Administration in the Federal Emergency Management Agency, as well as such other Federal agencies as the President may designate.

A representative of the Department of Transportation shall serve as Chairman.

(b) OIL POLLUTION RESEARCH AND TECHNOLOGY PLAN.—

(1) IMPLEMENTATION PLAN.—Within 180 days after the date of enactment of this Act, the Interagency Committee shall submit to Congress a plan for the implementation of the oil pollution research, development, and demonstration program established pursuant to subsection (c). The research plan shall—

(A) identify agency roles and responsibilities;

(B) assess the current status of knowledge on oil pollution prevention, response, and mitigation technologies and effects of oil pollution on the environment;

(C) identify significant oil pollution research gaps including an assessment of major technological deficiencies in responses to past oil discharges;

(D) establish research priorities and goals for oil pollution technology development related to prevention, response, mitigation, and environmental effects;

(E) estimate the resources needed to conduct the oil pollution research and development program established

additional offshore leasing, exploration, or development offshore North Carolina; and

(8) the National Research Council report entitled "The Adequacy of Environmental Information for Outer Continental Shelf Oil and Gas Decisions: Florida and California", issued in 1989, concluded that—

(A) information with respect to those States, which have received greater scrutiny than has North Carolina, is inadequate; and

(B) there are serious generic defects in the Minerals Management Service's methods of environmental analysis, reinforcing concerns about the adequacy of the scientific and technical information which are the basis for a decision to lease additional tracts or approve an exploration plan offshore North Carolina, especially with respect to oceanographic, ecological, and socioeconomic information.

(c) PROHIBITION OF OIL AND GAS LEASING, EXPLORATION, AND DEVELOPMENT.—

(1) PROHIBITION.—The Secretary of the Interior shall not—

(A) conduct a lease sale;

(B) issue any new leases;

(C) approve any exploration plan;

(D) approve any development and production plan;

(E) approve any application for permit to drill; or

(F) permit any drilling,

for oil or gas under the Outer Continental Shelf Lands Act on any lands of the Outer Continental Shelf offshore North Carolina.

(2) BOUNDARIES.—For purposes of paragraph (1), the term "offshore North Carolina" means the area within the lateral seaward boundaries between areas offshore North Carolina and areas offshore—

(A) Virginia as provided in the joint resolution entitled "Joint resolution granting the consent of Congress to an agreement between the States of North Carolina and Virginia establishing their lateral seaward boundary" approved October 27, 1972 (86 Stat. 1298); and

(B) South Carolina as provided in the Act entitled "An Act granting the consent of Congress to the agreement between the States of North Carolina and South Carolina establishing their lateral seaward boundary" approved October 9, 1981 (95 Stat. 988).

(3) DURATION OF PROHIBITION.—

(A) IN GENERAL.—The prohibition under paragraph (1) shall remain in effect until the later of—

(i) October 1, 1991; or

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(ii) 45 days of continuous session of the Congress after submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel under subsection (e)—

(I) certifying that the information available, including information acquired pursuant to subsection (d), is sufficient to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in paragraph (1); and

(II) including a detailed explanation of any differences between such certification and the findings and recommendations of the Environmental Sciences Review Panel under subsection (e), and a detailed justification of each such difference.

(B) CONTINUOUS SESSION OF CONGRESS.—In computing any 45-day period of continuous session of Congress under subparagraph (A)(ii)—

(i) continuity of session is broken only by an adjournment of the Congress sine die; and

(ii) the days on which either House of Congress is not in session because of an adjournment of more than 3 days to a day certain are excluded.

(d) ADDITIONAL ENVIRONMENTAL INFORMATION.—The Secretary of the Interior shall undertake ecological and socioeconomic studies, additional physical oceanographic studies, including actual field work and the correlation of existing data, and other additional environmental studies, to obtain sufficient information about all significant conditions, processes, and environments which influence, or may be influenced by, oil and gas leasing, exploration, and development activities offshore North Carolina to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1). During the time that the Environmental Sciences Review Panel established under subsection (e) is in existence, the Secretary of the Interior shall consult with such Panel in carrying out this subsection.

(e) ENVIRONMENTAL SCIENCES REVIEW PANEL.— Establishment.

(1) ESTABLISHMENT AND MEMBERSHIP.—There shall be established an Environmental Sciences Review Panel, to consist of—

(A) 1 marine scientist selected by the Secretary of the Interior;

(B) 1 marine scientist selected by the Governor of North Carolina; and

(C) 1 person each from the disciplines of physical oceanography, ecology, and social science, to be selected jointly by the Secretary of the Interior and the Governor of North Carolina from a list of individuals nominated by the National Academy of Sciences.

(2) FUNCTIONS.—Not later than 6 months after the date of the enactment of this Act, the Environmental Sciences Review Panel shall—

(A) prepare and submit to the Secretary of the Interior findings and recommendations—

(i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1); and

(ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities; and

(B) consult with the Secretary of the Interior as provided in subsection (d).

(4) practice exercises not less than 2 times per year which test the capacity of the equipment and personnel required under this paragraph; and

(5) periodic testing and certification of equipment required under this paragraph, as required by the Secretary.

(b) DEFINITIONS.—In this section—

(1) the term "Prince William Sound" means all State and Federal waters within Prince William Sound, Alaska, including the approach to Hinchenbrook Entrance out to and encompassing Seal Rocks; and

(2) the term "worst case discharge" means—

(A) in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and

(B) in the case of a facility, the largest foreseeable discharge in adverse weather conditions.

33 USC 2736.

SEC. 5006. FUNDING.

(a) SECTION 5001.—Amounts in the Fund shall be available, subject to appropriations, and shall remain available until expended, to carry out section 5001 as follows:

(1) $5,000,000 shall be available for the first fiscal year beginning after the date of enactment of this Act.

(2) $2,000,000 shall be available for each of the 9 fiscal years following the fiscal year described in paragraph (1).

(b) SECTIONS 5003 AND 5004.—Amounts in the Fund shall be available, without further appropriations and without fiscal year limitation, to carry out sections 5003 and 5004, in an amount not to exceed $5,000,000.

33 USC 2737.

SEC. 5007. LIMITATION.

Notwithstanding any other law, tank vessels that have spilled more than 1,000,000 gallons of oil into the marine environment after March 22, 1989, are prohibited from operating on the navigable waters of Prince William Sound, Alaska.

TITLE VI—MISCELLANEOUS

33 USC 2751.

SEC. 6001. SAVINGS PROVISIONS.

(a) CROSS-REFERENCES.—A reference to a law replaced by this Act, including a reference in a regulation, order, or other law, is deemed to refer to the corresponding provision of this Act.

(b) CONTINUATION OF REGULATIONS.—An order, rule, or regulation in effect under a law replaced by this Act continues in effect under the corresponding provision of this Act until repealed, amended, or superseded.

(c) RULE OF CONSTRUCTION.—An inference of legislative construction shall not be drawn by reason of the caption or catch line of a provision enacted by this Act.

(d) ACTIONS AND RIGHTS.—Nothing in this Act shall apply to any rights and duties that matured, penalties that were incurred, and proceedings that were begun before the date of enactment of this Act, except as provided by this section, and shall be adjudicated pursuant to the law applicable on the date prior to the date of the enactment of this Act.

(e) ADMIRALTY AND MARITIME LAW.—Except as otherwise provided in this Act, this Act does not affect—

(1) admiralty and maritime law; or

(2) the jurisdiction of the district courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

SEC. 6002. ANNUAL APPROPRIATIONS. 33 USC 2752.

(a) REQUIRED.—Except as provided in subsection (b), amounts in the Fund shall be available only as provided in annual appropriation Acts.

(b) EXCEPTIONS.—Subsection (a) shall not apply to sections 1006(f), 1012(a)(4), or 5006(b), and shall not apply to an amount not to exceed $50,000,000 in any fiscal year which the President may make available from the Fund to carry out section 311(c) of the Federal Water Pollution Control Act, as amended by this Act, and to initiate the assessment of natural resources damages required under section 1006. Sums to which this subsection applies shall remain available until expended.

SEC. 6003. OUTER BANKS PROTECTION.

Outer Banks Protection Act. North Carolina. 33 USC 2753.

(a) SHORT TITLE.—This section may be cited as the "Outer Banks Protection Act".

(b) FINDINGS.—The Congress finds that—

(1) the Outer Banks of North Carolina is an area of exceptional environmental fragility and beauty;

(2) the annual economic benefits of commercial and recreational fishing activities to North Carolina, which could be adversely affected by oil or gas development offshore the State's coast, exceeds $1,000,000,000;

(3) the major industry in coastal North Carolina is tourism, which is subject to potentially significant disruption by offshore oil or gas development;

(4) the physical oceanographic characteristics of the area offshore North Carolina between Cape Hatteras and the mouth of the Chesapeake Bay are not well understood, being affected by Gulf Stream western boundary perturbations and accompanying warm filaments, warm and cold core rings which separate from the Gulf Stream, wind stress, outflow from the Chesapeake Bay, Gulf Stream meanders, and intrusions of Virginia coastal waters around and over the Diamond shoals;

(5) diverse and abundant fisheries resources occur in the western boundary area of the Gulf Stream offshore North Carolina, but little is understood of the complex ecological relationships between the life histories of those species and their physical, chemical, and biological environment;

(6) the environmental impact statements prepared for Outer Continental Shelf lease sales numbered 56 (1981) and 78 (1983) contain insufficient and outdated environmental information from which to make decisions on approval of additional oil and gas leasing, exploration, and development activities;

(7) the draft environmental report, dated November 1, 1989, and the preliminary final environmental report dated June 1, 1990, prepared pursuant to a July 14, 1989 memorandum of understanding between the State of North Carolina, the Department of the Interior, and the Mobil Oil Company, have not allayed concerns about the adequacy of the environmental information available to determine whether to proceed with

(A) in the case of the Prince William Sound Program, calling at the terminal facilities for the purpose of receiving and transporting oil to refineries, operating north of Middleston Island and bound for or exiting from Prince William Sound; and

(B) in the case of the Cook Inlet Program, calling at the terminal facilities for the purpose of receiving and transporting oil to refineries and operating in Cook Inlet and the Gulf of Alaska north of Amatuli Island, including tankers transiting to Cook Inlet from Prince William Sound;

(3) "vicinity of the terminal facilities" means that geographical area surrounding the environment of terminal facilities which is directly affected or may be directly affected by the operation of the terminal facilities; and

(4) "Secretary" means the Secretary of Transportation.

(n) SAVINGS CLAUSE.—

(1) REGULATORY AUTHORITY.—Nothing in this section shall be construed as modifying, repealing, superseding, or preempting any municipal, State or Federal law or regulation, or in any way affecting litigation arising from oil spills or the rights and responsibilities of the United States or the State of Alaska, or municipalities thereof, to preserve and protect the environment through regulation of land, air, and water uses, of safety, and of related development. The monitoring provided for by this section shall be designed to help assure compliance with applicable laws and regulations and shall only extend to activities—

(A) that would affect or have the potential to affect the vicinity of the terminal facilities and the area of crude oil tanker operations included in the Programs; and

(B) are subject to the United States or State of Alaska, or municipality thereof, law, regulation, or other legal requirement.

(2) RECOMMENDATIONS.—This subsection is not intended to prevent the Association or Council from recommending to appropriate authorities that existing legal requirements should be modified or that new legal requirements should be adopted.

Contracts.

(o) ALTERNATIVE VOLUNTARY ADVISORY GROUP IN LIEU OF COUNCIL.—The requirements of subsections (c) through (l), as such subsections apply respectively to the Prince William Sound Program and the Cook Inlet Program, are deemed to have been satisfied so long as the following conditions are met:

(1) PRINCE WILLIAM SOUND.—With respect to the Prince William Sound Program, the Alyeska Pipeline Service Company or any of its owner companies enters into a contract for the duration of the operation of the Trans-Alaska Pipeline System with the Alyeska Citizens Advisory Committee in existence on the date of enactment of this section, or a successor organization, to fund that Committee or organization on an annual basis in the amount provided for by subsection (k)(2)(A) and the President annually certifies that the Committee or organization fosters the general goals and purposes of this section and is broadly representative of the communities and interests in the vicinity of the terminal facilities and Prince William Sound.

(2) COOK INLET.—With respect to the Cook Inlet Program, the terminal facilities, offshore facilities, or crude oil tanker owners and operators enter into a contract with a voluntary advisory organization to fund that organization on an annual basis and the President annually certifies that the organization fosters the general goals and purposes of this section and is broadly representative of the communities and interests in the vicinity of the terminal facilities and Cook Inlet.

SEC. 5003. BLIGH REEF LIGHT. 33 USC 2733.

The Secretary of Transportation shall within one year after the date of the enactment of this title install and ensure operation of an automated navigation light on or adjacent to Bligh Reef in Prince William Sound, Alaska, of sufficient power and height to provide long-range warning of the location of Bligh Reef.

SEC. 5004. VESSEL TRAFFIC SERVICE SYSTEM. 33 USC 2734.

The Secretary of Transportation shall within one year after the date of the enactment of this title—

(1) acquire, install, and operate such additional equipment (which may consist of radar, closed circuit television, satellite tracking systems, or other shipboard dependent surveillance), train and locate such personnel, and issue such final regulations as are necessary to increase the range of the existing VTS system in the Port of Valdez, Alaska, sufficiently to track the locations and movements of tank vessels carrying oil from the Trans-Alaska Pipeline when such vessels are transiting Prince William Sound, Alaska, and to sound an audible alarm when such tankers depart from designated navigation routes; and Regulations.

(2) submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives a report on the feasibility and desirability of instituting positive control of tank vessel movements in Prince William Sound by Coast Guard personnel using the Port of Valdez, Alaska, VTS system, as modified pursuant to paragraph (1). Reports.

SEC. 5005. EQUIPMENT AND PERSONNEL REQUIREMENTS UNDER TANK VESSEL AND FACILITY RESPONSE PLANS. 33 USC 2735.

(a) IN GENERAL.—In addition to the requirements for response plans for vessels established by section 311(j) of the Federal Water Pollution Control Act, as amended by this Act, a response plan for a tank vessel operating on Prince William Sound, or a facility permitted under the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1651 et seq.), shall provide for—

(1) prepositioned oil spill containment and removal equipment in communities and other strategic locations within the geographic boundaries of Prince William Sound, including escort vessels with skimming capability; barges to receive recovered oil; heavy duty sea boom, pumping, transferring, and lightering equipment; and other appropriate removal equipment for the protection of the environment, including fish hatcheries;

(2) the establishment of an oil spill removal organization at appropriate locations in Prince William Sound, consisting of trained personnel in sufficient numbers to immediately remove, to the maximum extent practicable, a worst case discharge or a discharge of 200,000 barrels of oil, whichever is greater;

(3) training in oil removal techniques for local residents and individuals engaged in the cultivation or production of fish or fish products in Prince William Sound;

Federal department, agency, or other instrumentality shall, with respect to all permits, site-specific regulations, and other matters governing the activities and actions of the terminal facilities which affect or may affect the vicinity of the terminal facilities, consult with the appropriate Council prior to taking substantive action with respect to the permit, site-specific regulation, or other matter. This consultation shall be carried out with a view to enabling the appropriate Association and Council to review the permit, site-specific regulation, or other matters and make appropriate recommendations regarding operations, policy or agency actions. Prior consultation shall not be required if an authorized Federal agency representative reasonably believes that an emergency exists requiring action without delay.

(h) RECOMMENDATIONS OF THE COUNCIL.—In the event that the Association does not adopt, or significantly modifies before adoption, any recommendation of the Council made pursuant to the authority granted to the Council in subsection (d), the Association shall provide to the Council, in writing, within 5 days of its decision, notice of its decision and a written statement of reasons for its rejection or significant modification of the recommendation.

(i) ADMINISTRATIVE ACTIONS.—Appointments, designations, and selections of individuals to serve as members of the Associations and Councils under this section shall be submitted to the Secretary prior to the expiration of the 120-day period following the date of the enactment of this section. On or before the expiration of the 180-day period following that date of enactment of this section, the Secretary shall call an initial meeting of each Association and Council for organizational purposes.

(j) LOCATION AND COMPENSATION.—

(1) LOCATION.—Each Association and Council established by this section shall be located in the State of Alaska.

(2) COMPENSATION.—No member of an Association or Council shall be compensated for the member's services as a member of the Association or Council, but shall be allowed travel expenses, including per diem in lieu of subsistence, at a rate established by the Association or Council not to exceed the rates authorized for employees of agencies under sections 5702 and 5703 of title 5, United States Code. However, each Council may enter into contracts to provide compensation and expenses to members of the committees created under subsections (d), (e), and (f).

(k) FUNDING.—

(1) REQUIREMENT.—Approval of the contingency plans required of owners and operators of the Cook Inlet and Prince William Sound terminal facilities and crude oil tankers while operating in Alaskan waters in commerce with those terminal facilities shall be effective only so long as the respective Association and Council for a facility are funded pursuant to paragraph (2).

(2) PRINCE WILLIAM SOUND PROGRAM.—The owners or operators of terminal facilities or crude oil tankers operating in Prince William Sound shall provide, on an annual basis, an aggregate amount of not more than $2,000,000, as determined by the Secretary. Such amount—

(A) shall provide for the establishment and operation on the environmental oversight and monitoring program in Prince William Sound;

(B) shall be adjusted annually by the Anchorage Consumer Price Index; and

(C) may be adjusted periodically upon the mutual consent of the owners or operators of terminal facilities or crude oil tankers operating in Prince William Sound and the Prince William Sound terminal facilities Council.

(3) COOK INLET PROGRAM.—The owners or operators of terminal facilities, offshore facilities, or crude oil tankers operating in Cook Inlet shall provide, on an annual basis, an aggregate amount of not more than $1,000,000, as determined by the Secretary. Such amount—

(A) shall provide for the establishment and operation of the environmental oversight and monitoring program in Cook Inlet;

(B) shall be adjusted annually by the Anchorage Consumer Price Index; and

(C) may be adjusted periodically upon the mutual consent of the owners or operators of terminal facilities, offshore facilities, or crude oil tankers operating in Cook Inlet and the Cook Inlet Council.

(l) REPORTS.—

(1) ASSOCIATIONS AND COUNCILS.—Prior to the expiration of the 36-month period following the date of the enactment of this section, each Association and Council established by this section shall report to the President and the Congress concerning its activities under this section, together with its recommendations.

(2) GAO.—Prior to the expiration of the 36-month period following the date of the enactment of this section, the General Accounting Office shall report to the President and the Congress as to the handling of funds, including donated funds, by the entities carrying out the programs under this section, and the effectiveness of the demonstration programs carried out under this section, together with its recommendations.

(m) DEFINITIONS.—As used in this section, the term—

(1) "terminal facilities" means—

(A) in the case of the Prince William Sound Program, the entire oil terminal complex located in Valdez, Alaska, consisting of approximately 1,000 acres including all buildings, docks (except docks owned by the City of Valdez if those docks are not used for loading of crude oil), pipes, piping, roads, ponds, tanks, crude oil tankers only while at the terminal dock, tanker escorts owned or operated by the operator of the terminal, vehicles, and other facilities associated with, and necessary for, assisting tanker movement of crude oil into and out of the oil terminal complex; and

(B) in the case of the Cook Inlet Program, the entire oil terminal complex including all buildings, docks, pipes, piping, roads, ponds, tanks, vessels, vehicles, crude oil tankers only while at the terminal dock, tanker escorts owned or operated by the operator of the terminal, emergency spill response vessels owned or operated by the operator of the terminal, and other facilities associated with, and necessary for, assisting tanker movement of crude oil into and out of the oil terminal complex;

(2) "crude oil tanker" means a tanker (as that term is defined under section 2101 of title 46, United States Code)—

(E) provide advice and recommendations to the Association on port operations, policies and practices;

(F) recommend to the Association—

(i) standards and stipulations for permits and site-specific regulations intended to minimize the impact of the terminal facilities' and crude oil tankers' operations in the vicinity of the terminal facilities;

(ii) modifications of terminal facility operations and maintenance intended to minimize the risk and mitigate the impact of terminal facilities, operations in the vicinity of the terminal facilities and to minimize the risk of oil spills;

(iii) modifications of crude oil tanker operations and maintenance in Prince William Sound and Cook Inlet intended to minimize the risk and mitigate the impact of oil spills; and

(iv) modifications to the oil spill prevention and contingency plans for terminal facilities and for crude oil tankers in Prince William Sound and Cook Inlet intended to enhance the ability to prevent and respond to an oil spill; and

(G) create additional committees of the Council as necessary to carry out the above functions, including a scientific and technical advisory committee to the Prince William Sound Council.

(7) NO ESTOPPEL.—No Council shall be held liable under State or Federal law for costs or damages as a result of rendering advice under this section. Nor shall any advice given by a voting member of a Council, or program representative or agent, be grounds for estopping the interests represented by the voting Council members from seeking damages or other appropriate relief.

(8) SCIENTIFIC WORK.—In carrying out its research, development and monitoring functions, each Council is authorized to conduct its own scientific research and shall review the scientific work undertaken by or on behalf of the terminal operators or crude oil tanker operators as a result of a legal requirement to undertake that work. Each Council shall also review the relevant scientific work undertaken by or on behalf of any government entity relating to the terminal facilities or crude oil tankers. To the extent possible, to avoid unnecessary duplication, each Council shall coordinate its independent scientific work with the scientific work performed by or on behalf of the terminal operators and with the scientific work performed by or on behalf of the operators of the crude oil tankers.

(e) COMMITTEE FOR TERMINAL AND OIL TANKER OPERATIONS AND ENVIRONMENTAL MONITORING.—

(1) MONITORING COMMITTEE.—Each Council shall establish a standing Terminal and Oil Tanker Operations and Environmental Monitoring Committee (hereinafter in this section referred to as the "Monitoring Committee") to devise and manage a comprehensive program of monitoring the environmental impacts of the operations of terminal facilities and of crude oil tankers while operating in Prince William Sound and Cook Inlet. The membership of the Monitoring Committee shall be made up of members of the Council, citizens, and recognized scientific experts selected by the Council.

(2) DUTIES.—In fulfilling its responsibilities, the Monitoring Committee shall—

(A) advise the Council on a monitoring strategy that will permit early detection of environmental impacts of terminal facility operations and crude oil tanker operations while in Prince William Sound and Cook Inlet;

(B) develop monitoring programs and make recommendations to the Council on the implementation of those programs;

(C) at its discretion, select and contract with universities and other scientific institutions to carry out specific monitoring projects authorized by the Council pursuant to an approved monitoring strategy;

(D) complete any other tasks assigned by the Council; and

(E) provide written reports to the Council which interpret and assess the results of all monitoring programs. Reports.

(f) COMMITTEE FOR OIL SPILL PREVENTION, SAFETY, AND EMERGENCY RESPONSE.—

(1) TECHNICAL OIL SPILL COMMITTEE.—Each Council shall establish a standing technical committee (hereinafter referred to as "Oil Spill Committee") to review and assess measures designed to prevent oil spills and the planning and preparedness for responding to, containing, cleaning up, and mitigating impacts of oil spills. The membership of the Oil Spill Committee shall be made up of members of the Council, citizens, and recognized technical experts selected by the Council.

(2) DUTIES.—In fulfilling its responsibilities, the Oil Spill Committee shall—

(A) periodically review the respective oil spill prevention and contingency plans for the terminal facilities and for the crude oil tankers while in Prince William Sound or Cook Inlet, in light of new technological developments and changed circumstances;

(B) monitor periodic drills and testing of the oil spill contingency plans for the terminal facilities and for crude oil tankers while in Prince William Sound and Cook Inlet;

(C) study wind and water currents and other environmental factors in the vicinity of the terminal facilities which may affect the ability to prevent, respond to, contain, and clean up an oil spill;

(D) identify highly sensitive areas which may require specific protective measures in the event of a spill in Prince William Sound or Cook Inlet;

(E) monitor developments in oil spill prevention, containment, response, and cleanup technology;

(F) periodically review port organization, operations, incidents, and the adequacy and maintenance of vessel traffic service systems designed to assure safe transit of crude oil tankers pertinent to terminal operations;

(G) periodically review the standards for tankers bound for, loading at, exiting from, or otherwise using the terminal facilities;

(H) complete any other tasks assigned by the Council; and Reports.

(I) provide written reports to the Council outlining its findings and recommendations.

(g) AGENCY COOPERATION.—On and after the expiration of the 180-day period following the date of the enactment of this section, each

facilities, the United States, and the State of Alaska to discuss and to make recommendations concerning all permits, plans, and site-specific regulations governing the activities and actions of the terminal facilities which affect or may affect the environment in the vicinity of the terminal facilities and of crude oil tankers calling at those facilities.

(4) DESIGNATION OF EXISTING ORGANIZATION.—The Secretary may designate an existing nonprofit organization as an Association under this subsection if the organization is organized to meet the purposes of this section and consists of at least the individuals listed in paragraph (2).

(d) REGIONAL CITIZENS' ADVISORY COUNCILS.—

(1) MEMBERSHIP.—There is established a Regional Citizens' Advisory Council (hereinafter in this section referred to as the "Council") for each of the programs established by subsection (b).

(2) MEMBERSHIP.—Each Council shall be composed of voting members and nonvoting members, as follows:

(A) VOTING MEMBERS.—Voting members shall be Alaska residents and, except as provided in clause (vii) of this paragraph, shall be appointed by the Governor of the State of Alaska from a list of nominees provided by each of the following interests, with one representative appointed to represent each of the following interests, taking into consideration the need for regional balance on the Council:

(i) Local commercial fishing industry organizations, the members of which depend on the fisheries resources of the waters in the vicinity of the terminal facilities.

(ii) Aquaculture associations in the vicinity of the terminal facilities.

(iii) Alaska Native Corporations and other Alaska Native organizations the members of which reside in the vicinity of the terminal facilities.

(iv) Environmental organizations the members of which reside in the vicinity of the terminal facilities.

(v) Recreational organizations the members of which reside in or use the vicinity of the terminal facilities.

(vi) The Alaska State Chamber of Commerce, to represent the locally based tourist industry.

(vii)(I) For the Prince William Sound Terminal Facilities Council, one representative selected by each of the following municipalities: Cordova, Whittier, Seward, Valdez, Kodiak, the Kodiak Island Borough, and the Kenai Peninsula Borough.

(II) For the Cook Inlet Terminal Facilities Council, one representative selected by each of the following municipalities: Homer, Seldovia, Anchorage, Kenai, Kodiak, the Kodiak Island Borough, and the Kenai Peninsula Borough.

(B) NONVOTING MEMBERS.—One ex-officio, nonvoting representative shall be designated by, and represent, each of the following:

(i) The Environmental Protection Agency.

(ii) The Coast Guard.

(iii) The National Oceanic and Atmospheric Administration.

(iv) The United States Forest Service.

(v) The Bureau of Land Management.

(vi) The Alaska Department of Environmental Conservation.

(vii) The Alaska Department of Fish and Game.

(viii) The Alaska Department of Natural Resources.

(ix) The Division of Emergency Services, Alaska Department of Military and Veterans Affairs.

(3) TERMS.—

(A) DURATION OF COUNCILS.—The term of the Councils shall continue throughout the life of the operation of the Trans-Alaska Pipeline System and so long as oil is transported to or from Cook Inlet.

(B) THREE YEARS.—The voting members of each Council shall be appointed for a term of 3 years except as provided for in subparagraph (C).

(C) INITIAL APPOINTMENTS.—The terms of the first appointments shall be as follows:

(i) For the appointments by the Governor of the State of Alaska, one-third shall serve for 3 years, one-third shall serve for 2 years, and one-third shall serve for one year.

(ii) For the representatives of municipalities required by subsection (d)(2)(A)(vii), a drawing of lots among the appointees shall determine that one-third of that group serves for 3 years, one-third serves for 2 years, and the remainder serves for 1 year.

(4) SELF-GOVERNING.—Each Council shall elect its own chairperson, select its own staff, and make policies with regard to its internal operating procedures. After the initial organizational meeting called by the Secretary under subsection (i), each Council shall be self-governing.

(5) DUAL MEMBERSHIP AND CONFLICTS OF INTEREST PROHIBITED.—(A) No individual selected as a member of the Council shall serve on the Association.

(B) No individual selected as a voting member of the Council shall be engaged in any activity which might conflict with such individual carrying out his functions as a member thereof.

(6) DUTIES.—Each Council shall—

(A) provide advice and recommendations to the Association on policies, permits, and site-specific regulations relating to the operation and maintenance of terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of the terminal facilities;

(B) monitor through the committee established under subsection (e), the environmental impacts of the operation of the terminal facilities and crude oil tankers;

(C) monitor those aspects of terminal facilities' and crude oil tankers' operations and maintenance which affect or may affect the environment in the vicinity of the terminal facilities;

(D) review through the committee established under subsection (f), the adequacy of oil spill prevention and contingency plans for the terminal facilities and the adequacy of oil spill prevention and contingency plans for crude oil tankers, operating in Prince William Sound or in Cook Inlet;

(h) STATUS OF EMPLOYEES.—Employees of the Institute shall not, by reason of such employment, be considered to be employees of the Federal Government for any purpose.

(i) TERMINATION.—The Institute shall terminate 10 years after the date of the enactment of this Act.

(j) USE OF FUNDS.—All funds authorized for the Institute shall be provided through the National Oceanic and Atmospheric Administration. No funds made available to carry out this section may be used to initiate litigation. No funds made available to carry out this section may be used for the acquisition of real property (including buildings) or construction of any building. No more than 20 percent of funds made available to carry out this section may be used to lease necessary facilities and to administer the Institute. None of the funds authorized by this section shall be used for any purpose other than the functions specified in subsection (b).

Public information.

(k) RESEARCH.—The Institute shall publish and make available to any person upon request the results of all research, educational, and demonstration projects conducted by the Institute. The Administrator shall provide a copy of all research, educational, and demonstration projects conducted by the Institute to the National Oceanic and Atmospheric Administration.

(l) DEFINITIONS.—In this section, the term "Prince William Sound and its adjacent waters" means such sound and waters as generally depicted on the map entitled "EXXON VALDEZ oil spill dated March 1990".

Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990.
33 USC 2732.

SEC. 5002. TERMINAL AND TANKER OVERSIGHT AND MONITORING.

(a) SHORT TITLE AND FINDINGS.—

(1) SHORT TITLE.—This section may be cited as the "Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Act of 1990".

(2) FINDINGS.—The Congress finds that—

(A) the March 24, 1989, grounding and rupture of the fully loaded oil tanker, the EXXON VALDEZ, spilled 11 million gallons of crude oil in Prince William Sound, an environmentally sensitive area;

(B) many people believe that complacency on the part of the industry and government personnel responsible for monitoring the operation of the Valdez terminal and vessel traffic in Prince William Sound was one of the contributing factors to the EXXON VALDEZ oil spill;

(C) one way to combat this complacency is to involve local citizens in the process of preparing, adopting, and revising oil spill contingency plans;

(D) a mechanism should be established which fosters the long-term partnership of industry, government, and local communities in overseeing compliance with environmental concerns in the operation of crude oil terminals;

(E) such a mechanism presently exists at the Sullom Voe terminal in the Shetland Islands and this terminal should serve as a model for others;

(F) because of the effective partnership that has developed at Sullom Voe, Sullom Voe is considered the safest terminal in Europe;

(G) the present system of regulation and oversight of crude oil terminals in the United States has degenerated into a process of continual mistrust and confrontation;

(H) only when local citizens are involved in the process will the trust develop that is necessary to change the present system from confrontation to consensus;

(I) a pilot program patterned after Sullom Voe should be established in Alaska to further refine the concepts and relationships involved; and

(J) similar programs should eventually be established in other major crude oil terminals in the United States because the recent oil spills in Texas, Delaware, and Rhode Island indicate that the safe transportation of crude oil is a national problem.

(b) DEMONSTRATION PROGRAMS.—

(1) ESTABLISHMENT.—There are established 2 Oil Terminal and Oil Tanker Environmental Oversight and Monitoring Demonstration Programs (hereinafter referred to as "Programs") to be carried out in the State of Alaska.

(2) ADVISORY FUNCTION.—The function of these Programs shall be advisory only.

(3) PURPOSE.—The Prince William Sound Program shall be responsible for environmental monitoring of the terminal facilities in Prince William Sound and the crude oil tankers operating in Prince William Sound. The Cook Inlet Program shall be responsible for environmental monitoring of the terminal facilities and crude oil tankers operating in Cook Inlet located South of the latitude at Point Possession and North of the latitude at Amatuli Island, including offshore facilities in Cook Inlet.

(4) SUITS BARRED.—No program, association, council, committee or other organization created by this section may sue any person or entity, public or private, concerning any matter arising under this section except for the performance of contracts.

(c) OIL TERMINAL FACILITIES AND OIL TANKER OPERATIONS ASSOCIATION.—

(1) ESTABLISHMENT.—There is established an Oil Terminal Facilities and Oil Tanker Operations Association (hereinafter in this section referred to as the "Association") for each of the Programs established under subsection (b).

(2) MEMBERSHIP.—Each Association shall be comprised of 4 individuals as follows:

(A) One individual shall be designated by the owners and operators of the terminal facilities and shall represent those owners and operators.

(B) One individual shall be designated by the owners and operators of the crude oil tankers calling at the terminal facilities and shall represent those owners and operators.

(C) One individual shall be an employee of the State of Alaska, shall be designated by the Governor of the State of Alaska, and shall represent the State government.

(D) One individual shall be an employee of the Federal Government, shall be designated by the President, and shall represent the Federal Government.

(3) RESPONSIBILITIES.—Each Association shall be responsible for reviewing policies relating to the operation and maintenance of the oil terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of their respective terminals. Each Association shall provide a forum among the owners and operators of the terminal facilities, the owners and operators of crude oil tankers calling at those

TITLE V—PRINCE WILLIAM SOUND PROVISIONS

Alaska. Research and development.

33 USC 2731.

SEC. 5001. OIL SPILL RECOVERY INSTITUTE.

(a) ESTABLISHMENT OF INSTITUTE.—The Secretary of Commerce shall provide for the establishment of a Prince William Sound Oil Spill Recovery Institute (hereinafter in this section referred to as the "Institute") to be administered by the Secretary of Commerce through the Prince William Sound Science and Technology Institute and located in Cordova, Alaska.

(b) FUNCTIONS.—The Institute shall conduct research and carry out educational and demonstration projects designed to—

(1) identify and develop the best available techniques, equipment, and materials for dealing with oil spills in the arctic and subarctic marine environment; and

(2) complement Federal and State damage assessment efforts and determine, document, assess, and understand the long-range effects of the EXXON VALDEZ oil spill on the natural resources of Prince William Sound and its adjacent waters (as generally depicted on the map entitled "EXXON VALDEZ oil spill dated March 1990"), and the environment, the economy, and the lifestyle and well-being of the people who are dependent on them, except that the Institute shall not conduct studies or make recommendations on any matter which is not directly related to the EXXON VALDEZ oil spill or the effects thereof.

(c) ADVISORY BOARD.—

(1) IN GENERAL.—The policies of the Institute shall be determined by an advisory board, composed of 18 members appointed as follows:

(A) One representative appointed by each of the Commissioners of Fish and Game, Environmental Conservation, Natural Resources, and Commerce and Economic Development of the State of Alaska, all of whom shall be State employees.

(B) One representative appointed by each of—

(i) the Secretaries of Commerce, the Interior, Agriculture, Transportation, and the Navy; and

(ii) the Administrator of the Environmental Protection Agency;

all of whom shall be Federal employees.

(C) 4 representatives appointed by the Secretary of Commerce from among residents of communities in Alaska that were affected by the EXXON VALDEZ oil spill who are knowledgeable about fisheries, other local industries, the marine environment, wildlife, public health, safety, or education. At least 2 of the representatives shall be appointed from among residents of communities located in Prince William Sound. The Secretary shall appoint residents to serve terms of 2 years each, from a list of 8 qualified individuals to be submitted by the Governor of the State of Alaska based on recommendations made by the governing body of each affected community. Each affected community may submit the names of 2 qualified individuals for the Governor's consideration. No more than 5 of the 8 qualified persons recommended by the Governor shall be members of the same political party.

(D) 3 Alaska Natives who represent Native entities affected by the EXXON VALDEZ oil spill, at least one of whom represents an entity located in Prince William Sound, to serve terms of 2 years each from a list of 6 qualified individuals submitted by the Alaska Federation of Natives.

(E) One nonvoting representative of the Institute of Marine Science.

(F) One nonvoting representative appointed by the Prince William Sound Science and Technology Institute.

(2) CHAIRMAN.—The representative of the Secretary of Commerce shall serve as Chairman of the Advisory Board.

(3) POLICIES.—Policies determined by the Advisory Board under this subsection shall include policies for the conduct and support, through contracts and grants awarded on a nationally competitive basis, of research, projects, and studies to be supported by the Institute in accordance with the purposes of this section.

(d) SCIENTIFIC AND TECHNICAL COMMITTEE.— Establishment.

(1) IN GENERAL.—The Advisory Board shall establish a scientific and technical committee, composed of specialists in matters relating to oil spill containment and cleanup technology, arctic and subarctic marine ecology, and the living resources and socioeconomics of Prince William Sound and its adjacent waters, from the University of Alaska, the Institute of Marine Science, the Prince William Sound Science and Technology Institute, and elsewhere in the academic community.

(2) FUNCTIONS.—The Scientific and Technical Committee shall provide such advice to the Advisory Board as the Advisory Board shall request, including recommendations regarding the conduct and support of research, projects, and studies in accordance with the purposes of this section. The Advisory Board shall not request, and the Committee shall not provide, any advice which is not directly related to the EXXON VALDEZ oil spill or the effects thereof.

(e) DIRECTOR.—The Institute shall be administered by a Director appointed by the Secretary of Commerce. The Prince William Sound Science and Technology Institute, the Advisory Board, and the Scientific and Technical Committee may each submit independent recommendations for the Secretary's consideration for appointment as Director. The Director may hire such staff and incur such expenses on behalf of the Institute as are authorized by the Advisory Board.

(f) EVALUATION.—The Secretary of Commerce may conduct an ongoing evaluation of the activities of the Institute to ensure that funds received by the Institute are used in a manner consistent with this section.

(g) AUDIT.—The Comptroller General of the United States, and any of his or her duly authorized representatives, shall have access, for purposes of audit and examination, to any books, documents, papers, and records of the Institute and its administering agency that are pertinent to the funds received and expended by the Institute and its administering agency.

shall take into account the nature, circumstances, extent, and gravity of the violation, the degree of culpability, any history of prior violation, ability to pay, and such other matters as justice may require. The President may compromise, modify, or remit, with or without conditions, any civil penalty which is subject to imposition or which had been imposed under this paragraph. If any person fails to pay an assessed civil penalty after it has become final, the President may refer the matter to the Attorney General for collection.

(b) JUDICIAL.—In addition to, or in lieu of, assessing a penalty under subsection (a), the President may request the Attorney General to secure such relief as necessary to compel compliance with this section 1016, including a judicial order terminating operations. The district courts of the United States shall have jurisdiction to grant any relief as the public interest and the equities of the case may require.

26 USC 9509 note.

SEC. 4304. DEPOSIT OF CERTAIN PENALTIES INTO OIL SPILL LIABILITY TRUST FUND.

Penalties paid pursuant to section 311 of the Federal Water Pollution Control Act, section 309(c) of that Act, as a result of violations of section 311 of that Act, and the Deepwater Port Act of 1974, shall be deposited in the Oil Spill Liability Trust Fund created under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509).

SEC. 4305. INSPECTION AND ENTRY.

Section 311(m) of the Federal Water Pollution Control Act (33 U.S.C. 1321(m)) is amended to read as follows:

"(m) ADMINISTRATIVE PROVISIONS.—

"(1) FOR VESSELS.—Anyone authorized by the President to enforce the provisions of this section with respect to any vessel may, except as to public vessels—

"(A) board and inspect any vessel upon the navigable waters of the United States or the waters of the contiguous zone,

"(B) with or without a warrant, arrest any person who in the presence or view of the authorized person violates the provisions of this section or any regulation issued thereunder, and

"(C) execute any warrant or other process issued by an officer or court of competent jurisdiction.

"(2) FOR FACILITIES.—

Reports. Records.

"(A) RECORDKEEPING.—Whenever required to carry out the purposes of this section, the Administrator or the Secretary of the Department in which the Coast Guard is operating shall require the owner or operator of a facility to which this section applies to establish and maintain such records, make such reports, install, use, and maintain such monitoring equipment and methods, and provide such other information as the Administrator or Secretary, as the case may be, may require to carry out the objectives of this section.

"(B) ENTRY AND INSPECTION.—Whenever required to carry out the purposes of this section, the Administrator or the Secretary of the Department in which the Coast Guard is operating or an authorized representative of the Administrator or Secretary, upon presentation of appropriate credentials, may—

"(i) enter and inspect any facility to which this section applies, including any facility at which any records are required to be maintained under subparagraph (A); and

"(ii) at reasonable times, have access to and copy any records, take samples, and inspect any monitoring equipment or methods required under subparagraph (A).

"(C) ARRESTS AND EXECUTION OF WARRANTS.—Anyone authorized by the Administrator or the Secretary of the department in which the Coast Guard is operating to enforce the provisions of this section with respect to any facility may—

"(i) with or without a warrant, arrest any person who violates the provisions of this section or any regulation issued thereunder in the presence or view of the person so authorized; and

"(ii) execute any warrant or process issued by an officer or court of competent jurisdiction.

"(D) PUBLIC ACCESS.—Any records, reports, or information obtained under this paragraph shall be subject to the same public access and disclosure requirements which are applicable to records, reports, and information obtained pursuant to section 308.".

SEC. 4306. CIVIL ENFORCEMENT UNDER FEDERAL WATER POLLUTION CONTROL ACT.

Section 311(e) of the Federal Water Pollution Control Act (33 U.S.C. 1321) is amended to read as follows:

"(e) CIVIL ENFORCEMENT.—

State and local governments.

"(1) ORDERS PROTECTING PUBLIC HEALTH.—In addition to any action taken by a State or local government, when the President determines that there may be an imminent and substantial threat to the public health or welfare of the United States, including fish, shellfish, and wildlife, public and private property, shorelines, beaches, habitat, and other living and nonliving natural resources under the jurisdiction or control of the United States, because of an actual or threatened discharge of oil or a hazardous substance from a vessel or facility in violation of subsection (b), the President may—

"(A) require the Attorney General to secure any relief from any person, including the owner or operator of the vessel or facility, as may be necessary to abate such endangerment; or

"(B) after notice to the affected State, take any other action under this section, including issuing administrative orders, that may be necessary to protect the public health and welfare.

"(2) JURISDICTION OF DISTRICT COURTS.—The district courts of the United States shall have jurisdiction to grant any relief under this subsection that the public interest and the equities of the case may require."

(1) in subsection (b) by striking "shall be fined not more than $5,000, imprisoned for not more than one year, or both.", and inserting "commits a class A misdemeanor."; and

(2) in subsection (c)—

(A) by striking ", shall be" in the matter preceding paragraph (1);

(B) by inserting "is" before "liable" in paragraph (1); and

(C) by amending paragraph (2) to read as follows:

"(2) commits a class A misdemeanor.".

(b) INSPECTIONS.—Section 3318 of title 46, United States Code, is amended—

(1) in subsection (b) by striking "shall be fined not more than $10,000, imprisoned for not more than 5 years, or both." and inserting "commits a class D felony.";

(2) in subsection (c) by striking "shall be fined not more than $5,000, imprisoned for not more than 5 years, or both." and inserting "commits a class D felony.";

(3) in subsection (d) by striking "shall be fined not more than $5,000, imprisoned for not more than 5 years, or both." and inserting "commits a class D felony.";

(4) in subsection (e) by striking "shall be fined not more than $10,000, imprisoned for not more than 2 years, or both." and inserting "commits a class A misdemeanor."; and

(5) in the matter preceding paragraph (1) of subsection (f) by striking "shall be fined not less than $1,000 but not more than $10,000, and imprisoned for not less than 2 years but not more than 5 years," and inserting "commits a class D felony.".

(c) CARRIAGE OF LIQUID BULK DANGEROUS CARGOES.—Section 3718 of title 46, United States Code, is amended—

(1) in subsection (b) by striking "shall be fined not more than $50,000, imprisoned for not more than 5 years, or both." and inserting "commits a class D felony."; and

(2) in subsection (c) by striking "shall be fined not more than $100,000, imprisoned for not more than 10 years, or both." and inserting "commits a class C felony.".

(d) LOAD LINES.—Section 5116 of title 46, United States Code, is amended—

(1) in subsection (d) by striking "shall be fined not more than $10,000, imprisoned for not more than one year, or both." and inserting "commits a class A misdemeanor."; and

(2) in subsection (e) by striking "shall be fined not more than $10,000, imprisoned for not more than 2 years, or both." and inserting "commits a class A misdemeanor.".

(e) COMPLEMENT OF INSPECTED VESSELS.—Section 8101 of title 46, United States Code, is amended—

(1) in subsection (e) by striking "$50" and inserting "$1,000";

(2) in subsection (f) by striking "$100, or, for a deficiency of a licensed individual, a penalty of $500." and inserting "$10,000."; and

(3) in subsection (g) by striking "$500." and inserting "$10,000.".

(f) WATCHES.—Section 8104 of title 46, United States Code, is amended—

(1) in subsection (i) by striking "$100." and inserting "$10,000."; and

(2) in subsection (j) by striking "$500." and inserting "$10,000.".

(g) COASTWISE PILOTAGE.—Section 8502 of title 46, United States Code, is amended—

(1) in subsection (e) by striking "$500." and inserting "$10,000."; and

(2) in subsection (f) by striking "$500." and inserting "$10,000.".

(h) FOREIGN COMMERCE PILOTAGE.—Section 8503(e) of title 46, United States Code, is amended by striking "shall be fined not more than $50,000, imprisoned for not more than five years, or both." and inserting "commits a class D felony.".

(i) CREW REQUIREMENTS.—Section 8702(e) of title 46, United States Code, is amended by striking "$500." and inserting "$10,000.".

(j) PORTS AND WATERWAYS SAFETY ACT.—Section 13(b) of the Port and Waterways Safety Act (33 U.S.C. 1232(b)) is amended—

(1) in paragraph (1) by striking "shall be fined not more than $50,000 for each violation or imprisoned for not more than five years, or both." and inserting "commits a class D felony."; and

(2) in paragraph (2) by striking "shall, in lieu of the penalties prescribed in paragraph (1), be fined not more than $100,000, or imprisoned for not more than 10 years, or both." and inserting "commits a class C felony.".

(k) VESSEL NAVIGATION.—Section 4 of the Act of April 28, 1908 (33 U.S.C. 1236) is amended—

(1) in subsection (b) by striking "$500." and inserting "$5,000.";

(2) in subsection (c) by striking "$500," and inserting "$5,000,"; and

(3) in subsection (d) by striking "$250." and inserting "$2,500.".

(l) INTERVENTION ON THE HIGH SEAS ACT.—Section 12(a) of the Intervention of the High Seas Act (33 U.S.C. 1481(a)) is amended—

(1) in the matter preceding paragraph (1) by striking "Any person who" and inserting "A person commits a class A misdemeanor if that person"; and

(2) in paragraph (3) by striking ", shall be fined not more than $10,000 or imprisoned not more than one year, or both".

(m) DEEPWATER PORT ACT OF 1974.—Section 15(a) of the Deepwater Port Act of 1974 (33 U.S.C. 1514(a)) is amended by striking "shall on conviction be fined not more than $25,000 for each day of violation or imprisoned for not more than 1 year, or both." and inserting "commits a class A misdemeanor for each day of violation.".

(n) ACT TO PREVENT POLLUTION FROM SHIPS.—Section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. 1908(a)) is amended by striking "shall, for each violation, be fined not more than $50,000 or be imprisoned for not more than 5 years, or both." and inserting "commits a class D felony.".

SEC. 4303. FINANCIAL RESPONSIBILITY CIVIL PENALTIES.

President of U.S.
33 USC 2716a

(a) ADMINISTRATIVE.—Any person who, after notice and an opportunity for a hearing, is found to have failed to comply with the requirements of section 1016 or the regulations issued under that section, or with a denial or detention order issued under subsection (c)(2) of that section, shall be liable to the United States for a civil penalty, not to exceed $25,000 per day of violation. The amount of the civil penalty shall be assessed by the President by written notice. In determining the amount of the penalty, the President

penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

"(H) COLLECTION.—If any person fails to pay an assessment of a civil penalty—

"(i) after the assessment has become final, or

"(ii) after a court in an action brought under subparagraph (G) has entered a final judgment in favor of the Administrator or Secretary, as the case may be,

the Administrator or Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this subparagraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

"(I) SUBPOENAS.—The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this paragraph. In case of contumacy or refusal to obey a subpoena issued pursuant to this subparagraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Hazardous materials.

"(7) CIVIL PENALTY ACTION.—

"(A) DISCHARGE, GENERALLY.—Any person who is the owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of paragraph (3), shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil or unit of reportable quantity of hazardous substances discharged.

"(B) FAILURE TO REMOVE OR COMPLY.—Any person described in subparagraph (A) who, without sufficient cause—

"(i) fails to properly carry out removal of the discharge under an order of the President pursuant to subsection (c); or

"(ii) fails to comply with an order pursuant to subsection (e)(1)(B);

shall be subject to a civil penalty in an amount up to $25,000 per day of violation or an amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund as a result of such failure.

"(C) FAILURE TO COMPLY WITH REGULATION.—Any person who fails or refuses to comply with any regulation issued under subsection (j) shall be subject to a civil penalty in an amount up to $25,000 per day of violation.

"(D) GROSS NEGLIGENCE.—In any case in which a violation of paragraph (3) was the result of gross negligence or willful misconduct of a person described in subparagraph (A), the person shall be subject to a civil penalty of not less than $100,000, and not more than $3,000 per barrel of oil or unit of reportable quantity of hazardous substance discharged.

"(E) JURISDICTION.—An action to impose a civil penalty under this paragraph may be brought in the district court of the United States for the district in which the defendant is located, resides, or is doing business, and such court shall have jurisdiction to assess such penalty.

Courts, U.S.

"(F) LIMITATION.—A person is not liable for a civil penalty under this paragraph for a discharge if the person has been assessed a civil penalty under paragraph (6) for the discharge.

"(8) DETERMINATION OF AMOUNT.—In determining the amount of a civil penalty under paragraphs (6) and (7), the Administrator, Secretary, or the court, as the case may be, shall consider the seriousness of the violation or violations, 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.

"(9) MITIGATION OF DAMAGE.—In addition to establishing a penalty for the discharge of oil or a hazardous substance, the Administrator or the Secretary of the department in which the Coast Guard is operating may act to mitigate the damage to the public health or welfare caused by such discharge. The cost of such mitigation shall be deemed a cost incurred under subsection (c) of this section for the removal of such substance by the United States Government.

Hazardous materials.

"(10) RECOVERY OF REMOVAL COSTS.—Any costs of removal incurred in connection with a discharge excluded by subsection (a)(2)(C) of this section shall be recoverable from the owner or operator of the source of the discharge in an action brought under section 309(b) of this Act.

"(11) LIMITATION.—Civil penalties shall not be assessed under both this section and section 309 for the same discharge.".

(c) CRIMINAL PENALTIES.—Section 309(c) of the Federal Water Pollution Control Act (33 U.S.C. 1319(c)) is amended by inserting after "308," each place it appears the following: "311(b)(3),".

SEC. 4302. OTHER PENALTIES.

(a) NEGLIGENT OPERATIONS.—Section 2302 of title 46, United States Code, is amended—

may be assessed a class I or class II civil penalty by the Secretary of the department in which the Coast Guard is operating or the Administrator.

"(B) CLASSES OF PENALTIES.—

"(i) CLASS I.—The amount of a class I civil penalty under subparagraph (A) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before assessing a civil penalty under this clause, the Administrator or Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to assess the penalty and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed penalty. Such hearing shall not be subject to section 554 or 556 of title 5, United States Code, but shall provide a reasonable opportunity to be heard and to present evidence.

"(ii) CLASS II.—The amount of a class II civil penalty under subparagraph (A) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code. The Administrator and Secretary may issue rules for discovery procedures for hearings under this paragraph.

"(C) RIGHTS OF INTERESTED PERSONS.—

"(i) PUBLIC NOTICE.—Before issuing an order assessing a class II civil penalty under this paragraph the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

"(ii) PRESENTATION OF EVIDENCE.—Any person who comments on a proposed assessment of a class II civil penalty under this paragraph shall be given notice of any hearing held under this paragraph and of the order assessing such penalty. In any hearing held under this paragraph, such person shall have a reasonable opportunity to be heard and to present evidence.

Federal Register, publication.

"(iii) RIGHTS OF INTERESTED PERSONS TO A HEARING.—If no hearing is held under subparagraph (B) before issuance of an order assessing a class II civil penalty under this paragraph, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with subparagraph (B)(ii). If the Administrator or Secretary denies a hearing under this clause, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

"(D) FINALITY OF ORDER.—An order assessing a class II civil penalty under this paragraph shall become final 30 days after its issuance unless a petition for judicial review is filed under subparagraph (G) or a hearing is requested under subparagraph (C)(iii). If such a hearing is denied, such order shall become final 30 days after such denial.

"(E) EFFECT OF ORDER.—Action taken by the Administrator or Secretary, as the case may be, under this paragraph shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act; except that any violation—

"(i) with respect to which the Administrator or Secretary has commenced and is diligently prosecuting an action to assess a class II civil penalty under this paragraph, or

"(ii) for which the Administrator or Secretary has issued a final order assessing a class II civil penalty not subject to further judicial review and the violator has paid a penalty assessed under this paragraph,

shall not be the subject of a civil penalty action under section 309(d), 309(g), or 505 of this Act or under paragraph (7).

"(F) EFFECT OF ACTION ON COMPLIANCE.—No action by the Administrator or Secretary under this paragraph shall affect any person's obligation to comply with any section of this Act.

"(G) JUDICIAL REVIEW.—Any person against whom a civil penalty is assessed under this paragraph or who commented on the proposed assessment of such penalty in accordance with subparagraph (C) may obtain review of such assessment—

"(i) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

District of Columbia.

"(ii) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or Secretary, as the case may be, and the Attorney General. The Administrator or Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil

(B) Not later than 18 months after the date of the enactment of this Act, each Area Committee established under that section shall submit to the President the Area Contingency Plan required under that section.

(C) Not later than 24 months after the date of the enactment of this Act, the President shall—

(i) promptly review each plan;

(ii) require amendments to any plan that does not meet the requirements of section 311(j)(4) of the Federal Water Pollution Control Act; and

(iii) approve each plan that meets the requirements of that section.

Establishment.

(2) NATIONAL RESPONSE UNIT.—Not later than one year after the date of the enactment of this Act, the Secretary of the department in which the Coast Guard is operating shall establish a National Response Unit in accordance with section 311(j)(2) of the Federal Water Pollution Control Act, as amended by this Act.

Establishment.

(3) COAST GUARD DISTRICT RESPONSE GROUPS.—Not later than 1 year after the date of the enactment of this Act, the Secretary of the department in which the Coast Guard is operating shall establish Coast Guard District Response Groups in accordance with section 311(j)(3) of the Federal Water Pollution Control Act, as amended by this Act.

President of U.S. Regulations.

(4) TANK VESSEL AND FACILITY RESPONSE PLANS; TRANSITION PROVISION; EFFECTIVE DATE OF PROHIBITION.—(A) Not later than 24 months after the date of the enactment of this Act, the President shall issue regulations for tank vessel and facility response plans under section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act.

(B) During the period beginning 30 months after the date of the enactment of this paragraph and ending 36 months after that date of enactment, a tank vessel or facility for which a response plan is required to be prepared under section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act, may not handle, store, or transport oil unless the owner or operator thereof has submitted such a plan to the President.

(C) Subparagraph (E) of section 311(j)(5) of the Federal Water Pollution Control Act, as amended by this Act, shall take effect 36 months after the date of the enactment of this Act.

(c) STATE LAW NOT PREEMPTED.— Section 311(o)(2) of the Federal Water Pollution Control Act (33 U.S.C. 1321(o)(2)) is amended by inserting before the period the following: ", or with respect to any removal activities related to such discharge".

14 USC 92 note.

SEC. 4203. COAST GUARD VESSEL DESIGN.

The Secretary shall ensure that vessels designed and constructed to replace Coast Guard buoy tenders are equipped with oil skimming systems that are readily available and operable, and that complement the primary mission of servicing aids to navigation.

SEC. 4204. DETERMINATION OF HARMFUL QUANTITIES OF OIL AND HAZARDOUS SUBSTANCES.

Section 311(b)(4) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)(4)) is amended by inserting "or the environment" after "the public health or welfare".

SEC. 4205. COASTWISE OIL SPILL RESPONSE COOPERATIVES.

Section 12106 of title 46, United States Code, is amended by adding at the end the following:

"(d)(1) A vessel may be issued a certificate of documentation with a coastwise endorsement if—

"(A) the vessel is owned by a not-for-profit oil spill response cooperative or by members of such a cooperative who dedicate the vessel to use by the cooperative;

"(B) the vessel is at least 50 percent owned by persons or entities described in section 12102(a) of this title;

"(C) the vessel otherwise qualifies under section 12106 to be employed in the coastwise trade; and

"(D) use of the vessel is restricted to—

"(i) the deployment of equipment, supplies, and personnel to recover, contain, or transport oil discharged into the navigable waters of the United States, or within the Exclusive Economic Zone, or

"(ii) for training exercises to prepare to respond to such a discharge.

"(2) For purposes of the first proviso of section 27 of the Merchant Marine Act, 1920, section 2 of the Shipping Act of 1916, and section 12102(a) of this title, a vessel meeting the criteria of this subsection shall be considered to be owned exclusively by citizens of the United States.".

Subtitle C—Penalties and Miscellaneous

SEC. 4301. FEDERAL WATER POLLUTION CONTROL ACT PENALTIES.

(a) NOTICE TO STATE AND FAILURE TO REPORT.—Section 311(b)(5) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)(5)) is amended—

(1) by inserting after the first sentence the following: "The Federal agency shall immediately notify the appropriate State agency of any State which is, or may reasonably be expected to be, affected by the discharge of oil or a hazardous substance.";

(2) by striking "fined not more than $10,000, or imprisoned for not more than one year, or both" and inserting "fined in accordance with title 18, United States Code, or imprisoned for not more than 5 years, or both"; and

(3) in the last sentence by—

(A) striking "or information obtained by the exploitation of such notification"; and

(B) inserting "natural" before "person".

(b) PENALTIES FOR DISCHARGES AND VIOLATIONS OF REGULATIONS.—Section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)) is amended by striking paragraph (6) and inserting the following new paragraphs:

"(6) ADMINISTRATIVE PENALTIES.—

"(A) VIOLATIONS.—Any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility—

"(i) from which oil or a hazardous substance is discharged in violation of paragraph (3), or

"(ii) who fails or refuses to comply with any regulation issued under subsection (j) to which that owner, operator, or person in charge is subject,

operator of a tank vessel or facility described in subparagraph (B) to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.

"(B) The tank vessels and facilities referred to in subparagraph (A) are the following:

"(i) A tank vessel, as defined under section 2101 of title 46, United States Code.

"(ii) An offshore facility.

"(iii) An onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone.

"(C) A response plan required under this paragraph shall—

"(i) be consistent with the requirements of the National Contingency Plan and Area Contingency Plans;

"(ii) identify the qualified individual having full authority to implement removal actions, and require immediate communications between that individual and the appropriate Federal official and the persons providing personnel and equipment pursuant to clause (iii);

"(iii) identify, and ensure by contract or other means approved by the President the availability of, private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion), and to mitigate or prevent a substantial threat of such a discharge;

"(iv) describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the vessel or at the facility, to be carried out under the plan to ensure the safety of the vessel or facility and to mitigate or prevent the discharge, or the substantial threat of a discharge;

"(v) be updated periodically; and

"(vi) be resubmitted for approval of each significant change.

President of U.S.

"(D) With respect to any response plan submitted under this paragraph for an onshore facility that, because of its location, could reasonably be expected to cause significant and substantial harm to the environment by discharging into or on the navigable waters or adjoining shorelines or the exclusive economic zone, and with respect to each response plan submitted under this paragraph for a tank vessel or offshore facility, the President shall—

"(i) promptly review such response plan;

"(ii) require amendments to any plan that does not meet the requirements of this paragraph;

"(iii) approve any plan that meets the requirements of this paragraph; and

"(iv) review each plan periodically thereafter.

"(E) A tank vessel, offshore facility, or onshore facility required to prepare a response plan under this subsection may not handle, store, or transport oil unless—

"(i) in the case of a tank vessel, offshore facility, or onshore facility for which a response plan is reviewed by the President under subparagraph (D), the plan has been approved by the President; and

"(ii) the vessel or facility is operating in compliance with the plan.

"(F) Notwithstanding subparagraph (E), the President may authorize a tank vessel, offshore facility, or onshore facility to operate without a response plan approved under this paragraph, until not later than 2 years after the date of the submission to the President of a plan for the tank vessel or facility, if the owner or operator certifies that the 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.

"(G) The owner or operator of a tank vessel, offshore facility, or onshore facility may not claim as a defense to liability under title I of the Oil Pollution Act of 1990 that the owner or operator was acting in accordance with an approved response plan.

"(H) The Secretary shall maintain, in the Vessel Identification System established under chapter 125 of title 46, United States Code, the dates of approval and review of a response plan under this paragraph for each tank vessel that is a vessel of the United States.

"(6) EQUIPMENT REQUIREMENTS AND INSPECTION.—Not later than 2 years after the date of enactment of this section, the President shall require— President of U.S.

"(A) periodic inspection of containment booms, skimmers, vessels, and other major equipment used to remove discharges; and

"(B) vessels operating on navigable waters and carrying oil or a hazardous substance in bulk as cargo to carry appropriate removal equipment that employs the best technology economically feasible and that is compatible with the safe operation of the vessel.

"(7) AREA DRILLS.—The President shall periodically conduct drills of removal capability, without prior notice, in areas for which Area Contingency Plans are required under this subsection and under relevant tank vessel and facility response plans. The drills may include participation by Federal, State, and local agencies, the owners and operators of vessels and facilities in the area, and private industry. The President may publish annual reports on these drills, including assessments of the effectiveness of the plans and a list of amendments made to improve plans. President of U.S.

"(8) UNITED STATES GOVERNMENT NOT LIABLE.—The United States Government is not liable for any damages arising from its actions or omissions relating to any response plan required by this section.".

(b) IMPLEMENTATION.—

(1) AREA COMMITTEES AND CONTINGENCY PLANS.—(A) Not later than 6 months after the date of the enactment of this Act, the President shall designate the areas for which Area Committees are established under section 311(j)(4) of the Federal Water Pollution Control Act, as amended by this Act. In designating such areas, the President shall ensure that all navigable waters, adjoining shorelines, and waters of the exclusive economic zone are subject to an Area Contingency Plan under that section. 33 USC 1321 note. President of U.S.

(3) by moving paragraph (1) two ems to the right, so the left margin of that paragraph is aligned with the left margin of paragraph (2) of that subsection (as added by paragraph (6) of this subsection);

(4) in paragraph (1) by striking "(1)" and inserting the following:

"(1) IN GENERAL.—";

(5) by striking paragraph (2); and

(6) by adding at the end the following:

Uniformed services. North Carolina.

"(2) NATIONAL RESPONSE UNIT.—The Secretary of the department in which the Coast Guard is operating shall establish a National Response Unit at Elizabeth City, North Carolina. The Secretary, acting through the National Response Unit—

Public information.

"(A) shall compile and maintain a comprehensive computer list of spill removal resources, personnel, and equipment that is available worldwide and within the areas designated by the President pursuant to paragraph (4), which shall be available to Federal and State agencies and the public;

"(B) shall provide technical assistance, equipment, and other resources requested by a Federal On-Scene Coordinator;

"(C) shall coordinate use of private and public personnel and equipment to remove a worst case discharge, and to mitigate or prevent a substantial threat of such a discharge, from a vessel, offshore facility, or onshore facility operating in or near an area designated by the President pursuant to paragraph (4);

"(D) may provide technical assistance in the preparation of Area Contingency Plans required under paragraph (4);

"(E) shall administer Coast Guard strike teams established under the National Contingency Plan;

Records.

"(F) shall maintain on file all Area Contingency Plans approved by the President under this subsection; and

"(G) shall review each of those plans that affects its responsibilities under this subsection.

"(3) COAST GUARD DISTRICT RESPONSE GROUPS.—(A) The Secretary of the department in which the Coast Guard is operating shall establish in each Coast Guard district a Coast Guard District Response Group.

"(B) Each Coast Guard District Response Group shall consist of—

"(i) the Coast Guard personnel and equipment, including firefighting equipment, of each port within the district;

"(ii) additional prepositioned equipment; and

"(iii) a district response advisory staff.

"(C) Coast Guard district response groups—

"(i) shall provide technical assistance, equipment, and other resources when required by a Federal On-Scene Coordinator;

"(ii) shall maintain all Coast Guard response equipment within its district;

"(iii) may provide technical assistance in the preparation of Area Contingency Plans required under paragraph (4); and

"(iv) shall review each of those plans that affect its area of geographic responsibility.

Establishment.

"(4) AREA COMMITTEES AND AREA CONTINGENCY PLANS.—(A) There is established for each area designated by the President an Area Committee comprised of members appointed by the President from qualified personnel of Federal, State, and local agencies.

"(B) Each Area Committee, under the direction of the Federal On-Scene Coordinator for its area, shall—

"(i) prepare for its area the Area Contingency Plan required under subparagraph (C);

"(ii) work with State and local officials to enhance the contingency planning of those officials and to assure preplanning of joint response efforts, including appropriate procedures for mechanical recovery, dispersal, shoreline cleanup, protection of sensitive environmental areas, and protection, rescue, and rehabilitation of fisheries and wildlife; and

"(iii) work with State and local officials to expedite decisions for the use of dispersants and other mitigating substances and devices.

"(C) Each Area Committee shall prepare and submit to the President for approval an Area Contingency Plan for its area. The Area Contingency Plan shall—

"(i) when implemented in conjunction with the National Contingency Plan, be adequate to remove a worst case discharge, and to mitigate or prevent a substantial threat of such a discharge, from a vessel, offshore facility, or onshore facility operating in or near the area;

"(ii) describe the area covered by the plan, including the areas of special economic or environmental importance that might be damaged by a discharge;

"(iii) describe in detail the responsibilities of an owner or operator and of Federal, State, and local agencies in removing a discharge, and in mitigating or preventing a substantial threat of a discharge;

"(iv) list the equipment (including firefighting equipment), dispersants or other mitigating substances and devices, and personnel available to an owner or operator and Federal, State, and local agencies, to ensure an effective and immediate removal of a discharge, and to ensure mitigation or prevention of a substantial threat of a discharge;

"(v) describe the procedures to be followed for obtaining an expedited decision regarding the use of dispersants;

"(vi) describe in detail how the plan is integrated into other Area Contingency Plans and vessel, offshore facility, and onshore facility response plans approved under this subsection, and into operating procedures of the National Response Unit;

"(vii) include any other information the President requires; and

"(viii) be updated periodically by the Area Committee.

"(D) The President shall—

"(i) review and approve Area Contingency Plans under this paragraph; and

"(ii) periodically review Area Contingency Plans so approved.

Regulations.

"(5) TANK VESSEL AND FACILITY RESPONSE PLANS.—(A) The President shall issue regulations which require an owner or

"(i) dispersants, other chemicals, and other spill mitigating devices and substances, if any, that may be used in carrying out the Plan,

"(ii) the waters in which such dispersants, other chemicals, and other spill mitigating devices and substances may be used, and

"(iii) the quantities of such dispersant, other chemicals, or other spill mitigating device or substance which can be used safely in such waters,

which schedule shall provide in the case of any dispersant, chemical, spill mitigating device or substance, or waters not specifically identified in such schedule that the President, or his delegate, may, on a case-by-case basis, identify the dispersants, other chemicals, and other spill mitigating devices and substances which may be used, the waters in which they may be used, and the quantities which can be used safely in such waters.

"(H) A system whereby the State or States affected by a discharge of oil or hazardous substance may act where necessary to remove such discharge and such State or States may be reimbursed in accordance with the Oil Pollution Act of 1990, in the case of any discharge of oil from a vessel or facility, for the reasonable costs incurred for that removal, from the Oil Spill Liability Trust Fund.

"(I) Establishment of criteria and procedures to ensure immediate and effective Federal identification of, and response to, a discharge, or the threat of a discharge, that results in a substantial threat to the public health or welfare of the United States, as required under subsection (c)(2).

"(J) 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.

"(K) Designation of the Federal official who shall be the Federal On-Scene Coordinator for each area for which an Area Contingency Plan is required to be prepared under subsection (j).

"(L) Establishment of procedures for the coordination of activities of—

"(i) Coast Guard strike teams established under subparagraph (C);

"(ii) Federal On-Scene Coordinators designated under subparagraph (K);

"(iii) District Response Groups established under subsection (j); and

"(iv) Area Committees established under subsection (j).

Fish and fishing.
Wildlife.

"(M) A fish and wildlife response plan, developed in consultation with the United States Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and other interested parties (including State fish and wildlife conservation officials), for the immediate and effective protection, rescue, and rehabilitation of, and the minimization of risk of damage to, fish and wildlife resources and their habitat that are harmed or that may be jeopardized by a discharge.

"(3) REVISIONS AND AMENDMENTS.—The President may, from time to time, as the President deems advisable, revise or otherwise amend the National Contingency Plan.

"(4) ACTIONS IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.—After publication of the National Contingency Plan, the removal of oil and hazardous substances and actions to minimize damage from oil and hazardous substance discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan.".

(b) DEFINITIONS.— Section 311(a) of the Federal Water Pollution Control Act (33 U.S.C. 1321(a)) is amended—

(1) in paragraph (8), by inserting "containment and" after "refers to"; and

(2) in paragraph (16) by striking the period at the end and inserting a semicolon;

(3) in paragraph (17)—

(A) by striking "Otherwise" and inserting "otherwise"; and

(B) by striking the period at the end and inserting a semicolon; and

(4) by adding at the end the following:

"(18) 'Area Committee' means an Area Committee established under subsection (j);

"(19) 'Area Contingency Plan' means an Area Contingency Plan prepared under subsection (j);

"(20) 'Coast Guard District Response Group' means a Coast Guard District Response Group established under subsection (j);

"(21) 'Federal On-Scene Coordinator' means a Federal On-Scene Coordinator designated in the National Contingency Plan;

"(22) 'National Contingency Plan' means the National Contingency Plan prepared and published under subsection (d);

"(23) 'National Response Unit' means the National Response Unit established under subsection (j); and

"(24) 'worst case discharge' means—

"(A) in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and

"(B) in the case of an offshore facility or onshore facility, the largest foreseeable discharge in adverse weather conditions.".

(c) REVISION OF NATIONAL CONTINGENCY PLAN.—Not later than one year after the date of the enactment of this Act, the President shall revise and republish the National Contingency Plan prepared under section 311(c)(2) of the Federal Water Pollution Control Act (as in effect immediately before the date of the enactment of this Act) to implement the amendments made by this section and section 4202.

33 USC 1321 note.

SEC. 4202. NATIONAL PLANNING AND RESPONSE SYSTEM.

(a) IN GENERAL.—Subsection (j) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(j)) is amended—

(1) by striking "(j)" and inserting the following:

"(j) NATIONAL RESPONSE SYSTEM.—";

(2) by moving paragraph (1) so as to begin immediately below the heading for subsection (j) (as added by paragraph (1) of this subsection);

"(iii) into or on the waters of the exclusive economic zone; or

"(iv) that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

"(B) In carrying out this paragraph, the President may—

"(i) remove or arrange for the removal of a discharge, and mitigate or prevent a substantial threat of a discharge, at any time;

"(ii) direct or monitor all Federal, State, and private actions to remove a discharge; and

"(iii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(2) DISCHARGE POSING SUBSTANTIAL THREAT TO PUBLIC HEALTH OR WELFARE.—(A) If a discharge, or a substantial threat of a discharge, of oil or a hazardous substance from a vessel, offshore facility, or onshore facility is of such a size or character as to be a substantial threat to the public health or welfare of the United States (including but not limited to fish, shellfish, wildlife, other natural resources, and the public and private beaches and shorelines of the United States), the President shall direct all Federal, State, and private actions to remove the discharge or to mitigate or prevent the threat of the discharge.

"(B) In carrying out this paragraph, the President may, without regard to any other provision of law governing contracting procedures or employment of personnel by the Federal Government—

"(i) remove or arrange for the removal of the discharge, or mitigate or prevent the substantial threat of the discharge; and

"(ii) remove and, if necessary, destroy a vessel discharging, or threatening to discharge, by whatever means are available.

"(3) ACTIONS IN ACCORDANCE WITH NATIONAL CONTINGENCY PLAN.—(A) Each Federal agency, State, owner or operator, or other person participating in efforts under this subsection shall act in accordance with the National Contingency Plan or as directed by the President.

"(B) An owner or operator participating in efforts under this subsection shall act in accordance with the National Contingency Plan and the applicable response plan required under subsection (j), or as directed by the President.

"(4) EXEMPTION FROM LIABILITY.—(A) A person is not liable for removal costs or damages which result from actions taken or omitted to be taken in the course of rendering care, assistance, or advice consistent with the National Contingency Plan or as otherwise directed by the President.

"(B) Subparagraph (A) does not apply—

"(i) to a responsible party;

"(ii) to a response under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

"(iii) with respect to personal injury or wrongful death; or

"(iv) if the person is grossly negligent or engages in willful misconduct.

"(C) A responsible party is liable for any removal costs and damages that another person is relieved of under subparagraph (A).

"(5) OBLIGATION AND LIABILITY OF OWNER OR OPERATOR NOT AFFECTED.—Nothing in this subsection affects—

"(A) the obligation of an owner or operator to respond immediately to a discharge, or the threat of a discharge, of oil; or

"(B) the liability of a responsible party under the Oil Pollution Act of 1990.

"(6) RESPONSIBLE PARTY DEFINED.—For purposes of this subsection, the term 'responsible party' has the meaning given that term under section 1001 of the Oil Pollution Act of 1990.".

(b) NATIONAL CONTINGENCY PLAN.—Subsection (d) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(d)) is amended to read as follows:

"(d) NATIONAL CONTINGENCY PLAN.—

"(1) PREPARATION BY PRESIDENT.—The President shall prepare and publish a National Contingency Plan for removal of oil and hazardous substances pursuant to this section.

"(2) CONTENTS.—The National Contingency Plan shall provide for efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances, and shall include, but not be limited to, the following:

"(A) Assignment of duties and responsibilities among Federal departments and agencies in coordination with State and local agencies and port authorities including, but not limited to, water pollution control and conservation and trusteeship of natural resources (including conservation of fish and wildlife).

"(B) Identification, procurement, maintenance, and storage of equipment and supplies.

"(C) Establishment or designation of Coast Guard strike teams, consisting of—

"(i) personnel who shall be trained, prepared, and available to provide necessary services to carry out the National Contingency Plan;

"(ii) adequate oil and hazardous substance pollution control equipment and material; and

"(iii) a detailed oil and hazardous substance pollution and prevention plan, including measures to protect fisheries and wildlife.

"(D) A system of surveillance and notice designed to safeguard against as well as ensure earliest possible notice of discharges of oil and hazardous substances and imminent threats of such discharges to the appropriate State and Federal agencies.

"(E) Establishment of a national center to provide coordination and direction for operations in carrying out the Plan.

"(F) Procedures and techniques to be employed in identifying, containing, dispersing, and removing oil and hazardous substances.

"(G) A schedule, prepared in cooperation with the States, identifying—

"(2) obligations guaranteed may not exceed 75 percent of the actual cost or depreciated actual cost to the applicant for the construction or reconstruction of the vessel; and

"(3) reconstruction cost obligations may not be guaranteed unless the vessel after reconstruction will have a useful life of at least 15 years.

"(c)(1) The Secretary shall by rule require that the applicant provide adequate security against default. The Secretary may, in addition to any fees assessed under section 1104A(e), establish a Vessel Replacement Guarantee Fund into which shall be paid by obligors under this section—

"(A) annual fees which may be an additional amount on the loan guarantee fee in section 1104A(e) not to exceed an additional 1 percent; or

"(B) fees based on the amount of the obligation versus the percentage of the obligor's fleet being replaced by vessels constructed or reconstructed under this section.

"(2) The Vessel Replacement Guarantee Fund shall be a subaccount in the Federal Ship Financing Fund, and shall—

"(A) be the depository for all moneys received by the Secretary under sections 1101 through 1107 of this title with respect to guarantee or commitments to guarantee made under this section;

"(B) not include investigation fees payable under section 1104A(f) which shall be paid to the Federal Ship Financing Fund; and

"(C) be the depository, whenever there shall be outstanding any notes or obligations issued by the Secretary under section 1105(d) with respect to the Vessel Replacement Guarantee Fund, for all moneys received by the Secretary under sections 1101 through 1107 from applicants under this section.

"(d) The program created by this section shall, in addition to the requirements of this section, be subject to the provisions of sections 1101 through 1103; 1104A(b) (1), (4), (5), (6); 1104A(e); 1104A(f); 1104A(h); and 1105 through 1107; except that the Federal Ship Financing Fund is not liable for any guarantees or commitments to guarantee issued under this section.".

SEC. 4116. PILOTAGE.

(a) PILOT REQUIRED.—Section 8502(g) of title 46, United States Code, is amended to read as follows:

Regulations. Alaska.

"(g)(1) The Secretary shall designate by regulation the areas of the approaches to and waters of Prince William Sound, Alaska, if any, on which a vessel subject to this section is not required to be under the direction and control of a pilot licensed under section 7101 of this title.

"(2) In any area of Prince William Sound, Alaska, where a vessel subject to this section is required to be under the direction and control of a pilot licensed under section 7101 of this title, the pilot may not be a member of the crew of that vessel and shall be a pilot licensed by the State of Alaska who is operating under a Federal license, when the vessel is navigating waters between 60°49' North latitude and the Port of Valdez, Alaska.".

(b) SECOND PERSON REQUIRED.—Section 8502 of title 46, United States Code, is amended by adding at the end the following:

"(h) The Secretary shall designate waters on which tankers over 1,600 gross tons subject to this section shall have on the bridge a master or mate licensed to direct and control the vessel under section 7101(c)(1) of this title who is separate and distinct from the pilot required under subsection (a) of this section.".

(c) ESCORTS FOR CERTAIN TANKERS.—Not later than 6 months after the date of the enactment of this Act, the Secretary shall initiate issuance of regulations under section 3703(a)(3) of title 46, United States Code, to define those areas, including Prince William Sound, Alaska, and Rosario Strait and Puget Sound, Washington (including those portions of the Strait of Juan de Fuca east of Port Angeles, Haro Strait, and the Strait of Georgia subject to United States jurisdiction), on which single hulled tankers over 5,000 gross tons transporting oil in bulk shall be escorted by at least two towing vessels (as defined under section 2101 of title 46, United States Code) or other vessels considered appropriate by the Secretary.

Regulations. Alaska. Washington. 46 USC 3703 note.

(d) TANKER DEFINED.—In this section the term "tanker" has the same meaning the term has in section 2101 of title 46, United States Code.

46 USC 3703 note.

SEC. 4117. MARITIME POLLUTION PREVENTION TRAINING PROGRAM STUDY.

46 USC app. 1295 note.

The Secretary shall conduct a study 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 training institutions, equipping the vessels for oil spill response, and training students in oil pollution response skills. The study shall be completed and transmitted to the Congress no later than one year after the date of the enactment of this Act.

SEC. 4118. VESSEL COMMUNICATION EQUIPMENT REGULATIONS.

33 USC 1203 note.

The Secretary shall, not later than one year after the date of the enactment of this Act, issue regulations necessary to ensure that vessels subject to the Vessel Bridge-to-Bridge Radiotelephone Act of 1971 (33 U.S.C. 1203) are also equipped as necessary to—

(1) receive radio marine navigation safety warnings; and

(2) engage in radio communications on designated frequencies with the Coast Guard, and such other vessels and stations as may be specified by the Secretary.

Subtitle B—Removal

SEC. 4201. FEDERAL REMOVAL AUTHORITY.

President of U.S. Hazardous materials.

(a) IN GENERAL.—Subsection (c) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321(c)) is amended to read as follows:

"(c) FEDERAL REMOVAL AUTHORITY.—

"(1) GENERAL REMOVAL REQUIREMENT.—(A) The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge, of oil or a hazardous substance—

"(i) into or on the navigable waters;

"(ii) on the adjoining shorelines to the navigable waters;

"(iii) after January 1, 1997, if the vessel is 26 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides;

"(iv) after January 1, 1998, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides;

"(v) after January 1, 1999, if the vessel is 24 years old or older and has a single hull, or 29 years old or older and has a double bottom or double sides; and

"(vi) after January 1, 2000, if the vessel is 23 years old or older and has a single hull, or is 28 years old or older and has a double bottom or double sides.

"(4) Except as provided in subsection (b) of this section—

"(A) a vessel that has a single hull may not operate after January 1, 2010; and

"(B) a vessel that has a double bottom or double sides may not operate after January 1, 2015.".

46 USC 3703a note.

(b) RULEMAKING.—The Secretary shall, within 12 months after the date of the enactment of this Act, complete a rulemaking proceeding and issue a final rule to require that tank vessels over 5,000 gross tons affected by section 3703a of title 46, United States Code, as added by this section, comply until January 1, 2015, with structural and operational requirements that the Secretary determines will provide as substantial protection to the environment as is economically and technologically feasible.

(c) CLERICAL AMENDMENT.—The analysis for chapter 37 of title 46, United States Code, is amended by inserting after the item relating to section 3703 the following:

"3703a. Tank vessel construction standards.".

(d) LIGHTERING REQUIREMENTS.—Section 3715(a) of title 46, United States Code, is amended—

(1) in paragraph (1), by striking "; and" and inserting a semicolon;

(2) in paragraph (2), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(3) the delivering and the receiving vessel had on board at the time of transfer, a certificate of financial responsibility as would have been required under section 1016 of the Oil Pollution Act of 1990, had the transfer taken place in a place subject to the jurisdiction of the United States;

"(4) the delivering and the receiving vessel had on board at the time of transfer, evidence that each vessel is operating in compliance with section 311(j) of the Federal Water Pollution Control Act (33 U.S.C. 1321(j)); and

"(5) the delivering and the receiving vessel are operating in compliance with section 3703a of this title.".

46 USC 3703a note. Reports.

(e) SECRETARIAL STUDIES.—

(1) OTHER REQUIREMENTS.—Not later than 6 months after the date of enactment of this Act, the Secretary shall determine, based on recommendations from the National Academy of Sciences or other qualified organizations, whether other structural and operational tank vessel requirements will provide protection to the marine environment equal to or greater than that provided by double hulls, and shall report to the Congress that determination and recommendations for legislative action.

(2) REVIEW AND ASSESSMENT.—The Secretary shall—

(A) periodically review recommendations from the National Academy of Sciences and other qualified organizations on methods for further increasing the environmental and operational safety of tank vessels;

(B) not later than 5 years after the date of enactment of this Act, assess the impact of this section on the safety of the marine environment and the economic viability and operational makeup of the maritime oil transportation industry; and

(C) report the results of the review and assessment to the Congress with recommendations for legislative or other action. Reports.

(f) VESSEL FINANCING.—Section 1104 of the Merchant Marine Act of 1936 (46 App. U.S.C. 1274) is amended—

(1) by striking "SEC. 1104." and inserting "SEC. 1104A."; and

(2) by inserting after section 1104A (as redesignated by paragraph (1)) the following:

"SEC. 1104B. (a) Notwithstanding the provisions of this title, except as provided in subsection (d) of this section, the Secretary, upon the terms the Secretary may prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in financing and refinancing, including reimbursement to an obligor for expenditures previously made, of a contract for construction or reconstruction of a vessel or vessels owned by citizens of the United States which are designed and to be employed for commercial use in the coastwise or intercoastal trade or in foreign trade as defined in section 905 of this Act if— 46 USC app. 1274a.

"(1) the construction or reconstruction by an applicant is made necessary to replace vessels the continued operation of which is denied by virtue of the imposition of a statutorily mandated change in standards for the operation of vessels, and where, as a matter of law, the applicant would otherwise be denied the right to continue operating vessels in the trades in which the applicant operated prior to the taking effect of the statutory or regulatory change;

"(2) the applicant is presently engaged in transporting cargoes in vessels of the type and class that will be constructed or reconstructed under this section, and agrees to employ vessels constructed or reconstructed under this section as replacements only for vessels made obsolete by changes in operating standards imposed by statute;

"(3) the capacity of the vessels to be constructed or reconstructed under this title will not increase the cargo carrying capacity of the vessels being replaced;

"(4) the Secretary has not made a determination that the market demand for the vessel over its useful life will diminish so as to make the granting of the guarantee fiduciarily imprudent; and

"(5) the Secretary has considered the provisions of section 1104A(d)(1)(A) (iii), (iv), and (v) of this title.

"(b) For the purposes of this section—

"(1) the maximum term for obligations guaranteed under this program may not exceed 25 years;

"(2) when operating on the waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone.

"(b) This section does not apply to—

"(1) a vessel used only to respond to a discharge of oil or a hazardous substance;

"(2) a vessel of less than 5,000 gross tons equipped with a double containment system determined by the Secretary to be as effective as a double hull for the prevention of a discharge of oil; or

"(3) before January 1, 2015—

"(A) a vessel unloading oil in bulk at a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.); or

"(B) a delivering vessel that is offloading in lightering activities—

"(i) within a lightering zone established under section 3715(b)(5) of this title; and

"(ii) more than 60 miles from the baseline from which the territorial sea of the United States is measured.

"(c)(1) In this subsection, the age of a vessel is determined from the later of the date on which the vessel—

"(A) is delivered after original construction;

"(B) is delivered after completion of a major conversion; or

"(C) had its appraised salvage value determined by the Coast Guard and is qualified for documentation under section 4136 of the Revised Statutes of the United States (46 App. U.S.C. 14).

"(2) A vessel of less than 5,000 gross tons for which a building contract or contract for major conversion was placed before June 30, 1990, and that is delivered under that contract before January 1, 1994, and a vessel of less than 5,000 gross tons that had its appraised salvage value determined by the Coast Guard before June 30, 1990, and that qualifies for documentation under section 4136 of the Revised Statutes of the United States (46 App. U.S.C. 14) before January 1, 1994, may not operate in the navigable waters or the Exclusive Economic Zone of the United States after January 1, 2015, unless the vessel is equipped with a double hull or with a double containment system determined by the Secretary to be as effective as a double hull for the prevention of a discharge of oil.

"(3) A vessel for which a building contract or contract for major conversion was placed before June 30, 1990, and that is delivered under that contract before January 1, 1994, and a vessel that had its appraised salvage value determined by the Coast Guard before June 30, 1990, and that qualifies for documentation under section 4136 of the Revised Statutes of the United States (46 App. U.S.C. 14) before January 1, 1994, may not operate in the navigable waters or Exclusive Economic Zone of the United States unless equipped with a double hull—

"(A) in the case of a vessel of at least 5,000 gross tons but less than 15,000 gross tons—

"(i) after January 1, 1995, if the vessel is 40 years old or older and has a single hull, or is 45 years old or older and has a double bottom or double sides;

"(ii) after January 1, 1996, if the vessel is 39 years old or older and has a single hull, or is 44 years old or older and has a double bottom or double sides;

"(iii) after January 1, 1997, if the vessel is 38 years old or older and has a single hull, or is 43 years old or older and has a double bottom or double sides;

"(iv) after January 1, 1998, if the vessel is 37 years old or older and has a single hull, or is 42 years old or older and has a double bottom or double sides;

"(v) after January 1, 1999, if the vessel is 36 years old or older and has a single hull, or is 41 years old or older and has a double bottom or double sides;

"(vi) after January 1, 2000, if the vessel is 35 years old or older and has a single hull, or is 40 years old or older and has a double bottom or double sides; and

"(vii) after January 1, 2005, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides;

"(B) in the case of a vessel of at least 15,000 gross tons but less than 30,000 gross tons—

"(i) after January 1, 1995, if the vessel is 40 years old or older and has a single hull, or is 45 years old or older and has a double bottom or double sides;

"(ii) after January 1, 1996, if the vessel is 38 years old or older and has a single hull, or is 43 years old or older and has a double bottom or double sides;

"(iii) after January 1, 1997, if the vessel is 36 years old or older and has a single hull, or is 41 years old or older and has a double bottom or double sides;

"(iv) after January 1, 1998, if the vessel is 34 years old or older and has a single hull, or is 39 years old or older and has a double bottom or double sides;

"(v) after January 1, 1999, if the vessel is 32 years old or older and has a single hull, or 37 years old or older and has a double bottom or double sides;

"(vi) after January 1, 2000, if the vessel is 30 years old or older and has a single hull, or is 35 years old or older and has a double bottom or double sides;

"(vii) after January 1, 2001, if the vessel is 29 years old or older and has a single hull, or is 34 years old or older and has a double bottom or double sides;

"(viii) after January 1, 2002, if the vessel is 28 years old or older and has a single hull, or is 33 years old or older and has a double bottom or double sides;

"(ix) after January 1, 2003, if the vessel is 27 years old or older and has a single hull, or is 32 years old or older and has a double bottom or double sides;

"(x) after January 1, 2004, if the vessel is 26 years old or older and has a single hull, or is 31 years old or older and has a double bottom or double sides; and

"(xi) after January 1, 2005, if the vessel is 25 years old or older and has a single hull, or is 30 years old or older and has a double bottom or double sides; and

"(C) in the case of a vessel of at least 30,000 gross tons—

"(i) after January 1, 1995, if the vessel is 28 years old or older and has a single hull, or 33 years old or older and has a double bottom or double sides;

"(ii) after January 1, 1996, if the vessel is 27 years old or older and has a single hull, or is 32 years old or older and has a double bottom or double sides;

(4) evaluate the adequacy of navigation equipment and systems on tankers (including sonar, electronic chart display, and satellite technology);

(5) evaluate and test electronic means of position-reporting and identification on tankers, consider the minimum standards suitable for equipment for that purpose, and determine whether to require that equipment on tankers;

(6) evaluate the adequacy of navigation procedures under different operating conditions, including such variables as speed, daylight, ice, tides, weather, and other conditions;

(7) evaluate whether areas of navigable waters and the exclusive economic zone should be designated as zones where the movement of tankers should be limited or prohibited;

(8) evaluate whether inspection standards are adequate;

(9) review and incorporate the results of past studies, including studies conducted by the Coast Guard and the Office of Technology Assessment;

(10) evaluate the use of computer simulator courses for training bridge officers and pilots of vessels transporting oil or hazardous substances on the navigable waters and waters of the exclusive economic zone, and determine the feasibility and practicality of mandating such training;

(11) evaluate the size, cargo capacity, and flag nation of tankers transporting oil or hazardous substances on the navigable waters and the waters of the exclusive economic zone—

(A) identifying changes occurring over the past 20 years in such size and cargo capacity and in vessel navigation and technology; and

(B) evaluating the extent to which the risks or difficulties associated with tanker navigation, vessel traffic control, accidents, oil spills, and the containment and cleanup of such spills are influenced by or related to an increase in tanker size and cargo capacity; and

(12) evaluate and test a program of remote alcohol testing for masters and pilots aboard tankers carrying significant quantities of oil.

(c) REPORT.—Not later than 2 years after the date of enactment of this Act, the Secretary shall transmit to the Congress a report on the results of the study conducted under subsection (a), including recommendations for implementing the results of that study.

SEC. 4112. DREDGE MODIFICATION STUDY.

(a) STUDY.—The Secretary of the Army shall conduct a study and demonstration to determine the feasibility of modifying dredges to make them usable in removing discharges of oil and hazardous substances.

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the Secretary of the Army shall submit to the Congress a report on the results of the study conducted under subsection (a) and recommendations for implementing the results of that study.

President of U.S.

SEC. 4113. USE OF LINERS.

(a) STUDY.—The President shall conduct a study to determine whether liners or other secondary means of containment should be used to prevent leaking or to aid in leak detection at onshore facilities used for the bulk storage of oil and located near navigable waters.

(b) REPORT.—Not later than 1 year after the date of enactment of this Act, the President shall submit to the Congress a report on the results of the study conducted under subsection (a) and recommendations to implement the results of the study.

(c) IMPLEMENTATION.—Not later than 6 months after the date the report required under subsection (b) is submitted to the Congress, the President shall implement the recommendations contained in the report.

SEC. 4114. TANK VESSEL MANNING.

46 USC 3703 note.

(a) RULEMAKING.—In order to protect life, property, and the environment, the Secretary shall initiate a rulemaking proceeding within 180 days after the date of the enactment of this Act to define the conditions under, and designate the waters upon, which tank vessels subject to section 3703 of title 46, United States Code, may operate in the navigable waters with the auto-pilot engaged or with an unattended engine room.

(b) WATCHES.—Section 8104 of title 46, United States Code, is amended by adding at the end the following new subsection:

"(n) On a tanker, a licensed individual or seaman may not be permitted to work more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, except in an emergency or a drill. In this subsection, 'work' includes any administrative duties associated with the vessel whether performed on board the vessel or onshore.".

(c) MANNING REQUIREMENT.—Section 8101(a) of title 46, United States Code, is amended—

(1) by striking "and" at the end of paragraph (1);

(2) by striking the period at the end of paragraph (2) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(3) a tank vessel shall consider the navigation, cargo handling, and maintenance functions of that vessel for protection of life, property, and the environment.".

(d) STANDARDS.—Section 9102(a) of title 46, United States Code, is amended—

(1) by striking "and" at the end of paragraph (6);

(2) by striking the period at the end of paragraph (7) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(8) instruction in vessel maintenance functions.".

(e) RECORDS.—Section 7502 of title 46, United States Code, is amended by striking "maintain records" and inserting "maintain computerized records".

SEC. 4115. ESTABLISHMENT OF DOUBLE HULL REQUIREMENT FOR TANK VESSELS.

(a) DOUBLE HULL REQUIREMENT.—Chapter 37 of title 46, United States Code, is amended by inserting after section 3703 the following new section:

"§ 3703a. Tank vessel construction standards

"(a) Except as otherwise provided in this section, a vessel to which this chapter applies shall be equipped with a double hull—

"(1) if it is constructed or adapted to carry, or carries, oil in bulk as cargo or cargo residue; and

(B) by adding at the end the following:

"(2) This part applies, to the extent consistent with generally recognized principles of international law, to a foreign vessel constructed or adapted to carry, or that carries, oil in bulk as cargo or cargo residue involved in a marine casualty described under subsection (a) (4) or (5) in waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone.".

(c) TECHNICAL AND CONFORMING AMENDMENTS.—Section 9(a) of the Ports and Waterways Safety Act (33 U.S.C. 1228(a)) is amended—

(1) in the matter preceding paragraph (1), by striking "section 4417a of the Revised Statutes, as amended," and inserting "chapter 37 of title 46, United States Code,";

(2) in paragraph (2), by striking "section 4417a of the Revised Statutes, as amended," and inserting "chapter 37 of title 46, United States Code,"; and

(3) in paragraph (5), by striking "section 4417a(11) of the Revised Statutes, as amended," and inserting "section 9101 of title 46, United States Code,".

SEC. 4107. VESSEL TRAFFIC SERVICE SYSTEMS.

(a) IN GENERAL.—Section 4(a) of the Ports and Waterways Safety Act (33 U.S.C. 1223(a)) is amended—

(1) by striking "Secretary may—" and inserting "Secreary—";

(2) in paragraph (1) by striking "establish, operate, and maintain" and inserting "may construct, operate, maintain, improve, or expand";

(3) in paragraph (2) by striking "require" and inserting "shall require appropriate";

(4) in paragraph (3) by inserting "may" before "require";

(5) in paragraph (4) by inserting "may" before "control"; and

(6) in paragraph (5) by inserting "may" before "require".

(b) DIRECTION OF VESSEL MOVEMENT.—

(1) STUDY.—The Secretary shall conduct a study—

(A) of whether the Secretary should be given additional authority to direct the movement of vessels on navigable waters and should exercise such authority; and

(B) to determine and prioritize the United States ports and channels that are in need of new, expanded, or improved vessel traffic service systems, by evaluating—

(i) the nature, volume, and frequency of vessel traffic;

(ii) the risks of collisions, spills, and damages associated with that traffic;

(iii) the impact of installation, expansion, or improvement of a vessel traffic service system; and

(iv) all other relevant costs and data.

(2) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall submit to the Congress a report on the results of the study conducted under paragraph (1) and recommendations for implementing the results of that study.

SEC. 4108. GREAT LAKES PILOTAGE.

(a) INDIVIDUALS WHO MAY SERVE AS PILOT ON UNDESIGNATED GREAT LAKE WATERS.—Section 9302(b) of title 46, United States Code, is amended to read as follows:

"(b) A member of the complement of a vessel of the United States operating on register or of a vessel of Canada may serve as the pilot required on waters not designated by the President if the member is licensed under section 7101 of this title, or under equivalent provisions of Canadian law, to direct the navigation of the vessel on the waters being navigated.".

(b) PENALTIES.—Section 9308 of title 46, United States Code, is amended in each of subsections (a), (b), and (c) by striking "$500" and inserting "no more than $10,000".

SEC. 4109. PERIODIC GAUGING OF PLATING THICKNESS OF COMMERCIAL VESSELS.

46 USC 3703 note.

Regulations.

Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations for vessels constructed or adapted to carry, or that carry, oil in bulk as cargo or cargo residue—

(1) establishing minimum standards for plating thickness; and

(2) requiring, consistent with generally recognized principles of international law, periodic gauging of the plating thickness of all such vessels over 30 years old operating on the navigable waters or the waters of the exclusive economic zone.

SEC. 4110. OVERFILL AND TANK LEVEL OR PRESSURE MONITORING DEVICES.

Regulations. 46 USC 3703 note.

(a) STANDARDS.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall establish, by regulation, minimum standards for devices for warning persons of overfills and tank levels of oil in cargo tanks and devices for monitoring the pressure of oil cargo tanks.

(b) USE.—Not later than 1 year after the date of the enactment of this Act, the Secretary shall issue regulations establishing, consistent with generally recognized principles of international law, requirements concerning the use of—

(1) overfill devices, and

(2) tank level or pressure monitoring devices,

which are referred to in subsection (a) and which meet the standards established by the Secretary under subsection (a), on vessels constructed or adapted to carry, or that carry, oil in bulk as cargo or cargo residue on the navigable waters and the waters of the exclusive economic zone.

SEC. 4111. STUDY ON TANKER NAVIGATION SAFETY STANDARDS.

46 USC 3703 note.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Secretary shall initiate a study to determine whether existing laws and regulations are adequate to ensure the safe navigation of vessels transporting oil or hazardous substances in bulk on the navigable waters and the waters of the exclusive economic zone.

(b) CONTENT.—In conducting the study required under subsection (a), the Secretary shall—

(1) determine appropriate crew sizes on tankers;

(2) evaluate the adequacy of qualifications and training of crewmembers on tankers;

(3) evaluate the ability of crewmembers on tankers to take emergency actions to prevent or remove a discharge of oil or a hazardous substance from their tankers;

mate, or operator licensed under section 7101(c) (1) or (3) of this title shall—

"(1) temporarily relieve the master or individual in charge;

"(2) temporarily take command of the vessel;

"(3) in the case of a vessel required to have a log under chapter 113 of this title, immediately enter the details of the incident in the log; and

"(4) report those details to the Secretary—

"(A) by the most expeditious means available; and

"(B) in written form transmitted within 12 hours after the vessel arrives at its next port.".

SEC. 4105. ACCESS TO NATIONAL DRIVER REGISTER.

(a) ACCESS TO REGISTER.—Section 206(b) of the National Driver Register Act of 1982 (23 U.S.C. 401 note) is amended—

(1) by redesignating the second paragraph (5) (as added to the end of that section by section 4(b)(1) of the Rail Safety Improvement Act of 1988) as paragraph (6); and

(2) by adding at the end the following:

"(7)(A) Any individual who holds or who has applied for a license or certificate of registry under section 7101 of title 46, United States Code, or a merchant mariner's document under section 7302 of title 46, United States Code, may request the chief driver licensing official of a State to transmit to the Secretary of the department in which the Coast Guard is operating in accordance with subsection (a) information regarding the motor vehicle driving record of the individual.

"(B) The Secretary—

"(i) may receive information transmitted by the chief driver licensing official of a State pursuant to a request under subparagraph (A);

"(ii) shall make the information available to the individual for review and written comment before denying, suspending, or revoking the license, certificate of registry, or merchant mariner's document of the individual based on that information and before using that information in any action taken under chapter 77 of title 46, United States Code; and

"(iii) may not otherwise divulge or use that information, except for the purposes of section 7101, 7302, or 7703 of title 46, United States Code.

"(C) Information regarding the motor vehicle driving record of an individual may not be transmitted to the Secretary under this paragraph if the information was entered in the Register more than 3 years before the date of the request for the information, unless the information relates to revocations or suspensions that are still in effect on the date of the request. Information submitted to the Register by States under the Act of July 14, 1960 (74 Stat. 526), or under this title shall be subject to access for the purpose of this paragraph during the transition to the Register described under section 203(c) of this title.".

(b) CONFORMING AMENDMENTS.—

(1) REVIEW OF INFORMATION RECEIVED FROM REGISTER.—Chapter 75 of title 46, United States Code, is amended by adding at the end the following:

"§ 7505. Review of information in National Driver Register

"The Secretary shall make information received from the National Driver Register under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note) available to an individual for review and written comment before denying, suspending, revoking, or taking any other action relating to a license, certificate of registry, or merchant mariner's document authorized to be issued for that individual under this part, based on that information.".

(2) PENALTY FOR NEGLIGENT OPERATION OF VESSEL.—Section 2302(c) of title 46, United States Code, is amended by striking "intoxicated" and inserting "under the influence of alcohol, or a dangerous drug in violation of a law of the United States".

(c) CLERICAL AMENDMENT.—The analysis for chapter 75 of title 46, United States Code, is amended by adding at the end the following:

"7505. Review of information in National Driver Register.".

SEC. 4106. MANNING STANDARDS FOR FOREIGN TANK VESSELS.

(a) STANDARDS FOR FOREIGN TANK VESSELS.—Section 9101(a) of title 46, United States Code, is amended to read as follows:

"(a)(1) The Secretary shall evaluate the manning, training, qualification, and watchkeeping standards of a foreign country that issues documentation for any vessel to which chapter 37 of this title applies—

"(A) on a periodic basis; and

"(B) when the vessel is involved in a marine casualty required to be reported under section 6101(a) (4) or (5) of this title.

"(2) After each evaluation made under paragraph (1) of this subsection, the Secretary shall determine whether—

"(A) the foreign country has standards for licensing and certification of seamen that are at least equivalent to United States law or international standards accepted by the United States; and

"(B) those standards are being enforced.

"(3) If the Secretary determines under this subsection that a country has failed to maintain or enforce standards at least equivalent to United States law or international standards accepted by the United States, the Secretary shall prohibit vessels issued documentation by that country from entering the United States until the Secretary determines those standards have been established and are being enforced.

"(4) The Secretary may allow provisional entry of a vessel prohibited from entering the United States under paragraph (3) of this subsection if—

"(A) the owner or operator of the vessel establishes, to the satisfaction of the Secretary, that the vessel is not unsafe or a threat to the marine environment; or

"(B) the entry is necessary for the safety of the vessel or individuals on the vessel.".

(b) REPORTING MARINE CASUALTIES.—

(1) REPORTING REQUIREMENT.—Section 6101(a) of title 46, United States Code, is amended by adding at the end the following:

"(5) significant harm to the environment.".

(2) APPLICATION TO FOREIGN VESSELS.—Section 6101(d) of title 46, United States Code, is amended—

(A) by inserting "(1)" before "This part"; and

46 USC 7106 note.

(d) TERMINATION OF EXISTING LICENSES, CERTIFICATES, AND DOCUMENTS.—A license, certificate of registry, or merchant mariner's document issued before the date of the enactment of this section terminates on the day it would have expired if—

(1) subsections (a), (b), and (c) were in effect on the date it was issued; and

(2) it was renewed at the end of each 5-year period under section 7106, 7107, or 7302 of title 46, United States Code.

(e) CRIMINAL RECORD REVIEW IN RENEWALS OF LICENSES AND CERTIFICATES OF REGISTRY.—

(1) IN GENERAL.—Section 7109 of title 46, United States Code, is amended to read as follows:

"§ 7109. Review of criminal records

"The Secretary may review the criminal record of each holder of a license or certificate of registry issued under this part who applies for renewal of that license or certificate of registry.".

(2) CLERICAL AMENDMENT.—The analysis for chapter 71 of title 46, United States Code, is amended by striking the item relating to section 7109 and inserting the following:

"7109. Review of criminal records."

SEC. 4103. SUSPENSION AND REVOCATION OF LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS FOR ALCOHOL AND DRUG ABUSE.

(a) AVAILABILITY OF INFORMATION IN NATIONAL DRIVER REGISTER.—

(1) IN GENERAL.—Section 7702 of title 46, United States Code, is amended by adding at the end the following:

"(c)(1) The Secretary shall request a holder of a license, certificate of registry, or merchant mariner's document to make available to the Secretary, under section 206(b)(4) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), all information contained in the National Driver Register related to an offense described in section 205(a)(3) (A) or (B) of that Act committed by the individual.

"(2) The Secretary shall require the testing of the holder of a license, certificate of registry, or merchant mariner's document for use of alcohol and dangerous drugs in violation of law or Federal regulation. The testing may include preemployment (with respect to dangerous drugs only), periodic, random, reasonable cause, and post accident testing.

"(d)(1) The Secretary may temporarily, for not more than 45 days, suspend and take possession of the license, certificate of registry, or merchant mariner's document held by an individual if, when acting under the authority of that license, certificate, or document—

"(A) that individual performs a safety sensitive function on a vessel, as determined by the Secretary; and

"(B) there is probable cause to believe that the individual—

"(i) has performed the safety sensitive function in violation of law or Federal regulation regarding use of alcohol or a dangerous drug;

"(ii) has been convicted of an offense that would prevent the issuance or renewal of the license, certificate, or document; or

"(iii) within the 3-year period preceding the initiation of a suspension proceeding, has been convicted of an offense described in section 205(a)(3) (A) or (B) of the National Driver Register Act of 1982.

"(2) If a license, certificate, or document is temporarily suspended under this section, an expedited hearing under subsection (a) of this section shall be held within 30 days after the temporary suspension.".

(2) DEFINITION OF DANGEROUS DRUG.—(A) Section 2101 of title 46, United States Code, is amended by inserting after paragraph (8) the following new paragraph:

"(8a) 'dangerous drug' means a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802)).".

(B) Sections 7503(a) and 7704(a) of title 46, United States Code, are repealed.

(b) BASES FOR SUSPENSION OR REVOCATION.—Section 7703 of title 46, United States Code, is amended to read as follows:

"§ 7703. Bases for suspension or revocation

"A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder—

"(1) when acting under the authority of that license, certificate, or document—

"(A) has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters; or

"(B) has committed an act of incompetence, misconduct, or negligence;

"(2) is convicted of an offense that would prevent the issuance or renewal of a license, certificate of registry, or merchant mariner's document; or

"(3) within the 3-year period preceding the initiation of the suspension or revocation proceeding is convicted of an offense described in section 205(a)(3) (A) or (B) of the National Driver Register Act of 1982 (23 U.S.C. 401 note).".

(c) TERMINATION OF REVOCATION.—Section 7701(c) of title 46, United States Code, is amended to read as follows:

"(c) When a license, certificate of registry, or merchant mariner's document has been revoked under this chapter, the former holder may be issued a new license, certificate of registry, or merchant mariner's document only after—

"(1) the Secretary decides, under regulations prescribed by the Secretary, that the issuance is compatible with the requirement of good discipline and safety at sea; and Regulations.

"(2) the former holder provides satisfactory proof that the bases for revocation are no longer valid.".

SEC. 4104. REMOVAL OF MASTER OR INDIVIDUAL IN CHARGE.

Section 8101 of title 46, United States Code, is amended by adding at the end the following:

"(i) When the 2 next most senior licensed officers on a vessel reasonably believe that the master or individual in charge of the vessel is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel, the next most senior master,

ity and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.

SEC. 3002. UNITED STATES-CANADA GREAT LAKES OIL SPILL COOPERATION.

(a) REVIEW.—The Secretary of State shall review relevant international agreements and treaties with the Government of Canada, including the Great Lakes Water Quality Agreement, to determine whether amendments or additional international agreements are necessary to—

(1) prevent discharges of oil on the Great Lakes;

(2) ensure an immediate and effective removal of oil on the Great Lakes; and

(3) fully compensate those who are injured by a discharge of oil on the Great Lakes.

(b) CONSULTATION.—In carrying out this section, the Secretary of State shall consult with the Department of Transportation, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the Great Lakes States, the International Joint Commission, and other appropriate agencies.

(c) REPORT.—The Secretary of State shall submit a report to the Congress on the results of the review under this section within 6 months after the date of the enactment of this Act.

SEC. 3003. UNITED STATES-CANADA LAKE CHAMPLAIN OIL SPILL COOPERATION.

(a) REVIEW.—The Secretary of State shall review relevant international agreements and treaties with the Government of Canada, to determine whether amendments or additional international agreements are necessary to—

(1) prevent discharges of oil on Lake Champlain;

(2) ensure an immediate and effective removal of oil on Lake Champlain; and

(3) fully compensate those who are injured by a discharge of oil on Lake Champlain.

Vermont. New York.

(b) CONSULTATION.—In carrying out this section, the Secretary of State shall consult with the Department of Transportation, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the States of Vermont and New York, the International Joint Commission, and other appropriate agencies.

(c) REPORT.—The Secretary of State shall submit a report to the Congress on the results of the review under this section within 6 months after the date of the enactment of this Act.

SEC. 3004. INTERNATIONAL INVENTORY OF REMOVAL EQUIPMENT AND PERSONNEL.

The President shall encourage appropriate international organizations to establish an international inventory of spill removal equipment and personnel.

SEC. 3005. NEGOTIATIONS WITH CANADA CONCERNING TUG ESCORTS IN PUGET SOUND.

Congress urges the Secretary of State to enter into negotiations with the Government of Canada to ensure that tugboat escorts are required for all tank vessels with a capacity over 40,000 deadweight tons in the Strait of Juan de Fuca and in Haro Strait.

TITLE IV—PREVENTION AND REMOVAL

Subtitle A—Prevention

SEC. 4101. REVIEW OF ALCOHOL AND DRUG ABUSE AND OTHER MATTERS IN ISSUING LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS.

(a) LICENSES AND CERTIFICATES OF REGISTRY.—Section 7101 of title 46, United States Code, is amended by adding at the end the following:

"(g) The Secretary may not issue a license or certificate of registry under this section unless an individual applying for the license or certificate makes available to the Secretary, under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), any information contained in the National Driver Register related to an offense described in section 205(a)(3) (A) or (B) of that Act committed by the individual.

"(h) The Secretary may review the criminal record of an individual who applies for a license or certificate of registry under this section.

"(i) The Secretary shall require the testing of an individual who applies for issuance or renewal of a license or certificate of registry under this chapter for use of a dangerous drug in violation of law or Federal regulation.".

(b) MERCHANT MARINERS' DOCUMENTS.—Section 7302 of title 46, United States Code, is amended by adding at the end the following:

"(c) The Secretary may not issue a merchant mariner's document under this chapter unless the individual applying for the document makes available to the Secretary, under section 206(b)(7) of the National Driver Register Act of 1982 (23 U.S.C. 401 note), any information contained in the National Driver Register related to an offense described in section 205(a)(3) (A) or (B) of that Act committed by the individual.

"(d) The Secretary may review the criminal record of an individual who applies for a merchant mariner's document under this section.

"(e) The Secretary shall require the testing of an individual applying for issuance or renewal of a merchant mariner's document under this chapter for the use of a dangerous drug in violation of law or Federal regulation.".

SEC. 4102. TERM OF LICENSES, CERTIFICATES OF REGISTRY, AND MERCHANT MARINERS' DOCUMENTS; CRIMINAL RECORD REVIEWS IN RENEWALS.

(a) LICENSES.—Section 7106 of title 46, United States Code, is amended by inserting "and may be renewed for additional 5-year periods" after "is valid for 5 years".

(b) CERTIFICATES OF REGISTRY.—Section 7107 of title 46, United States Code, is amended by striking "is not limited in duration." and inserting "is valid for 5 years and may be renewed for additional 5-year periods.".

(c) MERCHANT MARINERS' DOCUMENTS.—Section 7302 of title 46, United States Code, is amended by adding at the end the following:

"(f) A merchant mariner's document issued under this chapter is valid for 5 years and may be renewed for additional 5-year periods.".

imposing any additional liability or requirements with respect to—

(A) the discharge of oil or other pollution by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

(b) PRESERVATION OF STATE FUNDS.—Nothing in this Act or in section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509) shall in any way affect, or be construed to affect, the authority of any State—

(1) to establish, or to continue in effect, a fund any purpose of which is to pay for costs or damages arising out of, or directly resulting from, oil pollution or the substantial threat of oil pollution; or

(2) to require any person to contribute to such a fund.

(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.—Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof—

(1) to impose additional liability or additional requirements; or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil.

(d) FEDERAL EMPLOYEE LIABILITY.—For purposes of section 2679(b)(2)(B) of title 28, United States Code, nothing in this Act shall be construed to authorize or create a cause of action against a Federal officer or employee in the officer's or employee's personal or individual capacity for any act or omission while acting within the scope of the officer's or employee's office or employment.

33 USC 2719.

SEC. 1019. STATE FINANCIAL RESPONSIBILITY.

A State may enforce, on the navigable waters of the State, the requirements for evidence of financial responsibility under section 1016.

33 USC 2701 note.

SEC. 1020. APPLICATION.

This Act shall apply to an incident occurring after the date of the enactment of this Act.

TITLE II—CONFORMING AMENDMENTS

SEC. 2001. INTERVENTION ON THE HIGH SEAS ACT.

Section 17 of the Intervention on the High Seas Act (33 U.S.C. 1486) is amended to read as follows:

"SEC. 17. The Oil Spill Liability Trust Fund shall be available to the Secretary for actions taken under sections 5 and 7 of this Act."

SEC. 2002. FEDERAL WATER POLLUTION CONTROL ACT.

33 USC 1321 note.

(a) APPLICATION.—Subsections (f), (g), (h), and (i) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321) shall not apply with respect to any incident for which liability is established under section 1002 of this Act.

(b) CONFORMING AMENDMENTS.—Section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321) is amended as follows:

(1) Subsection (i) is amended by striking "(1)" after "(i)" and by striking paragraphs (2) and (3).

(2) Subsection (k) is repealed. Any amounts remaining in the revolving fund established under that subsection shall be deposited in the Fund. The Fund shall assume all liability incurred by the revolving fund established under that subsection. 33 USC 1321 note.

(3) Subsection (l) is amended by striking the second sentence.

(4) Subsection (p) is repealed.

(5) The following is added at the end thereof:

"(s) The Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509) shall be available to carry out subsections (b), (c), (d), (j), and (l) as those subsections apply to discharges, and substantial threats of discharges, of oil. Any amounts received by the United States under this section shall be deposited in the Oil Spill Liability Trust Fund.".

SEC. 2003. DEEPWATER PORT ACT.

(a) CONFORMING AMENDMENTS.—The Deepwater Port Act of 1974 (33 U.S.C. 1502 et seq.) is amended—

(1) in section 4(c)(1) by striking "section 18(l) of this Act;" and inserting "section 1016 of the Oil Pollution Act of 1990"; and 33 USC 1503.

(2) by striking section 18.

(b) AMOUNTS REMAINING IN DEEPWATER PORT FUND.—Any amounts remaining in the Deepwater Port Liability Fund established under section 18(f) of the Deepwater Port Act of 1974 (33 U.S.C. 1517(f)) shall be deposited in the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509). The Oil Spill Liability Trust Fund shall assume all liability incurred by the Deepwater Port Liability Fund. 33 USC 1517. 26 USC 9509 note.

SEC. 2004. OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978.

Repeal.

Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1811-1824) is repealed. Any amounts remaining in the Offshore Oil Pollution Compensation Fund established under section 302 of that title (43 U.S.C. 1812) shall be deposited in the Oil Spill Liability Trust Fund established under section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509). The Oil Spill Liability Trust Fund shall assume all liability incurred by the Offshore Oil Pollution Compensation Fund. 26 USC 9509 note.

TITLE III—INTERNATIONAL OIL POLLUTION PREVENTION AND REMOVAL

SEC. 3001. SENSE OF CONGRESS REGARDING PARTICIPATION IN INTERNATIONAL REGIME.

It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liabil-

able, in establishing evidence of financial responsibility to effectuate the purposes of this Act.

(f) CLAIMS AGAINST GUARANTOR.—Any claim for which liability may be established under section 1002 may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke (1) all rights and defenses which would be available to the responsible party under this Act, (2) any defense authorized under subsection (e), and (3) the defense that the incident was caused by the willful misconduct of the responsible party. The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

(g) LIMITATION ON GUARANTOR'S LIABILITY.—Nothing in this Act shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility required under this Act which that guarantor has provided for a responsible party.

(h) CONTINUATION OF REGULATIONS.—Any regulation relating to financial responsibility, which has been issued pursuant to any provision of law repealed or superseded by this Act, and which is in effect on the date immediately preceding the effective date of this Act, is deemed and shall be construed to be a regulation issued pursuant to this section. Such a regulation shall remain in full force and effect unless and until superseded by a new regulation issued under this section.

(i) UNIFIED CERTIFICATE.—The Secretary may issue a single unified certificate of financial responsibility for purposes of this Act and any other law.

33 USC 2717.

SEC. 1017. LITIGATION, JURISDICTION, AND VENUE.

(a) REVIEW OF REGULATIONS.—Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within 90 days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) JURISDICTION.—Except as provided in subsections (a) and (c), the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) STATE COURT JURISDICTION.—A State trial court of competent jurisdiction over claims for removal costs or damages, as defined under this Act, may consider claims under this Act or State law and any final judgment of such court (when no longer subject to ordinary forms of review) shall be recognized, valid, and enforceable for all purposes of this Act.

(d) ASSESSMENT AND COLLECTION OF TAX.—The provisions of subsections (a), (b), and (c) shall not apply to any controversy or other matter resulting from the assessment or collection of any tax, or to the review of any regulation promulgated under the Internal Revenue Code of 1986.

(e) SAVINGS PROVISION.—Nothing in this title shall apply to any cause of action or right of recovery arising from any incident which occurred prior to the date of enactment of this title. Such claims shall be adjudicated pursuant to the law applicable on the date of the incident.

(f) PERIOD OF LIMITATIONS.—

(1) DAMAGES.—Except as provided in paragraphs (3) and (4), an action for damages under this Act shall be barred unless the action is brought within 3 years after—

(A) the date on which the loss and the connection of the loss with the discharge in question are reasonably discoverable with the exercise of due care, or

(B) in the case of natural resource damages under section 1002(b)(2)(A), the date of completion of the natural resources damage assessment under section 1006(c).

(2) REMOVAL COSTS.—An action for recovery of removal costs referred to in section 1002(b)(1) must be commenced within 3 years after completion of the removal action. In any such action described in this subsection, the court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages. Except as otherwise provided in this paragraph, an action may be commenced under this title for recovery of removal costs at any time after such costs have been incurred.

(3) CONTRIBUTION.—No action for contribution for any removal costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this Act for recovery of such costs or damages, or

(B) the date of entry of a judicially approved settlement with respect to such costs or damages.

(4) SUBROGATION.—No action based on rights subrogated pursuant to this Act by reason of payment of a claim may be commenced under this Act more than 3 years after the date of payment of such claim.

(5) COMMENCEMENT.—The time limitations contained herein shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for such minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for such incompetent.

SEC. 1018. RELATIONSHIP TO OTHER LAW.

33 USC 2718.

(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.—Nothing in this Act or the Act of March 3, 1851 shall—

(1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from

shall promptly and at the expense of the responsible party or the guarantor involved, advertise the designation and the procedures by which claims may be presented to the responsible party or guarantor. Advertisement under this subsection shall continue for a period of no less than 30 days.

(c) ADVERTISEMENT BY PRESIDENT.—If—

(1) the responsible party and the guarantor both deny a designation within 5 days after receiving notification of a designation under subsection (a),

(2) the source of the discharge or threat was a public vessel, or

(3) the President is unable to designate the source or sources of the discharge or threat under subsection (a),

the President shall advertise or otherwise notify potential claimants of the procedures by which claims may be presented to the Fund.

33 USC 2715.

SEC. 1015. SUBROGATION.

(a) IN GENERAL.—Any person, including the Fund, who pays compensation pursuant to this Act to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

(b) ACTIONS ON BEHALF OF FUND.—At the request of the Secretary, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this Act, and all costs incurred by the Fund by reason of the claim, including interest (including prejudgment interest), administrative and adjudicative costs, and attorney's fees. Such an action may be commenced against any responsible party or (subject to section 1016) guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost or damages for which the compensation was paid. Such an action shall be commenced against the responsible foreign government or other responsible party to recover any removal costs or damages paid from the Fund as the result of the discharge, or substantial threat of discharge, of oil from a foreign offshore unit.

33 USC 2716.

SEC. 1016. FINANCIAL RESPONSIBILITY.

(a) REQUIREMENT.—The responsible party for—

(1) any vessel over 300 gross tons (except a non-self-propelled vessel that does not carry oil as cargo or fuel) using any place subject to the jurisdiction of the United States; or

(2) any vessel using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States;

shall establish and maintain, in accordance with regulations promulgated by the Secretary, evidence of financial responsibility sufficient to meet the maximum amount of liability to which, in the case of a tank vessel, the responsible party could be subject under section 1004 (a)(1) or (d) of this Act, or to which, in the case of any other vessel, the responsible party could be subjected under section 1004 (a)(2) or (d), in a case where the responsible party would be entitled to limit liability under that section. If the responsible party owns or operates more than one vessel, evidence of financial responsibility need be established only to meet the amount of the maximum liability applicable to the vessel having the greatest maximum liability.

(b) SANCTIONS.—

(1) WITHHOLDING CLEARANCE.—The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes of the United States of any vessel subject to this section that does not have the evidence of financial responsibility required for the vessel under this section.

(2) DENYING ENTRY TO OR DETAINING VESSELS.—The Secretary may—

(A) deny entry to any vessel to any place in the United States, or to the navigable waters, or

(B) detain at the place,

any vessel that, upon request, does not produce the evidence of financial responsibility required for the vessel under this section.

(3) SEIZURE OF VESSEL.—Any vessel subject to the requirements of this section which is found in the navigable waters without the necessary evidence of financial responsibility for the vessel shall be subject to seizure by and forfeiture to the United States.

(c) OFFSHORE FACILITIES.—

(1) IN GENERAL.—Except as provided in paragraph (2), each responsible party with respect to an offshore facility shall establish and maintain evidence of financial responsibility of $150,000,000 to meet the amount of liability to which the responsible party could be subjected under section 1004(a) in a case in which the responsible party would be entitled to limit liability under that section. In a case in which a person is the responsible party for more than one facility subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the facility having the greatest maximum liability.

(2) DEEPWATER PORTS.—Each responsible party with respect to a deepwater port shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability to which the responsible party could be subjected under section 1004(a) of this Act in a case where the responsible party would be entitled to limit liability under that section. If the Secretary exercises the authority under section 1004(d)(2) to lower the limit of liability for deepwater ports, the responsible party shall establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability so established. In a case in which a person is the responsible party for more than one deepwater port, evidence of financial responsibility need be established only to meet the maximum liability applicable to the deepwater port having the greatest maximum liability.

(e) METHODS OF FINANCIAL RESPONSIBILITY.—Financial responsibility under this section may be established by any one, or by any combination, of the following methods which the Secretary (in the case of a vessel) or the President (in the case of a facility) determines to be acceptable: evidence of insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In promulgating requirements under this section, the Secretary or the President, as appropriate, may specify policy or other contractual terms, conditions, or defenses which are necessary, or which are unaccept-

Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

(g) AUDITS.—The Comptroller General shall audit all payments, obligations, reimbursements, and other uses of the Fund, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. The Comptroller General shall submit to the Congress an interim report one year after the date of the enactment of this Act. The Comptroller General shall thereafter audit the Fund as is appropriate. Each Federal agency shall cooperate with the Comptroller General in carrying out this subsection.

Reports.

(h) PERIOD OF LIMITATIONS FOR CLAIMS.—

(1) REMOVAL COSTS.—No claim may be presented under this title for recovery of removal costs for an incident unless the claim is presented within 6 years after the date of completion of all removal actions for that incident.

(2) DAMAGES.—No claim may be presented under this section for recovery of damages unless the claim is presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care, or in the case of natural resource damages under section 1002(b)(2)(A), if later, the date of completion of the natural resources damage assessment under section 1006(e).

(3) MINORS AND INCOMPETENTS.—The time limitations contained in this subsection shall not begin to run—

(A) against a minor until the earlier of the date when such minor reaches 18 years of age or the date on which a legal representative is duly appointed for the minor, or

(B) against an incompetent person until the earlier of the date on which such incompetent's incompetency ends or the date on which a legal representative is duly appointed for the incompetent.

(i) LIMITATION ON PAYMENT FOR SAME COSTS.—In any case in which the President has paid an amount from the Fund for any removal costs or damages specified under subsection (a), no other claim may be paid from the Fund for the same removal costs or damages.

(j) OBLIGATION IN ACCORDANCE WITH PLAN.—

(1) IN GENERAL.—Except as provided in paragraph (2), amounts may be obligated from the Fund for the restoration, rehabilitation, replacement, or acquisition of natural resources only in accordance with a plan adopted under section 1006(c).

(2) EXCEPTION.—Paragraph (1) shall not apply in a situation requiring action to avoid irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action.

(k) PREFERENCE FOR PRIVATE PERSONS IN AREA AFFECTED BY DISCHARGE.—

(1) IN GENERAL.—In the expenditure of Federal funds for removal of oil, including for distribution of supplies, construction, and other reasonable and appropriate activities, under a contract or agreement with a private person, preference shall be given, to the extent feasible and practicable, to private persons residing or doing business primarily in the area affected by the discharge of oil.

(2) LIMITATION.—This subsection shall not be considered to restrict the use of Department of Defense resources.

SEC. 1013. CLAIMS PROCEDURE.

33 USC 2713.

(a) PRESENTATION.—Except as provided in subsection (b), all claims for removal costs or damages shall be presented first to the responsible party or guarantor of the source designated under section 1014(a).

(b) PRESENTATION TO FUND.—

(1) IN GENERAL.—Claims for removal costs or damages may be presented first to the Fund—

(A) if the President has advertised or otherwise notified claimants in accordance with section 1014(c);

(B) by a responsible party who may assert a claim under section 1008;

(C) by the Governor of a State for removal costs incurred by that State; or

(D) by a United States claimant in a case where a foreign offshore unit has discharged oil causing damage for which the Fund is liable under section 1012(a).

(2) LIMITATION ON PRESENTING CLAIM.—No claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.

(c) ELECTION.—If a claim is presented in accordance with subsection (a) and—

(1) each person to whom the claim is presented denies all liability for the claim, or

(2) the claim is not settled by any person by payment within 90 days after the date upon which (A) the claim was presented, or (B) advertising was begun pursuant to section 1014(b), whichever is later,

the claimant may elect to commence an action in court against the responsible party or guarantor or to present the claim to the Fund.

(d) UNCOMPENSATED DAMAGES.—If a claim is presented in accordance with this section and full and adequate compensation is unavailable, a claim for the uncompensated damages and removal costs may be presented to the Fund.

(e) PROCEDURE FOR CLAIMS AGAINST FUND.—The President shall promulgate, and may from time to time amend, regulations for the presentation, filing, processing, settlement, and adjudication of claims under this Act against the Fund.

President of U.S. Regulations.

SEC. 1014. DESIGNATION OF SOURCE AND ADVERTISEMENT.

President of U.S. 33 USC 2714.

(a) DESIGNATION OF SOURCE AND NOTIFICATION.—When the President receives information of an incident, the President shall, where possible and appropriate, designate the source or sources of the discharge or threat. If a designated source is a vessel or a facility, the President shall immediately notify the responsible party and the guarantor, if known, of that designation.

(b) ADVERTISEMENT BY RESPONSIBLE PARTY OR GUARANTOR.—If a responsible party or guarantor fails to inform the President, within 5 days after receiving notification of a designation under subsection (a), of the party's or the guarantor's denial of the designation, such party or guarantor shall advertise the designation and the procedures by which claims may be presented, in accordance with regulations promulgated by the President. Advertisement under the preceding sentence shall begin no later than 15 days after the date of the designation made under subsection (a). If advertisement is not otherwise made in accordance with this subsection, the President

APPENDIX E

MINERALS MANAGEMENT SERVICE ADVANCED NOTICE OF PROPOSED RULEMAKING

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 253

RIN 1010–AB78

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

AGENCY: Minerals Management Service, Interior.

ACTION: Advanced notice of proposed rulemaking.

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

DATES: Comments should be received or postmarked by October 25, 1993 to receive full consideration.

ADDRESSES: Comments should be mailed or hand delivered to the Department of the Interior; Minerals Management Service, Mail Stop 4700; 381 Elden Street; Herndon, Virginia 22070–4817; Attention: Chief, Engineering and Standards Branch.

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

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

- Establish the amount of oil spill financial responsibility that must be evidenced by responsible parties at $150 million;
- Establish requirements for certification of financial responsibility for all "offshore facilities" (as defined in OPA 90) including those in, on, or under any navigable waters, including inland waters, of the States of the U.S., territories, and possessions, and facilities subject to U.S. jurisdiction in, on, or under any other waters.
- Define acceptable methods available to demonstrate evidence of oil spill financial responsibility;
- Define procedures to be used to submit evidence of oil spill financial responsibility;
- Define responsibilities, liabilities, and defenses of guarantors;
- Establish the maximum civil penalties to which responsible parties are subject as $25,000 per day of violation; and
- Establish civil penalties procedures.

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

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

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

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

A similar function was previously performed by the U.S. Coast Guard (USCG) on OCS waters under the authority of Title III of OCSLAA 78, and implemented by 33 CFR part 135 provides that the regulations in 33 CFR part 135 be continued effective until new offshore financial responsibility regulations are promulgated. On October 1, 1992, a memorandum of agreement (MOA) was signed transferring the personnel, equipment, and files associated with the function to the MMS in furtherance of the delegations in E.O. 12777.

Affected Facilities

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

Geographic Jurisdiction

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

Through its definition of the terms "navigable waters of the United States," and "offshore facility" in section 1001(22), OPA 90 extends its provisions concerning offshore facilities to facilities in, on, or under navigable waters of the U.S. and any facilities subject to the jurisdiction of the U.S. in, on, or under other waters. Thus, for example, a company operating a petroleum pipeline that crosses the Ohio River below Pittsburgh, Pennsylvania, would be subject to the $150 million financial responsibility provisions of this rule, as would the operator of an oil well in the Great Lakes.

Implementation Procedures

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

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

Solicited Information

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

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

—Pipelines crossing over bodies of water on bridges, piers, breakwaters, berms, or similar structures.
—Fuel storage tanks, piping, and hoses installed in, on (i.e., in contact with or supported above), or under navigable waters, including those facilities in private marinas.
—Pipelines in, on, or under inland navigable waters but not crossing the inland navigable waters.
—Pipelines that cross in, on, or under both land masses and inland navigable waters.
—Pipelines that cross under inland navigable waters in tunnels or are surrounded by other impermeable barriers.
—Pipelines that cross the waters of the U.S. and the waters of another country.
—Drill strings, flow lines, or production casing extending under navigable waters but originating from land-based drilling and production facilities.
—Other structures to which the applicability of OPA 90 may be unclear.

2. Section 1016(e) of OPA 90, and 33 CFR part 135 enumerate the following potential ways of demonstrating financial responsibility:

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

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

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

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

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

—Whether and how direct action, language limiting liability, uncertain scope of damage provisions, and lack of preemption provisions in OPA 90 affect the availability of insurance.
—What regulatory approaches are available under OPA 90 that may improve the availability of an insurance market.

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

—What defenses should be available to a Guarantor to ensure the availability of affordable bonds, insurance, or other forms of guarantees.
—On what terms and conditions, if any, should bank letters of credit be

acceptable as evidence of financial responsibility.

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

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

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

—What organizational structures could be used for other indemnity mechanisms.

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

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

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

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

7. For the purposes of administering section 1016 of OPA 90, the MMS interpretation of the definition for "oil" in section 1001(23) of OPA 90, excludes facilities that handle or produce only dry natural gas. The MMS recognizes that some quantity of natural gas liquids may be produced with the gas. Facilities handling at any one time 1,000 barrels or less of these highly volatile, light end petroleum fractions were exempted from the USCG financial responsibility regulations (33 CFR part 135) because these liquids posed significantly less environmental risk than crude or refined oil. The MMS is seeking comments and the basis for those comments regarding:

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

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

—What are appropriate de minimis quantities.

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

—What information is available to substantiate this claim.

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

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

Dated: June 14, 1993.

Bob Armstrong,

Assistant Secretary for Land and Minerals Management.

[FR Doc. 93–20415 Filed 8–24–93; 8:45 am]

BILLING CODE 4310–MR–P

APPENDIX F

EXECUTIVE ORDER 12777

DELEGATION OF AUTHORITY

Executive Order 12777 of October 18, 1991

Implementation of Section 311 of the Federal Water Pollution Control Act of October 18, 1972, as Amended, and the Oil Pollution Act of 1990

By the authority vested in me as President by the Constitution and the laws of the United States of America, including Section 311 of the Federal Water Pollution Control Act, ("FWPCA") (33 U.S.C. 1321), as amended by the Oil Pollution Act of 1990 (Public Law 101–380) ("OPA"), and by Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

Section 1. *National Contingency Plan, Area Committees, and Area Contingency Plans.* (a) Section 1 of Executive Order No. 12580 of January 23, 1987, is amended to read as follows:

"**Section 1.** *National Contingency Plan.* (a)(1) The National Contingency Plan ("the NCP"), shall provide for a National Response Team ("the NRT") composed of representatives of appropriate Federal departments and agencies for national planning and coordination of preparedness and response actions, and Regional Response Teams as the regional counterparts to the NRT for planning and coordination of regional preparedness and response actions.

"(2) The following agencies (in addition to other appropriate agencies) shall provide representatives to the National and Regional Response Teams to carry out their responsibilities under the NCP: Department of State, Department of Defense, Department of Justice, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Transportation, Department of Energy, Environmental Protection Agency, Federal Emergency Management Agency, United States Coast Guard, and the Nuclear Regulatory Commission.

"(3) Except for periods of activation because of response action, the representative of the Environmental Protection Agency ("EPA") shall be the chairman, and the representative of the United States Coast Guard shall be the vice chairman, of the NRT and these agencies' representatives shall be co-chairs of the Regional Response Teams ("the RRTs"). When the NRT or an RRT is activated for a response action, the EPA representative shall be the chairman when the release or threatened release or discharge or threatened discharge occurs in the inland zone, and the United States Coast Guard representative shall be the chairman when the release or threatened release or discharge or threatened discharge occurs in the coastal zone, unless otherwise agreed upon by the EPA and the United States Coast Guard representatives (inland and coastal zones are defined in the NCP).

"(4) The RRTs may include representatives from State governments, local governments (as agreed upon by the States), and Indian tribal governments. Subject to the functions and authorities delegated to Executive departments and agencies in other sections of this order, the NRT shall provide policy and program direction to the RRTs.

"(b)(1) The responsibility for the revision of the NCP and all the other functions vested in the President by Sections 105(a), (b), (c), and (g), 125, and 301(f) of the Act, by Section 311(d)(1) of the Federal Water Pollution Control Act, and by Section 4201(c) of the Oil Pollution Act of 1990 is delegated to the Administrator of the Environmental Protection Agency ("the Administrator").

"(2) The function vested in the President by Section 118(p) of the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99–499) ("SARA") is delegated to the Administrator.

"(c) In accord with Section 107(f)(2)(A) of the Act, Section 311(f)(5) of the

Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(f)(5)), and Section 1006(b)(1) and (2) of the Oil Pollution Act of 1990, the following shall be among those designated in the NCP as Federal trustees for natural resources:

(1) Secretary of Defense;

(2) Secretary of the Interior;

(3) Secretary of Agriculture;

(4) Secretary of Commerce;

(5) Secretary of Energy.

In the event of a spill, the above named Federal trustees for natural resources shall designate one trustee to act as Lead Administrative Trustee, the duties of which shall be defined in the regulations promulgated pursuant to Section 1006(e)(1) of OPA. If there are natural resource trustees other than those designated above which are acting in the event of a spill, those other trustees may join with the Federal trustees to name a Lead Administrative Trustee which shall exercise the duties defined in the regulations promulgated pursuant to Section 1006(e)(1) of OPA.

"(d) Revisions to the NCP shall be made in consultation with members of the NRT prior to publication for notice and comment.

"(e) All revisions to the NCP, whether in proposed or final form, shall be subject to review and approval by the Director of the Office of Management and Budget ("OMB")."

(b) The functions vested in the President by Section 311(j)(4) of FWPCA, and Section 4202(b)(1) of OPA, respecting the designation of Areas, the appointment of Area Committee members, the requiring of information to be included in Area Contingency Plans, and the review and approval of Area Contingency Plans are delegated to the Administrator of the Environmental Protection Agency ("Administrator") for the inland zone and the Secretary of the Department in which the Coast Guard is operating for the coastal zone (inland and coastal zones are defined in the NCP).

Sec. 2. *National Response System.* (a) The functions vested in the President by Section 311(j)(1)(A) of FWPCA, respecting the establishment of methods and procedures for the removal of discharged oil and hazardous substances, and by Section 311(j)(1)(B) of FWPCA respecting the establishment of criteria for the development and implementation of local and regional oil and hazardous substance removal contingency plans, are delegated to the Administrator for the inland zone and the Secretary of the Department in which the Coast Guard is operating for the coastal zone.

(b)(1) The functions vested in the President by Section 311(j)(1)(C) of FWPCA, respecting the establishment of procedures, methods, and equipment and other requirements for equipment to prevent and to contain discharges of oil and hazardous substances from non-transportation-related onshore facilities, are delegated to the Administrator.

(2) The functions vested in the President by Section 311(j)(1)(C) of FWPCA, respecting the establishment of procedures, methods, and equipment and other requirements for equipment to prevent and to contain discharges of oil and hazardous substances from vessels and transportation-related onshore facilities and deepwater ports subject to the Deepwater Ports Act of 1974 ("DPA"), are delegated to the Secretary of Transportation.

(3) The functions vested in the President by Section 311(j)(1)(C) of FWPCA, respecting the establishment of procedures, methods, and equipment and other requirements for equipment to prevent and to contain discharges of oil and hazardous substances from offshore facilities, including associated pipelines, other than deepwater ports subject to the DPA, are delegated to the Secretary of the Interior.

(c) The functions vested in the President by Section 311(j)(1)(D) of FWPCA, respecting the inspection of vessels carrying cargoes of oil and hazardous substances and the inspection of such cargoes, are delegated to the Secretary of the Department in which the Coast Guard is operating.

(d)(1) The functions vested in the President by Section 311(j)(5) of FWPCA and Section 4202(b)(4) of OPA, respecting the issuance of regulations requiring the owners or operators of non-transportation-related onshore facilities to prepare and submit response plans, the approval of means to ensure the availability of private personnel and equipment, the review and approval of such response plans, and the authorization of non-transportation-related onshore facilities to operate without approved response plans, are delegated to the Administrator.

(2) The functions vested in the President by Section 311(j)(5) of FWPCA and Section 4202(b)(4) of OPA, respecting the issuance of regulations requiring the owners or operators of tank vessels, transportation-related onshore facilities and deepwater ports subject to the DPA, to prepare and submit response plans, the approval of means to ensure the availability of private personnel and equipment, the review and approval of such response plans, and the authorization of tank vessels, transportation-related onshore facilities and deepwater ports subject to the DPA to operate without approved response plans, are delegated to the Secretary of Transportation.

(3) The functions vested in the President by Section 311(j)(5) of FWPCA and Section 4202(b)(4) of OPA, respecting the issuance of regulations requiring the owners or operators of offshore facilities, including associated pipelines, other than deepwater ports subject to the DPA, to prepare and submit response plans, the approval of means to ensure the availability of private personnel and equipment, the review and approval of such response plans, and the authorization of offshore facilities, including associated pipelines, other than deepwater ports subject to the DPA, to operate without approved response plans, are delegated to the Secretary of the Interior.

(e)(1) The functions vested in the President by Section 311(j)(6)(A) of FWPCA, respecting the requirements for periodic inspections of containment booms and equipment used to remove discharges at non-transportation-related onshore facilities, are delegated to the Administrator.

(2) The functions vested in the President by Section 311(j)(6)(A) of FWPCA, respecting the requirements for periodic inspections of containment booms and equipment used to remove discharges on vessels, and at transportation-related onshore facilities and deepwater ports subject to the DPA, are delegated to the Secretary of Transportation.

(3) The functions vested in the President by Section 311(j)(6)(A) of FWPCA, respecting the requirements for periodic inspections of containment booms and equipment used to remove discharges at offshore facilities, including associated pipelines, other than deepwater ports subject to the DPA, are delegated to the Secretary of the Interior.

(f) The functions vested in the President by Section 311(j)(6)(B) of FWPCA, respecting requirements for vessels to carry appropriate removal equipment, are delegated to the Secretary of the Department in which the Coast Guard is operating.

(g)(1) The functions vested in the President by Section 311(j)(7) of FWPCA, respecting periodic drills of removal capability under relevant response plans for onshore and offshore facilities located in the inland zone, and the publishing of annual reports on those drills, are delegated to the Administrator.

(2) The functions vested in the President by Section 311(j)(7) of FWPCA, respecting periodic drills of removal capability under relevant response plans for tank vessels, and for onshore and offshore facilities located in the

coastal zone, and the publishing of annual reports on those drills, are delegated to the Secretary of the Department in which the Coast Guard is operating.

(h) No provision of Section 2 of this order, including, but not limited to, any delegation or assignment of any function hereunder, shall in any way affect, or be construed or interpreted to affect the authority of any Department or agency, or the head of any Department or agency under any provision of law other than Section 311(j) of FWPCA or Section 4202(b)(4) of OPA.

(i) The functions vested in the President by Section 311(j) of FWPCA or Section 4202(b)(4) of OPA which have been delegated or assigned by Section 2 of this order may be redelegated to the head of any Executive department or agency with his or her consent.

Sec. 3. *Removal.* The functions vested in the President by Section 311(c) of FWPCA and Section 1011 of OPA, respecting an effective and immediate removal or arrangement for removal of a discharge and mitigation or prevention of a substantial threat of a discharge of oil or a hazardous substance, the direction and monitoring of all Federal, State and private actions, the removal and destruction of a vessel, the issuance of directions, consulting with affected trustees, and removal completion determinations, are delegated to the Administrator for the inland zone and to the Secretary of the Department in which the Coast Guard is operating for the coastal zone.

Sec. 4. *Liability Limit Adjustment.* (a) The functions vested in the President by Section 1004(d) of OPA, respecting the establishment of limits of liability, with respect to classes or categories of non-transportation-related onshore facilities, the reporting to Congress on the desirability of adjusting limits of liability with respect to non-transportation-related onshore facilities, and the adjustment of limits of liability to reflect significant increases in the Consumer Price Index with respect to non-transportation-related onshore facilities, are delegated to the Administrator, acting in consultation with the Secretary of Transportation, the Secretary of Energy, and the Attorney General.

(b) The functions vested in the President by Section 1004(d) of OPA, respecting the establishment of limits of liability, with respect to classes or categories of transportation-related onshore facilities, the reporting to Congress on the desirability of adjusting limits of liability, with respect to vessels or transportation-related onshore facilities and deepwater ports subject to the DPA, and the adjustment of limits of liability to reflect significant increases in the Consumer Price Index with respect to vessels or transportation-related onshore facilities and deepwater ports subject to the DPA, are delegated to the Secretary of Transportation.

(c) The functions vested in the President by Section 1004(d) of OPA, respecting the reporting to Congress on the desirability of adjusting limits of liability with respect to offshore facilities, including associated pipelines, other than deepwater ports subject to the DPA, and the adjustment of limits of liability to reflect significant increases in the Consumer Price Index with respect to offshore facilities, including associated pipelines, other than deepwater ports subject to the DPA, are delegated to the Secretary of the Interior.

Sec. 5. *Financial Responsibility.* (a)(1) The functions vested in the President by Section 1016(e) of OPA, respecting (in the case of offshore facilities other than deepwater ports) the issuance of regulations concerning financial responsibility, the determination of acceptable methods of financial responsibility, and the specification of necessary or unacceptable terms, conditions, or defenses, are delegated to the Secretary of the Interior.

(2) The functions vested in the President by Section 1016(e) of OPA, respecting (in the case of deepwater ports) the issuance of regulations concerning financial responsibility, the determination of acceptable methods of

financial responsibility, and the specification of necessary or unacceptable terms, conditions, or defenses, are delegated to the Secretary of Transportation.

(b)(1) The functions vested in the President by Section 4303 of OPA, respecting (in cases involving vessels) the assessment of civil penalties, the compromising, modification or remission, with or without condition, and the referral for collection of such imposed penalties, and requests to the Attorney General to secure necessary judicial relief, are delegated to the Secretary of the Department in which the Coast Guard is operating.

(2) The functions vested in the President by Section 4303 of OPA, respecting (in cases involving offshore facilities other than deepwater ports) the assessment of civil penalties, the compromising, modification or remission, with or without condition, and the referral for collection of such imposed penalties, and requests to the Attorney General to secure necessary judicial relief, are delegated to the Secretary of the Interior.

(3) The functions vested in the President by Section 4303 of OPA, respecting (in cases involving deepwater ports) the assessment of civil penalties, the compromising, modification or remission, with or without condition, and the referral for collection of such imposed penalties, and requests to the Attorney General to secure necessary judicial relief, are delegated to the Secretary of Transportation.

Sec. 6. *Enforcement.* (a) The functions vested in the President by Section 311(m)(1) of FWPCA, respecting the enforcement of Section 311 with respect to vessels, are delegated to the Secretary of the Department in which the Coast Guard is operating.

(b) The functions vested in the President by Section 311(e) of FWPCA, respecting determinations of imminent and substantial threat, requesting the Attorney General to secure judicial relief, and other action including issuing administrative orders, are delegated to the Administrator for the inland zone and to the Secretary of the Department in which the Coast Guard is operating for the coastal zone.

Sec. 7. *Management of the Oil Spill Liability Trust Fund and Claims.* (a)(1)(A) The functions vested in the President by Section 1012(a)(1), (3), and (4) of OPA respecting payment of removal costs and claims and determining consistency with the National Contingency Plan (NCP) are delegated to the Secretary of the Department in which the Coast Guard is operating.

(B) The functions vested in the President by Section 6002(b) of the OPA respecting making amounts, not to exceed $50,000,000 and subject to normal budget controls, in any fiscal year, available from the Fund (i) to carry out Section 311(c) of FWPCA, and (ii) to initiate the assessment of natural resources damages required under Section 1006 of OPA are delegated to the Secretary of the Department in which the Coast Guard is operating. Such Secretary shall make amounts available from the Fund to initiate the assessment of natural resources damages exclusively to the Federal trustees designated in the NCP. Such Federal trustees shall allocate such amounts among all trustees required to assess natural resources damages under Section 1006 of OPA.

(2) The functions vested in the President by Section 1012(a)(2) of OPA, respecting the payment of costs and determining consistency with the NCP, are delegated to the Federal trustees designated in the NCP.

(3) The functions vested in the President by Section 1012(a)(5) of OPA, respecting the payment of costs and expenses of departments and agencies having responsibility for the implementation, administration, and enforcement of the Oil Pollution Act of 1990 and subsections (b), (c), (d), (j) and (l) of Section 311 of FWPCA, are delegated to each head of such department and agency.

(b) The functions vested in the President by Section 1012(c) of OPA, respecting designation of Federal officials who may obligate money, are dele-

gated to each head of the departments and agencies to whom functions have been delegated under section 7(a) of this order for the purpose of carrying out such functions.

(c)(1) The functions vested in the President by Section 1012(d) and (e) of OPA, respecting the obligation of the Trust Fund on the request of a Governor or pursuant to an agreement with a State, entrance into agreements with States, agreement upon terms and conditions, and the promulgation of regulations concerning such obligation and entrance into such agreement, are delegated to the Secretary of the Department in which the Coast Guard is operating, in consultation with the Administrator.

(2) The functions vested in the President by Section 1013(e) of OPA, respecting the promulgation and amendment of regulations for the presentation, filing, processing, settlement, and adjudication of claims under OPA against the Trust Fund, are delegated to the Secretary of the Department in which the Coast Guard is operating, in consultation with the Attorney General.

(3) The functions vested in the President by Section 1012(a) of OPA, respecting the payment of costs, damages, and claims, delegated herein to the Secretary of the Department in which the Coast Guard is operating, include, *inter alia,* the authority to process, settle, and administratively adjudicate such costs, damages, and claims, regardless of amount.

(d)(1) The Coast Guard is designated the "appropriate agency" for the purpose of receiving the notice of discharge of oil or hazardous substances required by Section 311(b)(5) of FWPCA, and the Secretary of the Department in which the Coast Guard is operating is authorized to issue regulations implementing this designation.

(2) The functions vested in the President by Section 1014 of OPA, respecting designation of sources of discharges or threats, notification to responsible parties, promulgation of regulations respecting advertisements, the advertisement of designation, and notification of claims procedures, are delegated to the Secretary of the Department in which the Coast Guard is operating.

Sec. 8. *Miscellaneous.* (a) The functions vested in the President by Section 311(b)(3) and (4) of FWPCA, as amended by the Oil Pollution Act of 1990, respecting the determination of quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment and the determinations of quantities, time, locations, circumstances, or conditions, which are not harmful, are delegated to the Administrator.

(b) The functions vested in the President by Section 311(d)(2)(G) of FWPCA, respecting schedules of dispersant, chemical, and other spill mitigating devices or substances, are delegated to the Administrator.

(c) The functions vested in the President by Section 1006(b)(3) and (4) of OPA respecting the receipt of designations of State and Indian tribe trustees for natural resources are delegated to the Administrator.

(d) The function vested in the President by Section 3004 of OPA, with respect to encouraging the development of an international inventory of equipment and personnel, is delegated to the Secretary of the Department in which the Coast Guard is operating, in consultation with the Secretary of State.

(e) The functions vested in the President by Section 4113 of OPA, respecting a study on the use of liners or other secondary means of containment for onshore facilities, and the implementation of the recommendations of the study, are delegated to the Administrator.

(f) The function vested in the President by Section 5002(c)(2)(D) of OPA, respecting the designating of an employee of the Federal Government who shall represent the Federal Government on the Oil Terminal Facilities and Oil Tanker Operations Associations, is delegated to the Secretary of Transportation.

(g) The functions vested in the President by Section 5002(o) of OPA, respecting the annual certification of alternative voluntary advisory groups, are delegated to the Secretary of Transportation.

(h) The function vested in the President by Section 7001(a)(3) of OPA, respecting the appointment of Federal agencies to membership on the Interagency Coordinating Committee on Oil Pollution Research, is delegated to the Secretary of Transportation.

(i) Executive Order No. 11735 of August 3, 1973, Executive Order No. 12123 of February 26, 1979, Executive Order No. 12418 of May 5, 1983 and the memorandum of August 24, 1990, delegating certain authorities of the President under the Oil Pollution Act of 1990 are revoked.

Sec. 9. *Consultation.* Authorities and functions delegated or assigned by this order shall be exercised subject to consultation with the Secretaries of departments and the heads of agencies with statutory responsibilities which may be significantly affected, including, but not limited to, the Department of Justice.

Sec. 10. *Litigation.* (a) Notwithstanding any other provision of this order, any representation pursuant to or under this order in any judicial proceedings shall be by or through the Attorney General. The conduct and control of all litigation arising under the Oil Pollution Act of 1990 shall be the responsibility of the Attorney General.

(b) Notwithstanding any other provision of this order, the authority under the Oil Pollution Act of 1990 to require the Attorney General to commence litigation is retained by the President.

(c) Notwithstanding any other provision of this order, the Secretaries of the Departments of Transportation, Commerce, Interior, Agriculture, and/or the Administrator of the Environmental Protection Agency may request that the Attorney General commence litigation under the Oil Pollution Act of 1990.

(d) The Attorney General, in his discretion, is authorized to require that, with respect to a particular oil spill, an agency refrain from taking administrative enforcement action without first consulting with the Attorney General.

GEORGE BUSH

THE WHITE HOUSE,
October 18, 1991.

APPENDIX G

EXECUTIVE ORDER 12866

REGULATORY PLANNING AND REVIEW

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Presidential Documents

Title 3—

The President

Executive Order 12866 of September 30, 1993

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statement of Regulatory Philosophy and Principles.* (a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation

is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. *Organization.* An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. *Definitions.* For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected

to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Sec. 4. *Planning Mechanism.* In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law: (a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

(A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;

(B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;

(C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;

(D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;

(E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter-agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. *Existing Regulations.* In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regula-

tions promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. *Centralized Review of Regulations.* The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory

actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

(i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and

(ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

(i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;

(ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and

(iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rulemaking proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

(i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);

(ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did

not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

(i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;

(ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and

(iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. *Resolution of Conflicts.* To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.

Sec. 8. *Publication.* Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without

any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. *Agency Authority.* Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. *Judicial Review.* Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. *Revocations.* Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.

William J. Clinton

THE WHITE HOUSE,
September 30, 1993.

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Editorial note: For the President's remarks on signing this Executive order, see issue 39 of the *Weekly Compilation of Presidential Documents.*

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