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**OIL POLLUTION ACT OF 1990: OPENING A
NEW ERA IN FEDERAL AND TEXAS
REGULATION OF OIL SPILL
PREVENTION, CONTAINMENT AND
CLEANUP, AND LIABILITY**

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I. INTRODUCTION

Exxon Valdez . . .

One need mention little more than that fated name to conjure up images of environmental tragedy on the scale of Love Canal, Three Mile Island, Bhopal, Chernobyl, and the Persian Gulf. Sadly, these environmental mega-disasters all too often serve as the final but necessary impetus for meaningful public response to what is later revealed to be a serious deficiency in our system of environmental regulation. The contamination of groundwater at Love Canal, New York, which many perceive as having been the catalyst for federal enactment of laws addressing cleanup of abandoned hazardous waste disposal sites, is by now known as simply one among thousands of similar stories of neglect and ignorance. The case is no different for the *Exxon Valdez*.

From 1973 through 1984, the United States experienced between 9,000 and 12,100 oil spills in its waters each year.¹ While most of these spills were small enough that no cleanup effort was deemed necessary, the total amount of oil released into the United States' marine environment from oil spills ranged, during the 1973-84 period, from a low of 8.2 million gallons in 1977 to a high of 21.5 million gallons in 1975.² Since 1972, over 177,000,000 gallons have been spilled.³ Spills of over 1,200 barrels (50,400 gallons) have been few in number, but they have accounted for the majority of oil spilled — 67 percent of the total volume spilled in 1983 came from 19 such large spills.⁴ Many of these large spills are caused by waterborne tanker and barge accidents.⁵

Except for its size, the spill resulting from the wreck of the super-tanker *Exxon Valdez* in March 1989 should not have been the surprise to the public conscience that it was. To be sure, the 11 million gallons

1. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 3, at 8 (1989).

2. *Id.*

3. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 34 (1989).

4. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 3, at 8-9 (1989).

5. *Id.*

spilled in that lone incident dwarf any other single spill in United States' history and will cost more to clean up than the annual budget of a mid-sized city, not to mention the direct damages to natural resources, economic losses, and tax revenue losses.⁶ But the nation's oil spill problem did not begin with the *Exxon Valdez*, and it surely will not end there. Indeed, only months after the *Exxon Valdez* incident, three large spills occurred in rapid succession in distant locations, dumping a total of almost one million gallons of additional oil into the nation's aquatic environment.⁷ The only positive result of the *Exxon Valdez* incident and its progeny is that they served irrefutably to thrust in front of the public eye what many observers, including some in Congress, long believed — "[t]he lack of necessary preparedness for a major spill . . . necessitates that improvements be made in the way the nation plans for and reacts to oil spills."⁸ To its credit, since 1978 Congress had been considering bills to establish a domestic oil pollution liability and compensation regime more comprehensive than federal law provided.⁹ By contrast, efforts to improve oil spill prevention, containment, and cleanup policy lagged far

6. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 3, at 9 (1989). The effect of the spill was devastating, killing over 26,000 migratory birds, 800 sea otters, and 90 eagles, and oiling over 170 miles of national park beaches. *Id.* Several commercial salmon, herring, crab, and shrimp fisheries were closed as a result of oil contamination. *Id.* See, e.g., 1990 State/Federal Natural Resource Damage Assessment and Restoration Plan for the Exxon Valdez Oil Spill (August 1990). The litigation ensuing out of this incident, involving public and private entities, is far too extensive to detail here. See, e.g., *In re Exxon Valdez*, No. A89-095 Civ. (D. Alaska Feb. 8, 1991); *In re Exxon Valdez Oil Spill Litigation*, No. 3AN-89-2533 (Alaska Super. Ct.).

7. H. R. REP. NO. 242, 101st Cong., 1st Sess., pt. 3, at 9-10 (1989). Within 24 hours on June 23 and 24, 1989, the Greek-registered tanker *World Prodigy* struck a rock and spilled over 290,000 gallons of heating oil into Naragansett Bay in Newport, Rhode Island; the oil tanker *Rachel B.* collided with an oil tanker in the Houston Ship Channel, spilling over 250,000 gallons of heavy crude oil; and over 300,000 gallons of heating oil was spilled into the Delaware River when the Uruguayan-registered tanker *President Rivera* ran aground. *Id.* By no means are major oil spills limited to vessel incidents. For example, on January 2, 1988, over one million gallons of diesel oil and gasoline spilled from a collapsed Ashland Oil Company storage tank at a facility near Pittsburgh, Pennsylvania into the Monongahela River. The spill displaced water supplies to over two and one-half million people, killed an estimated 10,000 fish and 2,000 birds, and contaminated hundreds of miles of the Monongahela River and Ohio River aquatic shorelines. See OFFICE OF INSPECTOR GENERAL, ENVIRONMENTAL PROTECTION AGENCY, REPORT OF AUDIT OF THE SPILL PREVENTION CONTROL AND COUNTERMEASURE PROGRAM, at 5 (1990) [hereinafter "EPA Report of Audit"]. Only several months later, a spill from a Shell Oil Company tankage facility near San Francisco spilled over 400,000 gallons of crude oil into the Carquinez Strait. *Id.* at 6.

8. H. R. REP. NO. 242, 101st Cong., 1st Sess., pt. 1, at 28 (1989).

9. See H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 32-36 (1989). For a thorough description of congressional initiatives during this period having to do with liability for oil spills, see also Comment, *Federal Oil Spill Fund Legislation: A Future Standard*, 53 ALB. L. REV. 161, 195-207 (1988) (discussion of 1987 legislative proposals, including congressional, administrative, state, and industrial views).

behind.¹⁰ Then, in 1989, a surge of legislative activity followed on the heels of that year's four major oil spills.¹¹ Although the bills under consideration failed to gain early approval, the momentum Congress built in 1989 led to enactment of the Oil Pollution Act of 1990 ("OPA").¹²

Congress succinctly stated the premise for OPA in connection with one of the bills under consideration in 1989:

What the Nation needs is a package of complementary international, national, and State laws that will adequately compensate victims of oil spills, provide quick, efficient cleanup, minimize damage to fisheries, wildlife and other natural resources and internalize those costs within the oil industry and its transportation sector.

Instead, there is a fragmented collection of Federal and State laws providing inadequate cleanup and damage remedies, taxpayer subsidies to cover cleanup costs, third party damages that go uncompensated, and substantial barriers to victim recoveries — such as legal defenses, statutes of limitation, the corporate form, and the burdens of proof that favor those responsible for the spill.¹³

Congress thus identified the three principle areas to be addressed in federal oil pollution legislation — prevention, containment and cleanup, and liability.¹⁴

This article assesses Congress' effort, through enactment of OPA, to meet the goals it stated in 1989. Part II provides an overview of the

10. See H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 1, at 37-43 (1989).

11. See *id.* at 43-51 (1989), see, e.g., H.R. 1465, 101st Cong., 1st Sess., 135 CONG. REC. H7892-95 (daily ed. Nov. 1, 1989); see also 135 CONG. REC. H7954-75 (daily ed. Nov. 2, 1989), 135 CONG. REC. H8120-67 (daily ed. Nov. 8, 1989). The House passed H.R. 1465 on November 9, 1989, five votes shy of unanimous approval. See 135 CONG. REC. H8241-88 (daily ed. Nov. 9, 1989); S. 686, 101st Cong., 1st Sess., 135 CONG. REC. S9678-9716 (daily ed. Aug. 3, 1989). The Senate passed S. 686 on August 4, 1989, unanimously. See 135 CONG. REC. S10070-90 (daily ed. Aug. 4, 1989). Before Congress could act, still more oil was released into sensitive aquatic environments in large spills occurring in connection with the June 8, 1990, explosion of the *Mega Borg* in the Gulf of Mexico (3.9 million gallons), and the July 28, 1990, collision of a barge with the Greek tanker *Shinoussa* (700,000 gallons), both of which further spurred Congress toward approval of the Oil Pollution Act of 1990. See 136 CONG. REC. 511536-48 (daily ed. Aug. 2, 1990); 136 CONG. REC. H6920-49 (daily ed. Aug. 3, 1990).

12. Pub. L. No. 101-380, 104 Stat. 484 (1990) (to be codified in scattered sections of Titles 14, 16, 23, 26, 33, 43, and 46 of U.S.C. and 46 U.S.C. app.). President Bush signed OPA into law on August 18, 1990. See 26 WEEKLY COMP. PRES. DOC., at 1265-66 (Aug. 27, 1990); see also Grumbles, *Major Provisions, Themes of the Oil Pollution Act of 1990*, 21 Env't Rep. (BNA) 1264-69 (Nov. 2, 1990) (thorough discussion of the legislative background of Congress' work and debate on OPA during 1990); see also Comment, *Federal Oil Spill Fund Legislation: A Future Standard* 53 ALB. L. REV. 161, 207-212 (1988) (discussion of 1989 legislative proposals upon which Senate Bill for OPA was based) (hereinafter "Comment, *Federal Oil Spill Fund Legislation*").

13. S. REP. NO. 94, 101st Cong., 1st Sess. 2 (1989).

14. *Id.* at 2-3.

“fragmented” condition of pre-OPA federal law addressing oil spills and an examination of the deficiencies Congress believed existed in that body of law. An understanding of those perceived deficiencies is essential for interpreting OPA. Part III surveys the basic features of OPA, particularly its liability provisions. It concludes that, although OPA surely achieves a major overhaul of federal oil spill law, it is basically in the same boat. Part IV examines the response of the states to OPA, focusing on recent developments in Texas. OPA clearly intends for states to remain an integral part of national oil spill response readiness. Recent developments in the Texas Legislature and the manner in which Texas environmental agencies implement these initiatives will determine how big a role Texas will play.

The article concludes by predicting the effect of OPA on the potential oil spill liabilities faced by the petroleum production and transportation industry. Taken alone, the liability terms of OPA seem straightforward. However, much has changed in the world of environmental law since the laws which OPA amended were first enacted. Placed in the current day context, OPA's liability impact could spread far beyond the primary production and transportation functions. It could affect marketers, ship builders, lenders, insurers, and other ancillary (but essential) participants in the petroleum business. Moreover, OPA leaves for future consideration lurking issues which should be of utmost concern to anyone even remotely touched by OPA.

II. THE PRE-OPA WATERFRONT

A. *The Legal Framework*

It is no exaggeration to accuse pre-OPA oil spill liability law of being fragmented, some would argue, to the point of ineffectiveness. No fewer than five federal laws covered oil spill liabilities in ways sometimes overlapping and sometimes mutually exclusive. Because the federal network overlaid a multitude of state statutory and common law remedies, each with its own nuances, and existed alongside a variety of international protocols, the result was a true patchwork of laws which could confuse even the most experienced.

However, the mere trait of a patchwork approach alone is not enough to condemn the pre-OPA framework. The objective of a comprehensive, fair oil spill liability system could be achieved notwithstanding the lack of a single, all-encompassing statute. Indeed, the adoption of a basic federal “minimum” standard of liability which leaves the states free to supplement, is the federalist approach fundamental to many environ-

mental regulation statutes.¹⁵ But pre-OPA law was perceived as failing even in this respect, and the factors which led to that perception are essential to understanding the objectives of OPA. Thus, a brief review of the pre-OPA legal framework is not only useful, but necessary.

B. Pre-OPA Federal Laws

The cornerstone of pre-OPA federal oil spill liability law was found in the Federal Water Pollution Control Act ("FWPCA").¹⁶ Supplementing that central provision in specified, limited contexts were the Trans-Alaska Pipeline Authorization Act,¹⁷ the Deepwater Port Act of 1974,¹⁸ and the Outer Continental Shelf Lands Act ("OCSLA").¹⁹ Preceding that quartet of liability laws, the River and Harbor Act of 1899, also known as the Refuse Act,²⁰ contained several provisions which allowed recovery for oil spill liabilities in very limited contexts. Curtailing all of those laws in certain circumstances was the Limitation of Liability Act of 1851.²¹

1. FWPCA Section 311

Congress overhauled federal oil spill liability with the 1972 enactment of section 311 of FWPCA,²² which applied to any owner, operator, or other person²³ in charge of any onshore or offshore facility²⁴ or ves-

15. See, e.g., Solid Waste Disposal Act § 3009, 42 U.S.C. § 6929 (1988) (states can impose more stringent regulation); Comprehensive Environmental Response, Compensation, and Liability Act § 114 (CERCLA), 42 U.S.C. § 9614 (1988) (relationship to state laws); Clean Air Act § 116, 42 U.S.C. § 7416 (1988) (retention of state authority under the Clean Air Act).

16. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1988)).

17. Pub. L. No. 93-153, 87 Stat. 584 (1973) (codified as amended at 43 U.S.C. §§ 1651-1655 (1988)).

18. Pub. L. No. 93-627, 88 Stat. 2126 (1975) (codified as amended at 33 U.S.C. §§ 1501-1524 (1988)).

19. Pub. L. No. 95-372, 92 Stat. 629 (1978) (codified as amended at 43 U.S.C. §§ 1331-1356, 1801-1866 (1988 & Supp. I 1989)).

20. River and Harbor Act of 1899, ch. 425, 30 Stat. 1121 (codified as amended in scattered sections of 33 U.S.C., principally at 33 U.S.C. § 407 (1988)).

21. Limitation of Liability Act, ch. 43, 9 Stat. 635 (codified as amended at 46 U.S.C. app. §§ 181-196 (1988)).

22. Pub. L. No. 92-500, 86 Stat. 816, 862 (1972) (codified at 33 U.S.C. § 1321 (1988)).

23. Section 311 defined the owner or operator as:

(A) in the case of a vessel, any person owning, operating, or chartering by demise, such 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.

FWPCA § 311(a)(6), 33 U.S.C. § 1321(a)(6) (1988). A person under section 311 included "an

sel²⁵ from which oil²⁶ was discharged²⁷ into or upon the navigable waters of the United States,²⁸ adjoining shorelines, the waters of the contiguous zone,²⁹ or in connection with activities covered by OCSLA or DWPA. The basic scheme of section 311 was to establish the authority, standards, and funding for federally-coordinated oil spill cleanups and to provide the means to recover cleanup costs, damages to natural resources, and civil penalties.

The cleanup side of section 311 revolved around the requirement that the President create a National Contingency Plan ("NCP") to "provide for efficient, coordinated, and effective action to minimize damage from oil . . . discharges, including containment, dispersal, and removal of oil . . ." ³⁰ A person having knowledge of an oil discharge from a vessel or facility under the control of such person was required to report the discharge pursuant to the NCP.³¹ Section 311 authorized the President,

individual, firm, corporation, association, and a partnership." FWPCA § 311(a)(7), 33 U.S.C. § 1321(a)(7) (1988).

24. FWPCA section 311 defined an onshore facility as "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." FWPCA § 311(a)(10), 33 U.S.C. § 1321(a)(10) (1988). An offshore facility included "any facility of any kind located in, on, or under, any of the navigable waters of the United States, other than a vessel or public vessel." FWPCA § 311(a)(11), (codified with some differences in language at 33 U.S.C. § 1321 (1988)).

25. A vessel under section 311 included "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." FWPCA § 311(a)(3), 33 U.S.C. § 1321(a)(3) (1988).

26. The term "oil" under section 311 extended to "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." FWPCA § 311(a)(1), 33 U.S.C. § 1321(a)(1) (1988).

27. Discharges regulated under section 311 included, "any spilling, leaking, pumping, pouring, emitting, emptying or dumping." FWPCA § 311(a)(2), 33 U.S.C. § 1321(a)(2) (1988).

28. The navigable waters of the United States subject to regulation under section 311 included all "the waters of the United States, including the territorial seas." FWPCA § 502(a)(7), 33 U.S.C. § 1362(a)(7) (1988). The territorial seas were defined as "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 three miles." FWPCA § 502(8), 33 U.S.C. § 1362(8) (1988).

29. The contiguous zone was defined in section 311 as "the entire zone established or to be established by the United States under article 24 of the Convention on the Territorial Sea and the Contiguous Zone." FWPCA § 311(a)(9), 33 U.S.C. § 1321(a)(9) (1988).

30. FWPCA § 311(d)(2), 33 U.S.C. § 1321(d)(2) (1988). The National Oil and Hazardous Pollution Contingency Plan ("NCP") was promulgated at 40 C.F.R. §§ 300.1-300.920 (1990). Through the NCP, the President has delegated the various duties required under Section 311 to the Environmental Protection Agency ("EPA") and the United States Coast Guard under a unified regulation. 40 C.F.R. § 300.3(b) (1990). EPA recently amended portions of the NCP dealing principally with hazardous substances. *See* 55 Fed. Reg. 8,666 (1990).

31. FWPCA § 311(b)(5), 86 Stat. 862, 864 (1972) (codified at 33 U.S.C. § 1321(b)(5) (1988)) (authorizing the President to act or arrange for removal of oil).

acting under procedures and standards established in the NCP and drawing from a revolving fund set at \$35 million,³² “to act to remove or arrange for the removal of such oil” discharged into covered areas.³³ Alternatively, the President could allow the owner or operator of the facility or vessel from which the discharge occurred to conduct the oil removal if the President determined that person would do so properly.³⁴

The liability side of section 311 was more complex; asserting strict liability but relying at its core on a two-tiered distinction between discharges caused by “willful negligence or willful misconduct within the privity and knowledge of the owner” of the facility or vessel³⁵, and discharges caused without such scienter. For discharges caused by willful negligence or misconduct, section 311 authorized the federal government to recover the full amount of the cleanup costs from the owner or operator of the discharging facility or vessel.³⁶ In contrast, where willful conduct could not be shown, section 311 provided monetary limitations on what nonetheless remained strict liability for the oil removal costs.³⁷ In either case, the allowed costs could be recovered through a federal judicial action or, for discharges from vessels, through a federal maritime lien proceeding.³⁸ Included within the scope of oil removal costs were natural resource damages which encompassed “any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil”³⁹

Defenses to this strict liability provision were extremely limited. The defenses required proof that the spill was caused solely by “(A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without

32. FWPCA § 311(k), 33 U.S.C. § 1321(k) (1988) (repealed by OPA § 2002(b)(2)).

33. FWPCA § 311(c)(1)(A), 33 U.S.C. § 1321(c)(1)(A) (1988) (authorizing the President to act to arrange for removal of oil).

34. FWPCA § 311(c)(1)(B), 33 U.S.C. § 1321(c)(1)(B) (1988).

35. FWPCA § 311(f)(1)-(3), 33 U.S.C. § 1321(f)(1)-(3) (1988).

36. *Id.*

37. FWPCA § 311(f)(1), 33 U.S.C. § 1321(f)(1) (1988). The liability limits under § 311 varied for vessels, onshore facilities, and offshore facilities. Vessel liability was limited to “an amount not to exceed, in the case of an inland oil barge \$125 per gross ton of such barge, or \$125,000, whichever is greater, and in the case of any other vessel, \$150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, \$250,000), whichever is greater.” Offshore facilities were subject to a flat \$50,000,000 limit. FWPCA § 311(f)(3), 33 U.S.C. § 1321(f)(3) (1988) (public law set the limit at \$8,000,000). The \$50,000,000 limit for onshore and offshore facilities could be reduced by regulation to as low an amount as \$8,000,000. FWPCA § 311(q), 33 U.S.C. § 1321(q) (1988).

38. FWPCA § 311(f)(1)-(3), 33 U.S.C. § 1321(f)(1)-(3) (1982).

39. FWPCA § 311(f)(4), 33 U.S.C. § 1321(f)(4) (1988).

regard to whether any such act or omission was or was not negligent”⁴⁰ Moreover, the third party liability defense was further limited by the requirement that the primary party pay the government’s costs and be merely subrogated to the United States’ recovery against the third party.⁴¹ That remedy, in turn, was similarly limited to the two-tiered scheme employed against the owner or operator who is primarily responsible for the spill.⁴² In cases of joint causation by the owner or operator and a third party, the United States could sue the third party directly under section 1321(f)(1)-(3) or other applicable laws,⁴³ and the owner or operator retained all rights of contribution or other claims against the third party which may otherwise have applied.⁴⁴

Sorely lacking from section 311 was a meaningful spill prevention measure. Congress instructed the President, without specific guidance, merely to promulgate regulations “establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil . . . [and] governing the inspection of vessels carrying cargoes of oil.”⁴⁵ Indirectly, a requirement that certain vessels maintain evidence of financial responsibility satisfying specified amounts could have assisted in spill prevention.⁴⁶ Like the other regulatory provisions of section 311, these measures could be enforced through civil penalty actions.⁴⁷

2. *Fund-Based Supplements to Section 311*

After enactment of FWPCA, Congress enacted, as supplements to section 311, three additional federal laws to address specific oil spill problems. Due to the importance of the problems these laws addressed, when taken together, these measures had a substantial effect on federal oil spill liability law.

3. *Trans-Alaska Pipeline Authorization Act*

The first law enacted supplementing section 311 of FWPCA was the

40. FWPCA § 311(f)(2), 33 U.S.C. § 1321(f)(2) (1988).

41. FWPCA § 311(g), 33 U.S.C. § 1321(g) (1988).

42. *Id.*

43. FWPCA § 311(h), 33 U.S.C. § 1321(h) (1988).

44. *Id.*

45. FWPCA § 311(j), 33 U.S.C. § 1321(j) (1988). EPA has promulgated oil spill prevention regulations applicable to specified onshore oil storage facilities. *See* 40 C.F.R. § 112 (1991). EPA estimates that 650,000 such facilities are subject to those regulations. *See* EPA Report of Audit *supra* note 7, at 5 (1990). EPA currently plans to strengthen the standards through regulatory amendments expected to be proposed in 1991. EPA Report of Audit, *supra* note 7, at 14.

46. FWPCA § 311(p), 33 U.S.C. § 1321(p) (1988) (repealed by OPA § 2002(b)(4)).

47. FWPCA § 311(b)(6)(A)-(B), 33 U.S.C. § 1321(b)(6)(A)-(B).

Trans-Alaska Pipeline Authorization Act ("TAPAA")⁴⁸ of 1973. TAPAA established a \$100 million fund by imposing a tax on all oil transported through the Trans-Alaska pipeline.⁴⁹ The fund could be used immediately to finance or reimburse cleanup costs for oil spills occurring from oil transported "along or in the vicinity of" the pipeline,⁵⁰ including oil from vessels loaded at the pipeline's terminal facilities.⁵¹ The TAPAA fund could also be used to compensate for damages in excess of the government's cleanup costs, including natural resource damages and private property and economic damages.⁵² TAPAA made discharging vessel owners strictly liable for the first \$14 million of all such cleanup costs and other damages, with the fund used for the remainder of the costs up to \$100 million per incident.⁵³

4. Deepwater Port Act of 1974

The Deepwater Port Act of 1974 ("DWPA")⁵⁴ made the owner or operator of a vessel or the licensee of a deepwater port⁵⁵ strictly liable for cleanup costs and damages resulting from oil spilled from deepwater ports, from vessels carrying oil from a deepwater port, or from any vessel located in a deepwater port's safety zone.⁵⁶ Like FWPCA, DWPA established a cleanup fund⁵⁷ and employed a two-tiered liability limitation scheme.⁵⁸ Unlike section 311, DWPA extended recovery rights to individuals⁵⁹ and allowed the United States Attorney General to pursue class actions for property damages.⁶⁰ The government could also recover

48. Pub. L. No. 93-153, 87 Stat. 584 (1973) (codified at 43 U.S.C. §§ 1651-1655 (1988)).

49. 43 U.S.C. § 1653(c)(5) (1988).

50. 43 U.S.C. § 1653(a)(1) (1988).

51. 43 U.S.C. § 1653(c)(1) (1988).

52. 43 U.S.C. § 1653(a)(1) (1988).

53. 43 U.S.C. § 1653(c)(3) (1988).

54. Pub. L. No. 93-627, 88 Stat. 2126 (1975) (codified at 33 U.S.C. §§ 1501-1524 (1988)).

55. A deepwater port is defined as:

[A]ny fixed or floating manmade structures other than a vessel, or any group of such structures, located beyond the territorial sea and off the coast of the United States and which are used or intended for use as a port or terminal for the loading or unloading and further handling of oil for transportation to any State . . . [This] includes all associated components and equipment, including pipelines, pumping stations, service platforms, mooring buoys, and similar appurtenances to the extent they are located seaward of the high water mark.

33 U.S.C. § 1502(10) (1988).

56. 33 U.S.C. § 1517(a)(1) (1988). A deepwater port safety zone is "the safety zone established around a deepwater port as determined by the Secretary." 33 U.S.C. § 1502(16) (1988).

57. 33 U.S.C. § 1517(f)(3) (1988).

58. 33 U.S.C. § 1517(d)-(e) (1988).

59. 33 U.S.C. § 1517(i) (1988).

60. *Id.*

natural resource damages for injury to the marine environment.⁶¹

5. Outer Continental Shelf Lands Act

Congress amended the Outer Continental Shelf Lands Act ("OCSLA")⁶² in 1978 to impose strict liability for oil spills on owners and operators of any offshore facility⁶³ located on the Outer Continental Shelf ("OCS")⁶⁴ and on vessels carrying oil from the OCS.⁶⁵ A \$200 million cleanup fund, similar to the section 311 fund, financed by a tax on oil produced from the OCS, was implemented.⁶⁶ While Congress limited vessel liability except in cases of failure "to provide all reasonable cooperation and assistance,"⁶⁷ it did not limit offshore facility liability for an oil spill cleanup.⁶⁸ Like TAPAA, OCSLA imposed limited liability for "[c]laims for economic loss, arising out of or directly resulting from oil pollution"⁶⁹ which could be pursued by individuals or, as under DWPA, by the Attorney General in class actions.⁷⁰ Indeed, the OCSLA fund could be tapped to compensate such economic losses when the discharger's liability limits have been met.⁷¹

6. Refuse Act Liability

Although it preceded the four fund-based oil spill liability statutes, the Refuse Act⁷² had never proven an effective tool for establishing liability for oil spills. The Act made it unlawful to discharge refuse, other than sewage, into the navigable waters of the United States without a permit.⁷³ Courts construed *refuse* to include oil discharges.⁷⁴ Although

61. 33 U.S.C. § 1517(i)(3) (1988).

62. Pub. L. No. 95-372, 92 Stat. 630 (1978) (codified at 43 U.S.C. §§ 1331-1356, 1801-1866 (1988)).

63. OCSLA defined an offshore facility as:

[A]ny oil refinery, drilling structure, oil storage or transfer terminal, or pipeline, or any appurtenance related to any of the foregoing, which is used to drill for, and produce, store, handle, transfer, process, or transport oil produced from the Outer Continental Shelf . . . and is located on the Outer Continental Shelf.

43 U.S.C. § 1811(8) (1988). Vessels and deepwater ports were excluded. *Id.*

64. The Outer Continental Shelf is "all submerged lands lying seaward and outside the area beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a) (1988).

65. 43 U.S.C. § 1814(a), (d) (1988).

66. 43 U.S.C. §§ 1812(a), (d) (1988).

67. 43 U.S.C. § 1814(b)(1) (1988).

68. 43 U.S.C. § 1814(b)(2) (1988).

69. 43 U.S.C. § 1813(a) (1988).

70. 43 U.S.C. § 1813(b)(7) (1988).

71. 43 U.S.C. §§ 1814(f)(1), 1817(d) (1988).

72. Act of Mar. 3, 1899, ch. 425, 30 Stat. 1152 (codified at various sections of 33 U.S.C., principally at 33 U.S.C. § 407 (1988)).

73. *Id.*; see *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973).

the Refuse Act did not specifically provide for recovery of oil spill cleanup costs, the courts implied a civil cause of action to include the government to recover such costs.⁷⁵ That relief, however, was limited to cases where the government showed negligence and causation,⁷⁶ thereby making recovery more burdensome than under the fund-based statutes.

7. *The Limitation of Liability Act of 1851*

The Limitation of Liability Act of 1851 ("1851 Act")⁷⁷ has long plagued the effectiveness of federal oil spill liability law. Enacted to promote a fledgling maritime industry, it provided that a vessel owner's liability for any loss or damage that was not the result of an occurrence within the owner's privity or knowledge was limited to the value of the vessel and freight at the time of the damage.⁷⁸ By judicial interpretation, this valuation was based on the condition of the vessel and freight existing *after* the accident, which may have involved a total loss to both.⁷⁹ Although this principle may have been superseded by the more recent federal laws governing oil spill liability, the 1851 Act has been held to limit oil spill damage recoveries under applicable state law, including state statutes allowing recovery beyond that provided in the federal laws.⁸⁰

C. *Federal Common Law Remedies*

Federal common law public and private remedies existing for oil spill damages prior to enactment of FWPCA⁸¹ (which would have been limited by the 1851 Act in any event) were sharply curtailed by the Supreme Court's 1981 decision in *City of Milwaukee v. Illinois (Milwaukee II)*.⁸² In *Milwaukee II*, the court found that the remedial scheme that FWPCA established was so comprehensive that it preempted federal

74. *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670-73 (1973).

75. *See Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967).

76. *Id.* at 204-07; *United States v. Perma Paving Co.*, 332 F.2d 754 (2d Cir. 1964).

77. Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (codified at 46 U.S.C. app. §§ 181-96 (1988)).

78. 46 U.S.C. app. § 183(a) (1988).

79. *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 492 (1886); *In re Barracuda Tanker Corp.*, 281 F. Supp. 228, 230-33 (S.D.N.Y. 1968), *rev'd*, 409 F.2d 1013 (2d Cir. 1969).

80. *See Palaez, Ownership at Sea: Identifying Those Entitled to Limit Liability in the Admiralty*, 22 DUQ. L. REV. 397 (1984); Comment, *Limitations of Liability in Admiralty: An Anachronism from the Days of Privity*, 10 VILL. L. REV. 721, 725-33 (1965) (provides a thorough discussion of the 1851 Act).

81. *See Comment, Federal Oil Spill Fund Legislation*, *supra* note 12 (provides a more thorough discussion of federal common law maritime tort remedies); Comment, *Cleanup Cost Liability for Oil Spills: Whether the FWPCA Precludes Alternative Remedies for Recovery of Cleanup Expenses*, 2 J. LAND USE & ENVTL. L. 51 (1986).

82. 451 U.S. 304 (1981).

common law remedies for oil pollution.⁸³ Furthermore, over time various arcane limitations imposed on maritime tort recovery had eroded the effectiveness of that avenue of relief.⁸⁴ Hence, by the time Congress considered OPA, federal common law remedies such as maritime tort and nuisance had virtually disappeared as a substantive concern.⁸⁵

D. State Laws

At the time Congress was considering OPA, it knew that most of the Coastal and Great Lakes states had enacted comprehensive oil pollution compensation statutes.⁸⁶ Many of these state laws, albeit limited by the 1851 Act, provided strict, unlimited liability at least as broad as the federal laws, for a scope of cleanup cost and economic injury damages.⁸⁷

By contrast, the Texas oil spill liability provision⁸⁸, promoting the State's policy "to prevent the spill or discharge of hazardous substances into the waters in the state and to cause the removal of such spills and discharges without undue delay"⁸⁹, falls in the category of the more restrictive state laws.

The Texas law authorizes the Texas Water Commission ("TWC") to promulgate rules governing spill response and remediation which the TWC has achieved through the State of Texas Oil and Hazardous Substance Spill Contingency Plan. The Plan sets forth procedures that regulated entities and the State must follow when responding to a spill.⁹⁰ This Plan requires cooperation with other state agencies and with federal agencies implementing section 311 of the FWPCA.⁹¹ A \$5 million fund

83. *Id.* at 317-19.

84. For example, ostensibly as a corollary to the principle of foreseeability of injury, private economic losses resulting from a maritime accident long have been held unrecoverable under maritime tort remedies in the absence of physical damage to the claimant's property. *See Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1021-29 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

85. Except to point out its impotency, there is virtually no mention in congressional debate on OPA of the role or effect of OPA upon federal common law maritime tort remedies with respect to oil spill liability.

86. S. REP. NO. 94, 101st Cong., 1st Sess. 2, at 3 (1989).

87. *See, e.g.*, ALA. CODE § 22-22-9(m) (1990); CAL. WATER CODE § (1990) 13304(c) (West Supp. 1991); GA. CODE ANN. § 12-55-51 (1988); ME. REV. STAT. ANN. tit. 38, § 551(6) (1989); MD. ENV'T CODE ANN. § 4-408 (1987); N.H. REV. STAT. ANN. § 146-A:9 (1990); OR. REV. STAT. § 468.805 (1989); WASH. REV. CODE ANN. § 90.48.335 (1991).

88. *See Texas Hazardous Substance Spill Prevention and Control Act*, TEX. WATER CODE ANN. §§ 26.261-26.268 (Vernon 1988).

89. TEX. WATER CODE ANN. § 26.262 (Vernon 1988).

90. TEX. WATER CODE ANN. § 26.264(b) (Vernon 1988). TWC issued the plan in October 1988. *See State of Texas Oil and Hazardous Spill Contingency Plan*, GP 88-01 (1988).

91. TEX. WATER CODE ANN. §§ 26.264(3)-(h), 26.266(d) (Vernon Supp. 1991).

is available to finance TWC-led oil spill cleanups,⁹² and TWC is required to seek reimbursement from federal oil spill funds and the persons responsible for the spill.⁹³ Responsible persons are directly liable for oil spill abatement⁹⁴ and may be liable to the State for twice TWC's costs in the event the responsible persons fail to perform the cleanup.⁹⁵ In no event, however, may liability exceed \$5 million under the Texas law.⁹⁶

Even prior to the enactment of OPA, Texas oil spill law had come under close scrutiny. In May 1989, Governor Bill Clements commissioned the Governor's Oil Spill Advisory Committee to review the adequacy of the State's legal and administrative framework for dealing with oil spills.⁹⁷ The action may have been prompted by several oil spills the State had suffered in the prior year.⁹⁸ In its interim 1989 report, the Advisory Committee made a broad array of recommendations many of which hinged upon the anticipated revision of federal law.⁹⁹ The Committee continued, after that report, to study each recommendation in the context of the ongoing federal debate in that area. Hence, at the time OPA was under consideration, Texas was itself on the brink of a major overhaul of its oil spill liability law. Similar developments in other states made the issue of preemption a paramount concern as congressional debate on the OPA ensued.

E. International Protocols

In 1969 and 1971, the international community negotiated two agreements dealing with tanker oil spills: The International Convention on Civil Liability for Oil Pollution Damage ("Civil Liability Convention"),¹⁰⁰ and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Compensation Convention) respectively.¹⁰¹ Protocols for the implementation of each of these conventions were established in 1984.¹⁰²

92. TEX. WATER CODE ANN. § 26.265(a) (Vernon Supp. 1991).

93. TEX. WATER CODE ANN. § 26.26(f) (Vernon Supp. 1991).

94. TEX. WATER CODE ANN. § 26.666(a) (Vernon Supp. 1991).

95. TEX. WATER CODE ANN. § 26.265(g) (Vernon Supp. 1991).

96. TEX. WATER CODE ANN. § 26.265(d) (Vernon Supp. 1991).

97. See Texas Governor's Executive Order WPC-89-8 (May 25, 1989); GOVERNOR'S OIL SPILL ADVISORY COMMITTEE, FINAL REPORT (Oct. 1990) (hereinafter FINAL REPORT).

98. See *supra* note 7.

99. See FINAL REPORT *supra* note 97.

100. Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, reprinted in 6 BENEDICT ON ADMIRALTY 6-62.103 (6th ed. 1991).

101. Convention Respecting Establishment of a Fund for Oil Pollution Damage, Dec. 18, 1971, 1110 U.N.T.S. 7, reprinted in 6 BENEDICT ON ADMIRALTY 6-100.2 to 6-112 (6th ed. 1991).

102. Protocol on Civil Liability for Oil Pollution Damage, May 25, 1984, reprinted in 6

The Civil Liability Convention became effective in 1978, exposing shipowners to strict, limited liability for pollution damage and requiring them to carry specified levels of oil pollution liability insurance. The Fund Compensation Convention was intended to provide an international fund to compensate oil spill victims beyond the limits of liability provided under the Civil Liability Convention. However, the 1984 Protocols do not become effective until ratified by ten countries, including six with substantial tanker fleets. The United States had not ratified either of the 1984 Protocols by the time OPA was under consideration, and neither was expected to have any hope of passage without the United States on board. Hence, like Texas and many other states, the international community also watched anxiously as Congress debated OPA.

F. The Perceived Deficiencies of Pre-OPA Federal Law

Congressional debate clearly exposed the deficiencies in federal oil spill regulation and liability policy which OPA was intended to correct. The foremost theme in that respect was that the inadequacies Congress perceived to exist in liability rules had contributed to the failures of the regulatory policy. Thus, Congress concluded, "the costs of spilling and paying for its clean-up and damage is [sic] not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain them."¹⁰³

First, Congress identified several features of section 311 and other pre-OPA federal oil spill laws which established insufficient liability for oil spills. Congress noted that of the \$124 million obligated from the section 311 cleanup fund spent for spills between 1971 and 1982, only \$49 million had been recovered from responsible parties.¹⁰⁴ Congress concluded that FWPCA "sets inappropriately low limits of liability for owners and operators of vessels with respect to Federal oil spill removal costs and natural damages."¹⁰⁵ Moreover, Congress recognized that the fund shortfall problem was compounded by the nature of the section 311 fund as "appropriated from the Treasury . . . [which] undercuts budget

BENEDICT ON ADMIRALTY 6-77 (6th ed. 1991); Protocol Respecting Establishment of an International Fund for Oil Pollution Damage, May 25, 1984, reprinted in 6 BENEDICT ON ADMIRALTY 6-116.2(3) to 116.10 (6th ed. 1991). See C. Wilkinson, L. Pittmen, R. Dye, SLICK WORK: AN ANALYSIS OF THE OIL POLLUTION ACT OF 1990 (Jan. 1991) (hereinafter "Wilkinson") (paper delivered at the Tenth New Orleans Maritime Seminar, New Orleans, Louisiana, Jan. 10, 1991, which gives a thorough discussion of the 1984 protocols, the substance of which is beyond the scope of this article).

103. S. REP. NO. 94, 101st Cong., 1st Sess. 3 (1989).

104. *Id.*

105. *Id.*

reduction goals,"¹⁰⁶ and that the "courts have held that the government cannot use common law maritime tort or nuisance theories to recover its excess costs."¹⁰⁷ Congress also noted that section 311 provided no coverage or compensation for other types of damages.¹⁰⁸ Overall, Congress concluded, the restricted scope of section 311 liability "runs counter to cost internalization policies."¹⁰⁹

Second, in ringing criticism of the 1851 Act, Congress recognized that federal oil spill liability law had prevented state law from compensating for the deficiencies inherent in section 311. As Congress explained:

[T]he 1851 Limitation of Liability Act represents a potentially devastating bar to effective recovery of either cleanup costs or damages. Perhaps that Act had merit 135 years ago, since its purpose was to further the interests of this country's budding merchant marine by encouraging shipbuilding and employment of ships . . . Current application of that law, however, has resulted in situations where the owner pays next to nothing because the vessel and cargo are a total loss following a catastrophic incident. In two Federal cases where the owner of a vessel has invoked the provisions of this Act, courts have held that this law, where applicable, has the effect of limiting recoveries under State law, including provisions allowing unlimited liability.¹¹⁰

Thus, Congress saw a need to ensure that "a state's authority to establish a compensation fund with the same, and possibly broader, purposes as the Federal and international funds are [sic] preserved."¹¹¹

Third, Congress explicitly objected to the patchwork approach of federal oil spill laws, concluding that "they provide varying and uneven liability standards and scope of coverage for cleanup costs and damages associated with activities covered by each individual law."¹¹² That "array of narrowly defined programs can create administrative problems . . ."¹¹³ For example, Congress noted that, given the geographically and functionally delineated jurisdictions of the various federal oil spill laws, it sometimes was necessary "to track down the source of the spill before the

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* Congress thus appears to have concluded that § 311 ran afoul of "two widely accepted principles: A polluter should pay in full for the costs of oil pollution caused by that polluter; and, a victim should be fully compensated." *Id.* at 7.

110. *Id.* at 4 (citing *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234 (9th Cir. 1989).

111. *Id.* at 6.

112. *Id.* at 4.

113. *Id.*

applicable statute was applied and compensation claims presented.”¹¹⁴

With respect to the need for regulatory reform, Congress summed up the *Exxon Valdez* cleanup as “an unreasonably slow, confused and inadequate response by industry and government that failed miserably in containing the spill and preventing damage.”¹¹⁵ That experience and the other spills of 1989 convinced Congress that “we are not using — or have not yet developed — technology capable of containing spills of less than a million gallons, let alone spills the size of the *Exxon Valdez*.”¹¹⁶ But Congress went even further by acknowledging that “any oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment.”¹¹⁷ Hence, Congress found that “preventing oil spills is more important than containing and cleaning them up quickly.”¹¹⁸

Overall, Congress found objectionable much of pre-OPA federal oil spill law. The problems Congress identified were not minor and could not be addressed through merely technical corrections to the existing laws. Rather, by 1989 Congress had clearly established an agenda for overhauling federal oil spill liability and regulatory policy. Thus, it may seem unusual that Congress used “[t]he body of law already established under section 311 of the Clean Water Act [as] the foundation of the reported bill.”¹¹⁹ Nevertheless, OPA does reflect an intent to deal with the deficiencies of prior policy by comprehensive revision rather than piecemeal approaches.

III. OVERVIEW OF THE OPA LIFEBOAT

OPA consists of nine titles.¹²⁰ Title I sets forth comprehensive liability and compensation provisions detailing who is liable to whom, when, and for how much.¹²¹ Title II contains amendments necessary to conform other laws to OPA’s provisions and to clarify their application.¹²² Title III relates to the United States’ participation in interna-

114. *Id.* Essentially the same liability deficiencies as those Congress identified are discussed in Comment, *Federal Oil Spill Fund Legislation*, *supra* note 12 at 181-86.

115. S. REP. NO. 94, 101st Cong., 1st Sess. 2 (1989).

116. *Id.*

117. *Id.*

118. *Id.* at 3.

119. *Id.* at 4.

120. Oil Pollution Act of 1990 (“OPA”), Pub. L. No. 101-380, 104 Stat. 484 (to be codified in scattered sections of Titles 14, 16, 23, 26, 33, 43, and 46 of U.S.C., and 46 U.S.C. app. (1990)).

121. OPA §§ 1001-1020, 104 Stat. at 486-506 (1990).

122. OPA §§ 2001-2004, 104 Stat. at 506-07 (1990).

tional efforts to prevent and clean up oil spills.¹²³ Title IV contains a variety of provisions also aimed at preventing and cleaning up oil spills.¹²⁴ For example, Title IV provisions establish oil tanker personnel requirements, requires double hulls on tankers, federal oil spill removal authority, a national oil spill response system, and certain increased penalties applicable to those handling oil.¹²⁵ Title V includes provisions specifically applicable to the Prince William Sound in Alaska.¹²⁶ Title VI includes various provisions, including appropriations, restricting drilling activity on the Outer Banks of North Carolina, and cooperative development of certain underwater lands.¹²⁷ Title VII establishes an oil pollution research committee.¹²⁸ Title VIII provides amendments regarding the Trans-Alaska Pipeline System which increase certain penalties, add new liability provisions, merge the Trans-Alaska Pipeline Liability Fund into the Oil Spill Liability Trust Fund, and require an inspection of and report on the Trans-Alaska Pipeline System.¹²⁹ Title IX contains provisions related to the funding of and expenditures by the Oil Spill Liability Trust Fund.¹³⁰

A. Title I — The Liability Provisions

1. Who Is Liable and for How Much?

Section 1002(a) is the heart of OPA's liability provisions. That section provides:

[E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses 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 . . . that result from such incident.¹³¹

OPA defines most of the terms used in this subsection broadly enough to include virtually any emission of oil which affects or threatens the navigable waters of the United States.

123. OPA §§ 3001-3005, 104 Stat. at 507-08 (1990).

124. OPA §§ 4101-4306, 104 Stat. at 509-41 (1990).

125. *Id.*

126. OPA §§ 5001-5007, 104 Stat. at 542-54 (1990).

127. OPA §§ 6001-6004, 104 Stat. at 554-59 (1990).

128. OPA § 7001, 104 Stat. at 559-64 (1990).

129. OPA §§ 8001-8302, 104 Stat. at 564-73 (1990).

130. OPA §§ 9001-9002, 104 Stat. at 573-75 (1990).

131. OPA § 1002(a), 104 Stat. at 489 (to be codified at 33 U.S.C. § 2702(a) (1990)).

2. Responsible Parties

a. Parties in Control

OPA defines a responsible party in the context of the structure at issue — vessels, onshore facilities, offshore facilities, deepwater ports, pipelines, and abandoned vessels, facilities, ports or pipelines.¹³² These definitions generally focus on the degree of control one has over the structure — *i.e.*, whether the party is an owner, operator, demise charterer, lessee, assignee or permittee of the vessel or structure at issue. These definitions do not preclude the existence of more than one responsible party for an actual or threatened oil emission.¹³³

OPA defines a “lessee” as “a person holding a leasehold interest in an oil or gas lease on lands beneath navigable waters . . . or on submerged lands of the Outer Continental Shelf, granted or maintained under applicable State law or the Outer Continental Shelf Lands Act (citation omitted).”¹³⁴ OPA defines a “permittee” as “a person holding an

132. OPA § 1001(32), 104 Stat. at 488-89 (1990) provides that a “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. §§ 1501-1524)), 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.

133. H.R. REP. NO. 242, 101st Cong. 1st Sess., pt. 2, at 55 (1989).

134. OPA § 1001(16), 104 Stat. 484, 487 (1990) (to be codified at 33 U.S.C. § 2701(16)). The term “navigable waters” as used in this definition is defined in Section 2(a) of the Submerged Lands Act (43 U.S.C. § 1301(a) (1988)). The term “navigable waters” as used elsewhere in OPA is the same as that contained in Section 502 of the FWPCA and is intended to have the same meaning under OPA as under the FWPCA. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 102 (1990). These definitions do not differ significantly.

authorization, license, or permit for geological exploration issued under section 11 of the Outer Continental Shelf Lands Act or applicable State law”¹³⁵ While situations may arise where the application of these definitions will be less than clear, they are relatively straightforward.

In contrast, OPA’s definition of “owner or operator” is likely to raise questions regarding its scope. OPA defines an “owner or operator” as follows:

(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 abandonment¹³⁶

At first blush, this appears to be an “I’ll know it when I see it” definition. However, OPA’s legislative history provides some guidance regarding the definition’s interpretation. According to the Conference Committee, the OPA definition of “owner or operator” is taken verbatim from section 311(a) of the FWPCA and is intended to have the same meaning.¹³⁷

One court interpreted that definition as:

The owner-operator of a vessel or a [f]acility has the capacity to make timely discovery of oil discharges. The owner-operator has power to direct the activities of persons who control the mechanisms causing the pollution. The owner-operator has the capacity to prevent and abate damage.¹³⁸

Thus, a key component to determining whether one is an owner or operator is determining the degree of control that one has over the vessel or facility at issue. Of course, this raises the question of what degree of control is required before liability attaches. The answer to that question is not clear.

It should be noted that OPA definitions change how current law addresses the liability for oil discharges with respect to OCS facilities. OCSLA provides that the owner or operator of an OCS facility is liable

135. OPA § 1001(28), 104 Stat. 484, 488 (1990) (to be codified at 33 U.S.C. § 2701(16)) (citations omitted).

136. OPA § 1001(26), 104 Stat. at 488 (1990).

137. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 102 (1990).

138. *United States v. Mobil Oil Corp.*, 464 F.2d 1124, 1127 (5th Cir. 1972). This definition was used by the court in *CPC Int’l, Inc. v. Aerojet-General Corp.*, 731 F. Supp. 783 (W.D. Mich. 1989) as guidance to interpret the definition of “owned or operated” in section 107(a)(2) of CERCLA (42 U.S.C. § 9607(a) (2) (1988)). In that case, the court also noted that where “a party assumes control of an activity and then fails to perform . . . [that party] should bear the responsibility for any pollution which results.” *Id.* at 788.

for these discharges.¹³⁹ However, the owner or operator is often not the actual holder of the rights to produce the oil.¹⁴⁰ By defining the responsible party as the lessee or permittee of the area in which the facility is located or the holder of the OCS rights, OPA harmonizes the law with that which existed before the 1978 OCSLA amendments and allows OCS leaseholders and drilling contractors to allocate their liability through contracts and indemnity agreements.¹⁴¹

b. Third Party Liability

As was true under section 311 of the FWPCA, a responsible party under OPA may be able to sue a third party for reimbursement in some circumstances¹⁴² or may collect reimbursement from the Oil Spill Liability Trust Fund¹⁴³ ("OSLTF" or "Fund") after paying the removal costs or damages to any claimant. A third party may be treated as a responsible party for purposes of determining liability under OPA if the responsible party can show that the discharge or threat of discharge and the resulting removal costs and damages were caused solely by an act or omission of the third party.¹⁴⁴ In order to assert this third party defense, the responsible party must show the following:

(1) that the responsible party "exercised due care with respect to the oil";¹⁴⁵

(2) that the responsible party "took precautions against foreseeable acts or omissions of the third party and the foreseeable consequences of those acts or omissions";¹⁴⁶ and,

(3) that the third party was not an employee or agent of the responsible party nor that the third party's act or omission occurred in connection with any contractual relationship with the responsible party, except when the contractual relationship involved carriage of oil by a common

139. 43 U.S.C. § 1814(a) (1988).

140. S. REP. NO. 94, 101st Cong., 1st Sess. 12 (1989).

141. *Id.*

142. *See generally* OPA §§ 1002(d), 1003(a)(3), 104 Stat. 484, 490-91 (1990) (to be codified at 33 U.S.C. §§ 2702(d), 2703(a)(3)).

143. *See generally* OPA §§ 1012-1013 (uses of the fund and cleanup procedure), 9001-9002 (creation of fund), 104 Stat. 484, 498-01, 573-75 (1990) (to be codified at 33 U.S.C. §§ 4612, 9509).

144. OPA §§ 1002(d)(1)(A), 1003(a)(3), 104 Stat. at 490-91 (1990).

145. OPA § 1003(a)(3)(A), 104 Stat. at 491 (1990).

146. OPA § 1003(a)(3)(B), 104 Stat. at 491 (1990). The purpose of this requirement is "to preclude defendant from avoiding liability by claiming a third party was responsible, when that third party had a contractual relationship with the defendant and was acting, in essence, as an extension of the defendant." S. REP. NO. 94, 101st Cong., 1st Sess., 13 (1989).

carrier by rail.¹⁴⁷

c. Vessels and Facilities

In general, if a structure floats, can float, or affects oil, one initially should assume that the structure is subject to OPA's requirements. OPA's definition of "vessel" includes everything that is or could be used as a means of transportation on water.¹⁴⁸ Congress intended the definition to cover every watercraft.¹⁴⁹ However, OPA exempts "public vessels" from this definition¹⁵⁰ and therefore, from OPA liability.

OPA's definition of "facility" essentially covers everything that is not a vessel, including drilling rigs, pipelines, oil trucks, refineries, and any other oil-related devices.¹⁵¹ It is noteworthy that the public exception provided for "vessels" does not apply to "facilities."

d. Discharge

OPA declares that any emission of oil which is not natural seepage is covered by the Act.¹⁵² The Act does not define what constitutes a "substantial threat of a discharge of oil." As a result, it is not clear how great a threat there must be, or how long a threat must last, before liability attaches. The legislative history of OPA provides little insight regarding the intent of this phrase. In its Report on the measure, the House of Representatives Committee on Merchant Marine and Fisheries noted:

The Committee intends that liability for removal costs resulting from a threat of a discharge of oil should attach in the event that the threat is substantial. Thus, liability may exist if a vessel were aground and actions were taken to pre[v]ent the vessel from breaking up and spilling the oil. No liability would result, however, from the presence of tanker traffic alongside waterfront property

147. OPA § 1003(a)(3), 104 Stat. at 491 (1990); H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. (1990).

148. OPA § 1001(37), 104 Stat. at 489 (1990) (to be codified at 33 U.S.C. § 2701(37)).

149. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 56 (1989).

150. OPA § 1001(37), 104 Stat. 489 (1990) (to be codified at 33 U.S.C. § 2701(37)). OPA defines "public vessel" in § 1001(29) as a "vessel owned or bareboat chartered and operated by the United States, or by a [s]tate or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce . . ." OPA § 1001(29), 104 Stat. at 486 (1990) (to be codified at 33 U.S.C. § 2701(29)). Generally, these are a subclass of vessels that perform governmental functions for federal state or local governments. See H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 54 (1989). The "except when the vessel is engaged in commerce" clause means that a *public vessel* is to be treated as a *vessel* when it is engaged in any type of trade or business involving the transportation of goods or persons, excluding when it is performing service as a combat vessel. *Id.*

151. OPA § 1001(9), 104 Stat. 484, 486 (1990) (to be codified at 33 U.S.C. § 2701(9)).

152. OPA § 1001(7), 104 Stat. at 486 (1990); H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 52 (1989).

resulting in reduced property values because of the potential for a discharge of oil.¹⁵³

This gray area may give rise to intense debate between those enforcing the Act and those claiming they did not meet the threshold of danger necessary for liability.

It is important to note that certain discharges are not covered by OPA.¹⁵⁴ These include discharges authorized by federal, state or local permits, discharges from a public vessel, and discharges subject to the Trans-Alaska Pipeline Authorization Act.¹⁵⁵

e. Covered Waters

OPA covers emissions into or upon the navigable waters, adjoining shorelines or the exclusive economic zone.¹⁵⁶ The "exclusive economic zone,"¹⁵⁷ established by Presidential Proclamation No. 5030, extends 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.¹⁵⁸ OPA defines the territorial seas as "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."¹⁵⁹ This definition is the same as the one given in section 502 of FWPCA.¹⁶⁰

3. Liability

OPA provides that "each responsible party . . . is liable" for the removal costs and damages resulting from an oil discharge.¹⁶¹ This provision results in joint, several, and strict liability for each responsible party for the entire removal costs and damages resulting from a discharge, subject to certain limitations.¹⁶²

The first clause of section 1002(a), "[n]otwithstanding any other

153. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 56 (1989).

154. OPA § 1002(c), 104 Stat. 484, 490 (1990) (to be codified at 33 U.S.C. § 2702(6)).

155. *Id.* In addition, some oil-related discharges are covered by regulations not promulgated pursuant to OPA. For example, on March 13, 1991, EPA proposed new regulations promulgated under the Clean Water Act to limit effluent discharges to waters of the United States from offshore oil and gas extraction facilities. 56 Fed. Reg. 10,664 (1991).

156. OPA § 1002(a), 104 Stat. at 489 (1990).

157. OPA § 1001(8), 104 Stat. at 486 (1990).

158. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 52 (1989).

159. OPA § 1001(35), 104 Stat. 484, 489 (1990) (to be codified at 33 U.S.C. § 2701(35)).

160. 33 U.S.C. § 1362(8) (1988); H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 102 (1989).

161. OPA § 1002(a), 104 Stat. 484, 489 (1990) (to be codified at 33 U.S.C. § 2702(a)).

162. S. REP. NO. 94, 101st Cong., 1st Sess. 11 (1989); H.R. REP. 101-653, 101st Cong., 2d Sess., at 102 (1990).

provision or rule of law . . .,” indicates that the liability limitations provided by the 1851 Act do not limit the liability imposed by OPA.¹⁶³ This clause also negates application of the *Robins Doctrine*.¹⁶⁴

Section 1003 provides three complete defenses to first party liability — a discharge caused by an act of God, an act of war, or an act or omission of a third party.¹⁶⁵ The Act also provides that a responsible party is not liable for damages to a claimant to the extent those damages are due to the claimant’s gross negligence or willful misconduct.¹⁶⁶ However, the Act limits the applicability of these defenses in certain circumstances, including a failure to report the discharge or a failure to cooperate with a responsible official on removal activities.¹⁶⁷ Although OPA does not specify the standard of proof applicable to these defenses, a responsible party will likely need to prove the applicability of a defense by a preponderance of the evidence.¹⁶⁸

The Act limits a responsible party’s liability,¹⁶⁹ except for discharges from an OCS facility, a vessel carrying oil as cargo from such a facility, or incidents where the responsible party’s or his employee’s, agent’s, or other contractually related person’s gross negligence, willful misconduct, or violation of an applicable federal safety, construction or operation reg-

163. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 103 (1990). OPA § 1018(c), 104 Stat. 484, 506 (1990) (to be codified at 33 U.S.C. § 2718(c)), provides that the Act of March 3, 1851 does not limit the imposition of additional liability, additional requirements, or the amount of any fine or penalty for any violation of law relating to the discharge or substantial threat of a discharge of oil. The Act limits vessel owner liability to “the amount or value of the interest of such owner in such vessel, and her freight pending.” S. REP. NO. 94, 101st Cong., 1st Sess. 4 (1990).

164. See *supra* note 84 and accompanying text.

165. OPA § 1003(a)(3), 104 Stat. 484, 491 (1990) (to be codified at 33 U.S.C. § 2703(a)(3)). These defenses are similar to those provided by § 311(f) of FWPCA, except for the third party defenses.

166. OPA § 1003(b), 104 Stat. at 491 (1990).

167. OPA § 1003(c), 104 Stat. at 491 (1990).

168. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 58 (1989).

169. OPA § 1004(a), 104 Stat. 484, 491-92 (1990) (to be codified at 33 U.S.C. § 2704(a)).

This section provides the following limits on liability:

(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.

ulation causes a discharge.¹⁷⁰ The Act authorizes the President to adjust these limitations for onshore facilities subject to certain constraints.¹⁷¹ In addition, OPA allows for the study of the environmental risks associated with deepwater ports and the adjustment of limits of liability under DWPA to reflect those risks.¹⁷² If a responsible party is entitled to assert either a complete defense or the liability limitations, the party may recover from OSLTF funds spent in excess of his liability.¹⁷³ OPA allows parties to enter into indemnity agreements¹⁷⁴, but it does not allow a responsible party to transfer liability to another party.¹⁷⁵

4. Damages

A responsible party may be liable for all removal costs¹⁷⁶ and damages to natural resources,¹⁷⁷ real or personal property,¹⁷⁸ subsistence use,¹⁷⁹ revenues of governmental units (including taxes),¹⁸⁰ profits and earning capacity,¹⁸¹ the costs of providing increased or additional public services,¹⁸² and interest on all the above.¹⁸³ The claimants for these damages may be United States citizens or foreigners.¹⁸⁴ Unless the re-

170. The requirement that the violation of an applicable federal safety, construction, or operating regulation proximately causes the incident is intended to limit the violations which will negate the liability limits. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 559 (1989). In other words, the regulation which is alleged to have been violated must be related to the discharge and should not be "trivial requirements." S. REP. NO. 94, 101st Cong., 1st Sess. at 14 (1989). However, it is likely that investigations regarding the cause of a spill will almost always indicate a violation or series of violations that contributed to causing the discharge. As a result, it is possible that the limits on liability will seldom, if ever, apply.

171. OPA § 1004(d), 104 Stat. at 493 (1990) (to be codified at 33 U.S.C. § 2704(d)). The President must consider the facility's "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." *Id.*

172. OPA § 1004(d)(2), 104 Stat. at 493 (1990).

173. OPA § 1008, 104 Stat. at 497 (1990).

174. OPA § 1010(a), 104 Stat. at 498 (1990).

175. OPA § 1010(b), 104 Stat. at 498 (1990).

176. OPA § 1002(b)(1), 104 Stat. at 489 (1990).

177. OPA § 1002(b)(2)(A), 104 Stat. at 490 (1990).

178. OPA § 1002(b)(2)(B), 104 Stat. at 490 (1990).

179. OPA § 1002(b)(2)(C), 104 Stat. at 490 (1990).

180. OPA § 1002(b)(2)(D), 104 Stat. at 490 (1990).

181. OPA § 1002(b)(2)(E), 104 Stat. at 490 (1990). A claimant for these lost profits and earning capacity does not have to be the owner of the damaged property or resources to recover the lost profits or income. H.R. CONF. REP. NO. 101-653; 101st Cong., 2d Sess. 103 (1990).

182. OPA § 1002(b)(2)(F), 104 Stat. 484, 490 (1990) (to be codified at 33 U.S.C. § 2702(b)(2)(F)).

183. OPA § 1005, 104 Stat. at 493-94 (1990).

184. OPA § 1007, 104 Stat. at 496-97 (1990). Foreigners can recover for removal costs or damages only in certain cases. OPA § 1007(b), 104 Stat. at 497 (1990). In order to recover, a foreign claimant must meet the definition provided in section 1007(c), show that he has not

sponsible party can either assert a complete defense or show it is entitled to a limitation on liability, the responsible party faces unlimited liability. Natural resources damages under the Act include: "(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."¹⁸⁵ OPA requires the President to promulgate regulations regarding how to assess these damages by August 18, 1992.¹⁸⁶ OPA also provides for the designation of federal, state, Indian, and foreign trustees responsible for assessing and presenting claims for natural resources damages and developing and implementing "a plan for the restoration, rehabilitation, replacement or acquisition of the equivalent of the natural resources under their trusteeship."¹⁸⁷

5. *Oil Spill Liability Trust Fund*

Section 1012 of OPA governs the uses of the Oil Spill Liability Trust Fund. The OSLTF is available to the President to pay for removal costs, costs of the natural resource trustees, removal costs, uncompensated removal costs, and certain related administrative, operational and personnel costs and expenses.¹⁸⁸ However, the Fund may not be used to pay claims which result from a claimant's gross negligence or willful miscon-

otherwise been compensated for his removal costs or damages, and establish that the recovery sought is authorized by a treaty or executive agreement between the United States and the claimant's country or that the claimant's country provides a comparable remedy for United States claimants. OPA § 1007(a)(1), 104 Stat. at 496-97 (1990). The latter alternative requirement does not apply to Canadian citizens under certain circumstances. OPA § 1007(a)(2), 104 Stat. at 497 (1990).

185. OPA § 1006(d)(1), 104 Stat. at 496 (1990). The diminution of value element refers to the standard for measuring natural resource damages used in *Ohio v. United States Dep't of the Interior*, 880 F.2d 432 (D.C. Cir. 1989). H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 108 (1990). In that case, the court rejected the Department of the Interior's use of a narrow market value and use value based approach to assessing damages. *Ohio v. United States Dep't of the Interior*, 880 F.2d 432, 642-464 (D.C. Cir. 1989). Instead, the court encouraged the Department "to derive use values for natural resources by summing up all reliably calculated use values, however measured," without double counting. *Id.* at 464. The court also upheld the Department's proposed contingent valuation assessment methodology. *Id.* at 474-81.

186. OPA § 1006(e)(1), 104 Stat. 484, 496 (1990) (to be codified at 33 U.S.C. § 2706(e)(1)). The Act provides that a determination or assessment of damages of natural resources in accordance with the regulations to be promulgated will have the force and effect of a rebuttable presumption. OPA § 1006(e)(2), 104 Stat. at 496 (1990). On December 28, 1990, the National Oceanic and Atmospheric Administration issued an advance notice of proposed rulemaking regarding the development of these damage assessment regulations. 55 Fed. Reg. 53,478 (1990).

187. OPA § 1006(b)-(c), 104 Stat. at 494-96 (1990).

188. OPA § 1012(a), 104 Stat. at 498-99 (1990).

duct.¹⁸⁹ OPA allows the President to promulgate regulations designating officials who may obligate the Fund¹⁹⁰ and requires the President to promulgate regulations regarding how the Fund may be obligated to pay certain costs.¹⁹¹ Under certain circumstances, OPA allows state officials, through the President or pursuant to an agreement, to access the OSLTF for up to \$250,000¹⁹² and permits emergency obligation of the Fund in limited cases.¹⁹³ The OPA also sets forth a series of statutes of limitations for claims against the Fund¹⁹⁴ and outlines a preferential hiring plan for private persons located in an area affected by any discharge.¹⁹⁵

In order to recover monies from the OSLTF, a claimant usually must first present his claim to the responsible party or guarantor of the designated source.¹⁹⁶ If the person to whom a claim is presented denies liability or fails to resolve the claim within ninety days of the latter of presentment or advertisement,¹⁹⁷ the claimant may sue the responsible party or guarantor or present his claim to the OSLTF.¹⁹⁸ OPA requires the President to develop regulations addressing the handling of claims presented to the Fund.¹⁹⁹ If the Fund pays the claim, the Fund is subro-

189. OPA § 1012(b), 104 Stat. at 499 (1990).

190. OPA § 1012(c), 104 Stat. at 499 (1990).

191. OPA § 1012(e), 104 Stat. at 499 (1990). The delay in promulgating these regulations has hindered the Coast Guard's ability to access the fund. *Outdated Rules, Lack of Authority Limits Coast Guard Use of Oil Spill Fund*, 21 *Env't Rep.* (BNA) 1058, 1058-59 (1991).

192. OPA § 1012(d), 104 Stat. at 499 (1990).

193. OPA § 1012(j), 104 Stat. at 500 (1990).

194. OPA § 1012(h), 104 Stat. at 500 (1990). For removal costs, a claimant must present his claim within six years after the date of completion of all removal actions for that incident. OPA § 1012(h)(1), 104 Stat. at 500 (1990). For damages, one must present a claim within three years after the date the claimant discovered the injury and its connection with the discharge or, for natural resources, within three years after the date of the completion of the natural resources damage assessment. OPA § 1012(h)(2), 104 Stat. at 500 (1990). The Act provides for tolling the statute of limitations for minors and incompetents. OPA § 1012(h)(3), 104 Stat. at 500 (1990).

195. OPA § 1012(k)(1), 104 Stat. at 500 (1990).

196. OPA § 1013(a), 104 Stat. at 501 (1990). OPA section 1014(a) provides for the designation of the source of a discharge or threat of discharge by the President. It is important to note that the responsible party or guarantor has five days from notification of a designation to deny the designation. OPA § 1014(b)-(c), 104 Stat. at 501-02 (1990).

197. After the President notifies a responsible party or guarantor of the designation of a source or sources of a discharge or threat of discharge for which they are the responsible party or the guarantor, and that party or guarantor fails to deny the designation, the party or guarantor is required to advertise the designation and the procedures for presenting claims to the party or guarantor. OPA § 1014(b), 104 Stat. at 501-02 (1990). This advertisement must be performed in accordance with regulations which the OPA requires the President to promulgate. OPA § 1014(b), 104 Stat. at 501-02 (1990). In addition, the President may advertise procedures for presenting claims to the OSLTF in certain circumstances. OPA § 1014(c), 104 Stat. at 502 (1990).

198. OPA § 1013(c)-(d), 104 Stat. at 501 (1990).

199. OPA § 1013(e), 104 Stat. at 501 (1990).

gated to that claim,²⁰⁰ and the Attorney General may sue on behalf of the Fund for recovery.²⁰¹

6. *Financial Responsibility*

OPA requires the responsible parties of certain vessels to establish and maintain "evidence of financial responsibility sufficient to meet the maximum amount of liability to which . . . the responsible party could be subject" if the liability limitations provided in section 1004 were applied.²⁰² Where a responsible party owns more than one vessel, they only must provide evidence of financial responsibility to meet the maximum liability applicable to the vessel having the greatest maximum liability.²⁰³ While the Act does not specify where the evidence must be maintained, it will likely need to be maintained on board the vessel or at the facility.²⁰⁴ If a vessel's responsible party fails to establish and maintain evidence of this financial responsibility, the Secretary of the Treasury may withhold or revoke the clearance of the vessel, deny entry of the vessel to any place in the United States or navigable waters, or detain the vessel.²⁰⁵ In addition, if the Secretary finds a vessel in the United States' navigable waters without the proper evidence of financial responsibility, the vessel becomes subject to seizure by, and forfeiture to, the United States.²⁰⁶ Section 4303 also provides for penalties of up to \$25,000 per day of violation of section 1016.²⁰⁷ OPA allows state officials to enforce this requirement in the navigable waters of the state.²⁰⁸ This section should not expand the requirements of section 1016.²⁰⁹ Section 1016(e) provides methods a responsible party can use to provide the requisite evidence of financial responsibility.²¹⁰

200. OPA § 1015(a), 104 Stat. at 502 (1990).

201. OPA § 1015(b), 104 Stat. at 502 (1990).

202. OPA § 1016(a), 104 Stat. at 502 (1990). This requirement is similar to that provided in section 311(p) of FWPCA. 33 U.S.C. § 1321(p) (1988). This requirement applies to "foreign vessels using navigable waters of the United States or calling at offshore facilities subject to the jurisdiction of the United States . . ." H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 119 (1990).

203. OPA § 1016(a), 104 Stat. 484, 502 (1990) (to be codified at 33 U.S.C. § 2716(a)).

204. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 69 (1989).

205. OPA § 1016(b)(1)-(2), 104 Stat. 484, 502-03 (1990) (to be codified at 33 U.S.C. § 2716(b)(1)-(2)). It is important to note that the provisions of section 4115(d) require certain lightering vessels to have this proof of financial responsibility even if the transfer occurs in a place not subject to the jurisdiction of the United States. OPA § 4115(d), 104 Stat. at 520 (1990).

206. OPA § 1016(b)(3), 104 Stat. at 503 (1990).

207. OPA § 4303(a), 104 Stat. at 539-40 (1990).

208. OPA § 1019, 104 Stat. at 506 (1990).

209. S. REP. NO. 94, 101st Cong., 1st Sess. 74 (1989).

210. OPA § 1016(e), 104 Stat. 484, 503-04 (1990) (to be codified at 33 U.S.C. § 2716(e)).

Each responsible party for an offshore facility is required to establish and maintain financial responsibility of \$150 million.²¹¹ In contrast, each responsible party with respect to a deepwater port is required to establish and maintain evidence of financial responsibility of \$350 million.²¹² If the responsible party owns more than one of either of the above facilities, as with vessels, he must only provide evidence of financial responsibility to meet the maximum liability applicable to the facility having the greatest maximum liability.²¹³

If a responsible party uses a guarantor to provide evidence of financial responsibility, claims for damages may be presented directly to the guarantor.²¹⁴ The guarantor may assert any defenses which the responsible party might have, and also may assert that the incident was caused by the willful misconduct of the responsible party.²¹⁵

7. *Jurisdiction, Venue, Statute of Limitations and Other Matters*

OPA provides both federal and state courts with jurisdiction for claims for removal costs and damages.²¹⁶ All suits for removal costs and

211. OPA § 1016(c)(1), 104 Stat. at 503 (1990).

212. OPA § 1016(c)(2), 104 Stat. at 503 (1990) and OPA § 1004(a)(4), 104 Stat. at 492 (1990).

213. OPA § 1016(c), 104 Stat. at 503 (1990). This appears to mean that if the responsible party owns two deepwater ports, he must provide evidence of financial responsibility of \$350 million. If the responsible party owns two offshore facilities, one of which is a deepwater port, OPA appears to require the responsible party to provide evidence of financial responsibility of \$350 million, although one could interpret OPA's language to require evidence of financial responsibility for each individual facility.

The limits on liability for offshore facilities, other than deepwater ports, provided by OPA section 1004 are "the total of all removal costs plus \$75,000,000 . . ." OPA § 1004(a)(3), 104 Stat. at 491-92 (1990). Due to this language, OPA's provision allowing a party responsible for more than one offshore facility to provide evidence of financial responsibility "only to meet the maximum liability applicable to the facility having the greatest maximum liability" appears to make no practical sense, since one cannot predict in advance what the removal costs for a discharge would be. According to the Conference Committee, a responsible party for more than one offshore facility will only be required to provide evidence of financial responsibility of \$150 million. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 119 (1990). However, this statement conflicts with OPA's express language, which makes it unclear how a responsible party could provide the evidence of financial responsibility.

214. OPA § 1016(f), 104 Stat. 484, 504 (1990) (to be codified at 33 U.S.C. § 2716(F)).

215. *Id.* The Conference Committee limited the defenses a guarantor could assert "to facilitate prompt recovery by claimants." H.R. CONF. REP. NO. 101-653, 101st Cong., 1st Sess. 119 (1990). It is important to note that in order to encourage the continued existence of a market for providers of financial responsibility, OPA provides the Secretary of Transportation with the power to authorize policy terms and defenses related to providing evidence of financial responsibility. H.R. CONF. REP. NO. 101-653, 101st Cong., 1st Sess. at 120 (1990).

216. OPA § 1017(b)-(c), 104 Stat. 484, 504 (1990) (to be codified at 33 U.S.C. § 2717(b)-(c)). It should be noted that these jurisdictional provisions may lead to absurd results with suits related to a single spill being heard in a multitude of federal and state courts throughout the nation. A detailed discussion of this issue is beyond the scope of this article.

damages must be brought within three years after specified dates.²¹⁷ The Act does not preempt states from imposing additional liability or requirements with respect to the discharge of oil or other pollution by oil.²¹⁸ In addition, OPA provides that it does not affect any obligations under the Solid Waste Disposal Act or state law.²¹⁹

B. Title II — Conforming Amendments

1. Intervention on the High Seas Act

Section 2001 amends the Intervention on the High Seas Act²²⁰ to

217. OPA section 1017(f) provides the following 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 the 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.

OPA § 1017(f), 104 Stat. at 505 (1990).

218. OPA § 1018(a)(1), 104 Stat. at 505-06 (1990). S. REP. NO. 94, 101st Cong., 1st Sess. 6 (1989). Several states have taken this provision to heart and have enacted or are considering enacting their own provisions.

219. OPA § 1018(a)(2), 104 Stat. 484, 506 (1990) (to be codified at 33 U.S.C. § 2718(a)(2)).

220. 33 U.S.C. §§ 1471-1487 (1989).

provide that the OSLTF, rather than the Fund established under section 311 of FWPCA,²²¹ is available for intervention procedures relating to the discharge of oil as authorized by that Act.²²² The amounts in that fund are transferred to the OSLTF by OPA section 2002(b).²²³

2. *Federal Water Pollution Control Act*

Section 2002 of OPA provides several amendments to section 311 of FWPCA. Subsection (a) causes section 311 of the FWPCA to not apply to incidents that OPA section 1002 covers.²²⁴ Subsection (b) repeals portions of section 311 which OPA supersedes and also transfers all monies in the section 311 fund created by this section to the OSLTF.²²⁵ As a result of these amendments, the provisions of OPA will dictate liability and compensation for oil pollution and removal costs and damages caused by a discharge from a covered vessel or facility after August 18, 1990, but the OSLTF is immediately available to cover costs and damages associated with prior discharges in the same manner as the FWPCA fund was available to respond to such discharges.²²⁶

3. *Deepwater Port Act*

Section 2003 of OPA amends DWPA²²⁷ to require applications under that chapter to contain all the information required by OPA section 1016,²²⁸ to delete the liability provisions of that Act,²²⁹ to eliminate the Deepwater Port Liability Trust Fund,²³⁰ to transfer all remaining monies of that fund to the OSLTF, and to provide that the new fund assumes all liability incurred by the Deepwater Port Liability Fund.²³¹ The liability compensation provisions of the DWPA were repealed because OPA's provisions supersede them.²³²

221. FWPCA § 311, 33 U.S.C. § 1321 (1989).

222. OPA § 2001(b), 104 Stat. 484, 506 (1990) (to be codified at 33 U.S.C. § 1486); *see also* H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 122 (1990).

223. OPA § 2002(b), 104 Stat. at 507 (1990); *see also* OPA § 9001(a), 104 Stat. at 573 (1990), amending the Internal Revenue Code (26 U.S.C. § 9509 (1988)) to provide that all monies that would have been paid to the FWPCA § 311 Fund are now to be credited to the OPA Fund.

224. OPA § 2002(a), 104 Stat. at 507 (1990).

225. OPA § 2002(b), 104 Stat. at 507 (1990).

226. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 124 (1990).

227. 33 U.S.C. §§ 1502-1524 (1989).

228. OPA § 2003(a)(1), 104 Stat. 484, 507 (1990) (amending 33 U.S.C. § 1503 (1988)).

229. 33 U.S.C. § 1517 (1988).

230. 33 U.S.C. § 1517(f) (1989).

231. OPA § 2003(b), 104 Stat. 484, 507 (1990) (to be codified at 33 U.S.C. §§ 1503, 1517).

232. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 124 (1990).

4. *Outer Continental Shelf Lands Act Amendments of 1978*

Similar to the preceding conforming amendments, OPA section 2004 amends the OCSLA Amendments of 1978 by repealing Title III of that Act.²³³ OPA includes provisions superseding those contained in the repealed Title. In addition, the OPA eliminates the Offshore Oil Spill Pollution Fund established by that Title,²³⁴ transfers monies remaining in that fund to the OSLTF, and provides that the OSLTF assumes all liabilities incurred by the OCSLA Fund.²³⁵ Through these amendments, OPA creates a single fund to handle the costs and damages previously covered by three separate funds.

C. *Title III — International Oil Pollution Prevention and Removal*

1. *1984 International Protocols*

One of the main concerns in drafting the final version of OPA was determining whether the measure would implement the two 1984 international protocols on oil spill liability and compensation.²³⁶ Title III of the House-approved version of OPA provided statutory authority to implement these protocols.²³⁷ The Senate version of OPA had no similar provision.²³⁸ The Senate opposed the House provision because of its concern that the protocols would preempt federal and state oil spill liability laws.²³⁹

Instead of including the House provision,²⁴⁰ OPA provides a statement regarding the sense of the Congress with respect to participation in international oil pollution liability and compensation regimes.²⁴¹ In his statement made regarding signing OPA, President Bush expressed his disappointment that OPA did not implement these 1984 protocols.²⁴²

233. OPA § 2004, 104 Stat. 484, 507 (1990) (to be codified at 43 U.S.C. §§ 1811-1824 (1989)).

234. See 43 U.S.C. § 1812 (1989).

235. OPA § 2004, 104 Stat. 484, 507 (1990) (to be codified at 43 U.S.C. §§ 1811-1824).

236. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 125 (1990).

237. H.R. 1465, 101st Cong., 1st Sess. §§ 3001-3008, 135 CONG. REC. H 8247-8248 (daily ed. Nov. 9, 1989).

238. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 125 (1990).

239. 21 Env't Rep. (BNA) No. 10, at 341-42 (1990).

240. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 125 (1990).

241. OPA § 3001, 104 Stat. 484, 507-08 (1990) (to be codified at 43 U.S.C. §§ 1811-1824).

This Section provides:

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 liability 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.

242. Statement on Signing the Oil Pollution Act of 1990, 26 WEEKLY COMP. PRES. DOC. (Aug. 18, 1990).

2. *United States and Canada*

OPA requires the Secretary of State to investigate the need for additional cooperative efforts by the United States and Canada to prevent oil spills and to provide full compensation to those injured by oil spills in the Great Lakes and Lake Champlain.²⁴³ The Act further required the Secretary to provide reports on these issues before February 18, 1991.²⁴⁴ In addition, Congress urged the Secretary to enter into negotiations with the government of Canada to ensure tugboat escorts for certain vessels traveling in the Strait of Juan de Fuca and Haro Strait.²⁴⁵

3. *International Inventory of Removal Equipment and Personnel*

Section 3004 of OPA requires the President to "encourage appropriate international organizations to establish an international inventory of spill removal equipment and personnel."²⁴⁶ This inventory would likely help in the development of the National Contingency Plan.²⁴⁷

D. *Title IV — Prevention and Removal*

The importance of Title IV, which constitutes over one-third of the text of the Act, should not be overlooked. However, because the focus of this Article is on liability, the discussion of the provisions of Title IV is limited to the provisions which have a direct or indirect effect on the liability potential created by OPA.

1. *Subtitle A — Prevention*

Subtitle A consists of provisions relating to licensing mariners,²⁴⁸ the removal of a master,²⁴⁹ manning requirements for tank vessels,²⁵⁰ evaluating vessel traffic service systems and vessel navigation systems,²⁵¹ pilotage requirements,²⁵² requirements for the equipment on and the con-

243. OPA §§ 3002, 3003, 104 Stat. 484, 508 (1990).

244. OPA § 3002(c), 3003(c), 104 Stat. 484, 508 (1990).

245. OPA § 3005, 104 Stat. at 508 (1990).

246. OPA § 3004, 104 Stat. at 508 (1990).

247. See S. REP. NO. 94, 101st Cong., 1st Sess. 19 (1989) and H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 127 (1990). The legislative history on this section is less than clear. However, the similarity between the House's version of this section and the placement of the section in the Senate version indicate that this inventory should be considered in the National Contingency Plan. Compare H.R. 1465, 101st Cong., § 4205(e), 1st Sess. (1989) with S. 686, § 202, 101st Cong., 1st Sess. (1989).

248. OPA §§ 4101-4103, 4105, 104 Stat. 484, 509-11 (1990) (to be codified at 46 U.S.C. §§ 2101, 7101, 7106-07, 7106 note, 7109, 7302, 7503, 7701-04).

249. OPA § 4104, 104 Stat. at 511 (1990).

250. OPA §§ 4106, 4114, 104 Stat. at 513-14, 517 (1990).

251. OPA §§ 4107, 4111, 104 Stat. at 514 (1990).

252. OPA §§ 4108, 4116, 104 Stat. at 514-15, 522-23 (1990).

struction of vessels (including double hull requirements),²⁵³ and training programs.²⁵⁴

a. Alcohol and Drug Abuse by Mariners

Section 4101 requires an applicant for a license, certificate of registry,²⁵⁵ or merchant mariner's documents²⁵⁶ to make available any information contained in the National Driver Register²⁵⁷ regarding whether the applicant has been convicted of operating a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance or of a traffic violation arising in connection with a fatal traffic accident, reckless driving, or racing on highways.²⁵⁸ The Act allows an individual who holds or applies for a license, certificate of registry, or merchant mariner's documents to obtain and comment on this information before the information can be used against him.²⁵⁹ The Act further allows review of the applicant's criminal record²⁶⁰ and requires an applicant to undergo testing for the use of dangerous drugs upon application for or renewal of a license or certificate of registry.²⁶¹

Section 4102 provides for the renewal of licenses after five years.²⁶² OPA also limits the term of certificates of registry to five years, subject to renewal for additional five year periods.²⁶³ Previous law provided that certificates of registry were not limited in duration. Similarly, the Act provides that merchant mariner's documents are valid for five years, subject to renewal for additional five year periods.²⁶⁴ The Act also applies to current licenses, certificates, and documents.²⁶⁵ As a result, certificates of registry, which would heretofore not have expired, will begin to expire in the immediate future. Finally, this section provides the Secretary of

253. OPA §§ 4109, 4110, 4113, 4115, 4118, 104 Stat. at 515-17, 522-23 (1990).

254. OPA § 4117, 104 Stat. at 523 (1990).

255. OPA § 4104(a), 104 Stat. at 509 (1990) (amending 46 U.S.C. § 7101 (1988)).

256. OPA § 4101(b), 104 Stat. at 509 (1990) (amending 46 U.S.C. § 7302 (1988)).

257. 23 U.S.C. § 401 note (1988).

258. 23 U.S.C. § 205(a)(3)(A)-(B) (1988).

259. OPA § 4105(a)(2), (b)(1), 104 Stat. at 512-13 (1990).

260. OPA § 4101, 104 Stat. at 509 (1990).

261. OPA § 4101(a), 104 Stat. at 509 (1990). On February 19, 1991, the Coast Guard issued notice of a proposed rulemaking to amend its current regulations which require maritime employers to implement anti-drug programs. 56 Fed. Reg. 6,778 (1991). The proposed amendments would lessen the number of pre-employment and periodic tests required of commercial vessel personnel. *Id.*

262. OPA § 4102(a), 104 Stat. at 484, 509 (1990). (46 U.S.C. § 7109 already provides for the renewal of licenses for additional five-year periods. OPA repealed this section as currently written and inserts new language).

263. OPA § 4102(b), 104 Stat. at 509 (1990) (to be codified at 46 U.S.C. § 7107).

264. OPA § 4102(c), 104 Stat. at 509 (1990).

265. OPA § 4102(d), 104 Stat. at 510 (1990).

Transportation the authority to review the criminal record of each holder of a license or certificate of registry.²⁶⁶

OPA also contains provisions similar to those for licensing for suspension and revocation proceedings, including allowing review of information contained in the National Driver Register, requiring the testing of holders of licenses, certificates of registry and merchant mariner's documents for the use of alcohol and dangerous drugs, and providing for the suspension or revocation of a license, certificate of registry or merchant mariners' document in certain safety, drug or alcohol related circumstances.²⁶⁷ In addition, the Act provides when a revoked license, certificate, or document may be reinstated.²⁶⁸ Finally, OPA amends prior law to provide for the removal of a master or individual in charge of a vessel when that individual is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel.²⁶⁹

b. Vessel Personnel and Reporting Requirements

Prior law required periodic evaluation of manning, training, qualification, and watchkeeping standards of a country that certifies certain foreign vessels.²⁷⁰ The vessels were required to meet specified manning requirements when transferring oil or hazardous material in a port or place subject to the jurisdiction of the United States.²⁷¹ OPA revised prior law to require a periodic review of these standards and an additional review of the standards after a vessel is involved in a marine casualty, to prohibit certain vessels from entering the United States under certain circumstances,²⁷² to provide requirements for the pilotage of certain vessels in the Great Lakes,²⁷³ and to increase penalties for violating Great Lakes pilotage requirements.²⁷⁴ OPA also provides certain pilotage and tanker escort requirements essential in certain waters.²⁷⁵ In addition, the Act requires the reporting of marine casualties that result in significant harm to the environment. This provision creates a new class

266. OPA § 4102(e), 104 Stat. at 510 (1990).

267. OPA § 4103(a)(1), (b), 104 Stat. at 510-11 (1990). OPA defines "dangerous drug" as "a narcotic drug, a controlled substance, or a controlled substance analog." OPA § 4103(a)(2), 104 Stat. at 511 (1990).

268. OPA § 4103(c), 104 Stat. at 511 (1990).

269. OPA § 4104, 104 Stat. at 511-12 (1990).

270. 46 U.S.C. § 9101(a) (1988).

271. 46 U.S.C. § 9101(b) (1988).

272. OPA § 4106(a), 104 Stat. 484, 513 (1990) (to be codified at 46 U.S.C. § 9101).

273. OPA § 4108(a), 104 Stat. at 514-15 (1990).

274. OPA § 4108(b), 104 Stat. at 515 (1990).

275. OPA § 4116, 104 Stat. at 522-23 (1990).

of casualties that must be reported by all vessels.²⁷⁶ The Act extends the reporting requirements to foreign tank vessels involved in certain marine casualties on waters subject to the jurisdiction of the United States, including the exclusive economic zone.²⁷⁷

c. Vessel Construction and Operation

OPA seeks to prevent oil spills by increasing or imposing provisions that address the construction of and equipment on vessels which carry oil in bulk as cargo or as cargo residue. The Act requires the development of regulations which establish minimum standards for plating thickness, the gauging of plating thickness of certain vessels,²⁷⁸ and the promulgation of regulations regarding standards for and use of overfill devices and tank level or pressure monitoring devices.²⁷⁹ OPA also mandates studies and subsequent reports regarding the results of the studies; including reviewing the adequacy of existing laws and regulations to ensure the safe navigation of certain vessels,²⁸⁰ the feasibility of modifying dredges to make them usable in removing discharges of oil and hazardous substances,²⁸¹ and determining whether to require certain onshore facilities to use liners or other secondary means of containment for oil.²⁸²

Perhaps one of the most notable provisions of OPA addressing tanker construction is the requirement that certain vessels be equipped with a double hull.²⁸³ This requirement applies to vessels constructed or

276. OPA § 4106(b), 104 Stat. at 513-14 (1990); H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 132 (1990).

277. OPA § 4106(b), 104 Stat. at 513-14 (1990). According to the Conference Committee, the intent of this section is to expand the Coast Guard's investigative authority in certain incidents and is not intended to expand the investigative authority of the National Transportation Safety Board. H.R. CONF. REP. NO. 101-653, 101st. Cong., 2d Sess. 132-33 (1990).

278. OPA § 4109, 104 Stat. 484, 515 (1990) (to be codified at 46 U.S.C. § 3703 note).

279. OPA § 4110, 104 Stat. at 515 (1990). The Coast Guard issued an advance notice of proposed rulemaking regarding the development of regulations to require installation of tank level or pressure monitoring devices on May 7, 1991. 56 Fed. Reg. 21,116 (1991). In its notice, the Coast Guard solicited the input of environmental groups, industries, and other interested parties to comment on how these regulations should be developed. *Id.*

280. OPA § 4111, 104 Stat. at 515-16 (1990).

281. OPA § 4112, 104 Stat. at 516 (1990).

282. OPA § 4113, 104 Stat. at 516-17 (1990). In addition, this section requires the implementation of the report's recommendations within six months of the report. OPA § 4113(c), 104 Stat. at 517 (1990).

283. OPA § 4115, 104 Stat. at 517-20 (1990). The Coast Guard issued its notice of proposed rulemaking on December 5, 1990. 55 Fed. Reg. 50,192 (1990) (to be codified at 33 C.F.R. pt. 157) (proposed Dec. 5, 1990). In its notice, the Coast Guard interpreted "double hull," an undefined term in the OPA, to be "spaces between a vessel's skin and cargo tanks that provide reasonable protection of the entire cargo block from damage due to grounding or collision, the most likely sources of damage resulting in the loss of cargo." 55 Fed. Reg. 50,193 (1990). The Coast Guard's proposed requirements vary according to the size of the

adapted to carry oil in bulk as cargo, or cargo residue and operating on the waters subject to United States jurisdiction, including the exclusive economic zone.²⁸⁴ OPA will begin phasing in its requirements on January 1, 1995.²⁸⁵ However, certain vessels are specifically exempted from the Act's double hull requirements.²⁸⁶

In addition, OPA mandates periodic determination of and reporting on whether other structural and operational tank vessel requirements would provide protection to the marine environment equal to or greater than that provided by double hulls.²⁸⁷ The first report was due by February 15, 1991.²⁸⁸ Another report is due by August 18, 1995, which will assess the impact of the double hull requirement on the safety of the marine environment and the economic viability and operational makeup of the maritime oil transportation industry.²⁸⁹

Regarding vessel operations, OPA requires the development of regulations governing the operation of a vessel while an auto-pilot is engaged or the engine room is unattended.²⁹⁰ The Act limits the hours a licensed individual or seaman may be permitted to work,²⁹¹ increases the manning requirements for some tank vessels,²⁹² requires the maintenance of certain computerized records,²⁹³ and requires the promulgation of regulations regarding minimum communication abilities of certain vessels.²⁹⁴ Regarding vessel traffic service systems, OPA requires the Secretary of Transportation to mandate the participation of certain vessels²⁹⁵ and requires the Secretary to study and prioritize which ports and channels are

vessel. 55 Fed. Reg. 50,197 (1990). The Coast Guard re-opened the comment period on Sept. 6, 1991, to allow additional comments as a result of new developments in the international community on this issue. 56 Fed. Reg. 44,051 (1991).

It is also important to note that the Act includes provisions to aid the financing of vessels owned by citizens of the United States which are subject to the double hull requirement. OPA § 4115(f), 104 Stat. 484, 521-22 (1990).

284. OPA § 4115(a), 104 Stat. at 517-20 (1990).

285. *Id.*

286. *Id.* The OPA excludes vessels used only to respond to a discharge of oil or a hazardous substance, certain vessels of less than 5,000 gross tons, and, until January 1, 2015, vessels unloading oil in bulk at a licensed deepwater port and vessels offloading in certain lightering activities. *Id.*

287. OPA § 4115(e)(1), 104 Stat. at 520 (1990).

288. *Id.*

289. OPA § 4115(e)(2), 104 Stat. at 521 (1990).

290. OPA § 4114(a), 104 Stat. at 517 (1990).

291. OPA § 4114(b), 104 Stat. at 517 (1990).

292. OPA § 4114(c)-(d), 104 Stat. at 517 (1990).

293. OPA § 4114(e), 104 Stat. at 517 (1990).

294. OPA § 4118, 104 Stat. at 523 (1990).

295. OPA § 4107(a), 104 Stat. at 514 (1990). The Coast Guard issued a notice of proposed rulemaking regarding the development of national vessel traffic service regulations on August 1, 1991. 56 Fed. Reg. 36,910 (1991). The new regulations are planned to provide a

in need of new, expanded or improved systems.²⁹⁶ Additionally, OPA requires the Secretary to study the feasibility of instituting a Maritime Oil Pollution Prevention Training Program.²⁹⁷ The Secretary's report on this study was due by August 18, 1991.

2. Subtitle B — Removal

One concern raised by the Valdez spill was the ability of the federal government to respond to an oil discharge. Subtitle B of Title IV specifically addresses this concern by granting the President general authority to ensure the removal of a discharge and the mitigation or prevention of a substantial threat of a discharge of oil or a hazardous substance.²⁹⁸ In certain events, OPA *requires* the President to direct the removal efforts.²⁹⁹ However, the Act exempts from some forms of liability persons acting under the direction of the President or in a manner consistent with a National Contingency Plan.³⁰⁰ The National Contingency Plan, which OPA requires the President to develop and publish, addresses the removal of oil and hazardous substances as required by the Act.³⁰¹

OPA also establishes a national planning and response system consisting of a National Response Unit, Coast Guard District Response Groups, Area Committees and Area Contingency Plans.³⁰² In addition, the Act requires the President to promulgate regulations requiring owners or operators of certain tank vessels or facilities to prepare and submit response plans.³⁰³ Unless a covered tank vessel or facility receives au-

consolidated set of national vessel traffic service regulations which could be supplemented by local regulations as necessary. *Id.*

296. OPA § 4107(b), 104 Stat. at 514 (1990). (The secretary is to evaluate the type of vessel traffic in United States waterways and the risks of collision and damages, as well as the impact of a "vessel traffic system" and all other relevant information).

297. OPA § 4117, 104 Stat. at 523 (1990).

298. OPA § 4201(a), 104 Stat. at 523-25 (1990).

299. *Id.*

300. *Id.*

301. OPA § 4201(b), 104 Stat. at 523-25 (1990). The OPA provides specific topics which the Plan must include, a discussion of which is beyond the scope of this article.

302. OPA § 4202(a), 104 Stat. at 527-31 (1990). The OPA also provides deadlines for implementing the provisions of this system. OPA § 4202(b), 104 Stat. at 531-32 (1990). On July 22, 1991, the Coast Guard published a notice of intent describing how it plans to choose areas required to develop regional oil spill contingency plans. 56 Fed. Reg. 33,481-02 (1991). The Coast Guard plans to divide the United States into port areas, that will be formally designated in the future. 56 Fed. Reg. 33,481-02 (1991).

303. OPA § 4202(a), 104 Stat. at 527-31 (1990). The President must issue these regulations before August 18, 1992. Between February 18, 1993 and August 18, 1994, a vessel or facility which must prepare a response plan may not handle, store, or transport oil unless the owner or operator thereof has submitted the required plan to the President. On August 30, 1991, the Coast Guard issued an advance notice of proposed rulemaking to solicit comments regarding the development of these regulations. 56 Fed. Reg. 43,534 (1991).

thority from the President and is operating in compliance with the plan, it may not handle, store, or transport oil.³⁰⁴ However, the fact that the owner or operator of a vessel or facility operated it in accordance with an approved response plan will not provide a defense to liability under OPA.³⁰⁵ The Act also requires oil laden vessels operating in the navigable waters to carry appropriate removal equipment.³⁰⁶ In addition to the above, OPA contains provisions regarding the design and construction of new Coast Guard buoy tenders³⁰⁷ and for increasing the requirements for the issuance of a certificate of documentation with a coast wide endorsement.³⁰⁸

3. *Subtitle C — Penalties and Miscellaneous*

This Subtitle, as its name suggests, adds many penalties related to oil discharges and violations of administrative requirements and includes provisions relating to these penalties. The penalties include those for violating notification requirements and discharge prohibitions,³⁰⁹ operation and carriage requirements,³¹⁰ proof of financial responsibility requirements,³¹¹ and inspection requirements.³¹² In some cases, OPA increases existing penalties by 100 times that established by prior law.³¹³ In addition, the Act establishes procedures related to imposing these penalties.³¹⁴

It cannot be overemphasized that the penalties, both civil and criminal, imposed by OPA are extensive, severe, and raise many issues in and of themselves. In a major change from prior law, in criminal cases, OPA encourages the exploitation of parties filing required notification by al-

304. OPA § 4202(a), 104 Stat. at 527-31 (1990). The OPA allows the President to authorize a covered tank vessel or facility to operate for two years after submitting its response plan and before receiving approval thereof if the owner or operator provides certain certification. *Id.*

305. *Id.*

306. *Id.*

307. OPA § 4203, 104 Stat. at 532 (1990) (These vessels must be "equipped with oil skimming systems that are readily available and operable, and that compliment the [sic] primary mission of servicing aids to navigation.").

308. OPA § 4205, 104 Stat. at 533 (1990). On September 11, 1991, the Coast Guard issued a notice of proposed rulemaking regarding the procedures to be used for special use documentation of vessels under OPA's requirements. 56 Fed. Reg. 46, 268 (1991).

309. OPA § 4301, 104 Stat. at 535-37 (1990).

310. OPA § 4302, 104 Stat. at 537-39 (1990).

311. OPA § 4303, 104 Stat. at 539-40 (1990).

312. OPA § 4305, 104 Stat. at 540-41 (1990).

313. OPA § 4302(f), 104 Stat. at 538 (1990) (damages which were formerly \$100.00 are now \$10,000.00).

314. OPA §§ 4301(b), 4303-4306, 104 Stat. at 539-41 (1990).

lowing such information to be used against the notifier.³¹⁵ Even information received pursuant to the notification itself, or secondary information derived therefrom, may be used against a corporation in a criminal case.³¹⁶ In addition, OPA criminalizes the discharge of oil or hazardous substances in many cases³¹⁷ and effectively subjects one who negligently discharges oil or a hazardous substance to criminal penalties under certain circumstances.³¹⁸ Thus, the criminal provisions of OPA are significant and merit consideration by oil pollution insurers and those who may be subject to them.

E. Title V — Prince William Sound Provisions

Because the Valdez spill occurred in the Prince William Sound, it should not be surprising that OPA contains provisions specifically aimed at protecting this area from future incidents. Towards this end, OPA requires the Secretary of Commerce to establish the establishment of the Prince William Sound Oil Spill Recovery Institute in Alaska.³¹⁹ This institute is required to research and carry out educational and demonstrational projects related to the handling of oil spills in the arctic and subarctic marine environment, and to conduct research related to the effects of the Valdez spill.³²⁰

OPA establishes two oil terminal and oil tanker environmental oversight and monitoring demonstration programs to provide environmental monitoring of the terminal facilities in Prince William Sound and Cook Inlet Sound and of the crude tankers operating in the Sounds.³²¹ In addition, the Act creates an Oil Terminal Facilities and Oil Tanker Operations Association to review operating and maintenance policies of the oil terminal facilities and crude oil tankers.³²² The Act creates a Regional Citizens' Advisory Council, or an alternative,³²³ to provide advice and recommendations to the Association on policies, permits, and site-specific regulations relating to the operation and maintenance of terminal facilities and certain crude oil tankers.³²⁴ OPA requires the Council to

315. OPA § 4301(a)(3), 104 Stat. at 533 (1990).

316. *Id.*

317. OPA § 4301(c), 104 Stat. at 537 (1990).

318. OPA § 4302, 104 Stat. at 537-39 (1990).

319. OPA § 5001(a), 104 Stat. at 542 (1990). § 5006(a) provides for the funding of the Institute. OPA § 5006(a), 104 Stat. at 554 (1990).

320. OPA § 5001(b), 104 Stat. at 542 (1990).

321. OPA § 5002(a)-(b), 104 Stat. at 544-45 (1990).

322. OPA § 5002(c), 104 Stat. at 545-46 (1990).

323. OPA § 5002(d), 104 Stat. at 546-48 (1990).

324. OPA § 5002(d)(6), 104 Stat. at 547 (1990).

establish advisory committees.³²⁵ The Act further provides for the interaction of the Association, Council, and other federal agencies,³²⁶ establishes a location, and designates the source of funding for the Association and Council.³²⁷

Other provisions of OPA related specifically to Prince William Sound require the installation of an automated navigation light on or adjacent to Bligh Reef,³²⁸ establishes requirements related to the VTS system in the Port of Valdez,³²⁹ and provides requirements regarding personnel and equipment under tank vessel and facility response plans for vessels operating on Prince William Sound or facilities permitted under the Trans-Alaska Pipeline Authorization Act.³³⁰ Finally, the Act prohibits a tank vessel that has spilled more than one million gallons in the marine environment after March 22, 1989 from operating on the navigable waters of Prince William Sound.³³¹

F. Title VI — Miscellaneous

Title VI of OPA addresses various concerns including savings provisions related to cross references with statutes, continued the effectiveness of certain regulations, the effect on other admiralty and maritime laws, and rules of construction for the Act.³³² This Title also contains appropriations for the OSLTF,³³³ prohibitions on oil and gas leasing, exploration and development on the Outer Continental Shelf offshore North Carolina for a certain period of time,³³⁴ provisions establishing an Environmental Sciences Review Panel in North Carolina,³³⁵ and provisions for the cooperative development of common hydrocarbon-bearing areas underlying the federal and state boundaries of OCS land.³³⁶

325. OPA § 5002(e)-(f), 104 Stat. at 548-49 (1990).

326. OPA § 5002(g)-(i), 104 Stat. at 549-50 (1990).

327. OPA § 5002(j)-(k), 104 Stat. at 550-51 (1990); OPA § 5006(b) relates to funding these organizations as well.

328. OPA § 5003, 104 Stat. at 553 (1990).

329. OPA § 5004, 104 Stat. at 553 (1990).

330. OPA § 5005, 104 Stat. at 553-54 (1990). On August 31, 1991, the Coast Guard issued an advance notice of proposed rulemaking, soliciting comments regarding how regulations implementing this section should be drafted and its interpretation of what must be included in the regulations. 56 Fed. Reg. 43,534 (1991).

331. OPA § 5007, 104 Stat. at 554 (1990).

332. OPA § 6001, 104 Stat. at 554-55 (1990).

333. OPA § 6002, 104 Stat. at 555 (1990) (funding the Oil Spill Liability Trust Fund, 26 U.S.C. 9509-9602 (1988)).

334. OPA § 6003(a)-(d), 104 Stat. at 555-57 (1990).

335. OPA § 6003(e), 104 Stat. at 557-58 (1990).

336. OPA § 6004(a), 104 Stat. at 558 (1990).

G. Title VII — Oil Pollution Research and Development Program

In this Title, OPA establishes an Interagency Coordinating Committee on Oil Pollution Research.³³⁷ The purpose of the Committee is to coordinate a program of oil pollution research, technology development and demonstration among federal agencies and industry, universities, research institutions, state governments and foreign nations.³³⁸ The Act requires the Committee to prepare and submit to Congress a plan for implementing the oil pollution research, development and demonstration programs,³³⁹ and provides requirements and suggestions for the activities of the Committee.³⁴⁰

H. Title VIII — Trans-Alaska Pipeline System

I. Subtitle A — Improvements to Trans-Alaska Pipeline System

This Subtitle provides provisions relating to the status of the Trans-Alaska Pipeline System and liability for damages resulting from activities along or in the vicinity of the pipeline right-of-way.³⁴¹ OPA dictates that the holder of the pipeline right-of-way may escape strict liability for damages caused by certain activities,³⁴² increases the limits of liability for those damages seven-fold³⁴³ and modifies the scope of the pollutants the holder of the right-of-way is responsible for controlling and removing.³⁴⁴ In order to conform with other provisions of OPA, the Act also provides amendments regarding the Trans-Alaska Pipeline Liability Fund, including expanding the damages which the Fund covers.³⁴⁵ In addition, OPA establishes a Presidential Task Force on the Trans-Alaska Pipeline System³⁴⁶ to audit the pipeline system³⁴⁷ and provide certain information to the President.³⁴⁸

337. OPA § 7001(a), 104 Stat. at 559 (1990). The Act also specifies representatives of various agencies who will be members of the Committee. OPA § 7001(a)(3), 104 Stat. at 559 (1990).

338. OPA § 7001(a)(2), 104 Stat. at 559 (1990).

339. OPA § 7001(b), 104 Stat. at 559-60 (1990).

340. OPA § 7001(c), 104 Stat. at 560-64 (1990).

341. OPA § 8101, 104 Stat. at 565 (1990).

342. OPA § 8101(a), 104 Stat. at 565 (1990).

343. OPA § 8101(b), 104 Stat. at 565 (1990).

344. OPA § 8101(c), 104 Stat. at 565 (1990).

345. OPA § 8102(d), 104 Stat. at 567 (1990).

346. OPA § 8103(a), 104 Stat. at 568 (1990).

347. OPA § 8103(b)(1), 104 Stat. at 568 (1990).

348. OPA § 8103(b)(2), 104 Stat. at 568-69 (1990).

2. *Subtitle B — Penalties*

This Subtitle increases certain penalties for violations of OCSLA³⁴⁹ and adds civil penalties to the Trans-Alaska Pipeline Authorization Act for the discharge of oil in certain cases.³⁵⁰

3. *Subtitle C — Provisions Applicable to Alaska Natives*

This Subtitle confirms the interests of native Alaskan corporations in certain areas of Alaska³⁵¹ and requires the Secretary of the Interior to conduct a study regarding recovery of damages, contingency plans, and coordinated actions in the event of an oil spill in the Arctic Ocean. The Secretary is required to report to Congress the results of that study.³⁵² In addition, the Act calls on the Secretary of State to initiate and report the results of negotiations with the Foreign Minister of Canada regarding these issues.³⁵³

I. *Title IX — Amendments to Oil Spill Liability Trust Fund*

This Title provides various amendments to conform OPA funding scheme provisions related to the Oil Spill Liability Trust Fund (hereinafter OSLTF) and to provide for the funding of OPA's fund.³⁵⁴ In addition, the Act increases the expenditures and borrowing authority of the OSLTF,³⁵⁵ and provides amendments to the Tax Code related to the OSLTF.³⁵⁶

IV. THE TEXAS RESPONSE TO THE CALL FOR IMPROVED RESPONSE

Having borne the brunt of so many oil spills, Texas understandably followed the development of OPA closely and simultaneously examined the need for reform of its own laws.³⁵⁷ Shortly after Congress enacted OPA, the Governor's Advisory Committee issued its report outlining extensive recommendations for Texas oil spill law and policy.³⁵⁸ The Advisory Committee was comprised of representatives from five Texas

349. OPA § 8201, 104 Stat. at 570 (1990).

350. OPA § 8202, 104 Stat. at 571-72 (1990).

351. OPA § 8301, 104 Stat. at 572 (1990).

352. OPA § 8302, 104 Stat. at 572-73 (1990). As stated in OPA, this section is a response to Canada's consideration of a plan to ship oil that may be produced from the Amalagak region of the Northwest Territory across the Beaufort Sea to tankers which would transport the oil to Asia and the Far East. *Id.*

353. OPA § 8302, 104 Stat. at 572-73 (1990).

354. OPA § 9001(a)-(b), 104 Stat. at 573-74 (1990).

355. OPA § 9001(c)-(d), 104 Stat. at 574 (1990).

356. OPA § 9002, 104 Stat. at 574-75 (1990).

357. See *supra* text accompanying notes 97-99.

358. See FINAL REPORT *supra* note 97.



agencies playing key roles in oil spill response.³⁵⁹

The Advisory Committee's recommendations span fifteen pages of detailed analysis of federal and state law and policy, largely directed at applauding Congress' passage of OPA and calling for greater coordination and commitment of state authorities both with the federal authorities and with each other, as well as with industry. For example, the Advisory Committee concluded that "[m]ost, if not all, of the provisions of importance to the state are present [in OPA] and [are] favorable."³⁶⁰ The bulk of the report was then devoted to explaining how State agencies could take advantage of OPA to improve spill response, and how better to assemble and coordinate information regarding spill prevention, containment, and cleanup.³⁶¹

In one sense, the Final Report aroused little controversy — few will argue for less coordination. However, the Final Report revealed that the state policy makers were divided as to whom the central coordinating authority should rest. The Advisory Committee voted in August 1990 to recognize a single existing Texas agency as having the lead responsibility of implementing the Texas Oil Spill Preparedness and Response Program. The Advisory Committee later voted 4 to 1 to designate TWC to continue, as it had since the mid-1970s, as that lead agency.³⁶² The dissenting vote came from the General Land Office Commissioner, Gary Mauro, who lodged a stinging criticism of TWC in his minority position report.³⁶³

Commissioner Mauro contended that after the "rash of spills this past summer in the Gulf of Mexico, Galveston Bay, and the Intracoastal Waterway . . . [w]hat we discovered is that the [s]tate of Texas is completely unprepared to respond to oil spills — and has been unprepared for years."³⁶⁴ The Committee majority, he alleged, advocates "enhancements to a flawed ineffective regime,"³⁶⁵ and "excuses the failings of that system with the old arguments of inadequate funding and lack of suffi-

359. The members were: Chairman Robert A. Lansford, State Coordinator of the Division of Emergency Management of the Texas Department of Public Safety; Committee members Garry Mauro, Commissioner of the General Land Office; Kent Hance, Chairman of the Railroad Commission of Texas; Charles D. Nash, Jr., Chairman of the Texas Parks and Wildlife Department; and B. J. Wynne, III, Chairman of the Texas Water Commission. FINAL REPORT *supra* note 97, at (i).

360. *Id.* at 1.

361. *Id.* at 1-15.

362. *Id.* at 13.

363. Minority Report by Texas Land Commissioner Gary Mauro to the Governor's Oil Spill Advisory Committee (attached to FINAL REPORT *supra* note 97).

364. *Id.* at 1.

365. *Id.* at 3.

cient legislative authority."³⁶⁶ As for TWC, Commissioner Mauro concluded that for as long as TWC has been the lead agency, "little or nothing has been done to improve the state's ability to respond to marine oil spills,"³⁶⁷ and enforcement policy had not been sufficiently aggressive.³⁶⁸ In sum, he alleged that TWC employed a bare minimum approach with respect to protection of the coastal and marine environment from oil spills.³⁶⁹

Commissioner Mauro's proposed solution to the problems he alleged TWC fostered and the Advisory Committee perpetuated was two-fold. First, he proposed to designate a single elected official as the lead for state oil spill policy and response. The nature of TWC as an appointed committee body means, in Commissioner Mauro's opinion, that its "decision-making . . . is a slow and deliberative process"³⁷⁰ and that it "knows no accountability and will not be responsive to the protection of the state's resources."³⁷¹ By contrast, he posited, a single elected official³⁷² would "provide rapid, effective response to oil spills" because "[t]he citizens of our state demand that their elected officials perform their duties in an exemplary manner."³⁷³

Beyond this intangible accountability factor, which many would argue history has shown to be an erratic predictor of actual performance, Commissioner Mauro called for "a fundamental restructuring [sic] of the

366. *Id.* at 2.

367. *Id.*

368. *Id.* Commissioner Mauro claimed that "no fines or penalties have been deposited into the Spill Response Fund . . . since 1978, despite some 2,000 spills reported to the agency annually." *Id.* (emphasis in original). Commissioner Mauro also accused the TWC of relying too heavily on independent contractors for cleanups.

369. *Id.* at 4. (For his part, TWC Chairman, Buck Wynne, responded forcefully to these assertions by arguing that "[s]pill preparedness and response is necessarily integrated with the State environmental regulatory programs administered by TWC in water quality and industrial and hazardous waste control."); See WYNNE, TEXAS LAWS AND PROPOSED LEGISLATION RELATING TO OIL SPILLS, 4 (1991) (presented at the Tenth New Orleans Maritime Seminar, New Orleans, Louisiana, Jan. 21, 1991). Chairman Wynne also vigorously defended his agency's record, arguing that it "has become a recognized national leader in spill management and response coordination . . . No other State agency currently has this [agency's] level of in-house experience and expertise." *Id.* at 3. Thus, Chairman Wynne concluded, "[r]ather than restructuring or creating a new program with a different state agency, the state should beef up its current spill response program at the TWC." *Id.*

370. Minority Report by Texas Land Commissioner Garry Mauro to the Governor's Oil Spill Advisory Committee (attached to FINAL REPORT *supra* note 97, at 3).

371. *Id.* at 4.

372. *Id.* at 3. It is not clear whether Commissioner Mauro meant to exclude an elected multi-member body such as the Railroad Commissioners by reference to a "single elected official." The General Land Office Commissioner is in that sense a true "single elected official."

373. *Id.*

state's oil spill response system."³⁷⁴ Although his minority report did not elaborate on the components of such a plan, a bill prefiled in the 72nd Texas Legislature, House Bill 88, appeared to reflect what Commissioner Mauro had in mind.³⁷⁵ Not surprisingly, as originally filed House Bill 88 designated the General Land Office ("GLO") as the state's lead oil spill response agency, to chair a cooperative council of state agencies participating in discharge prevention and response.³⁷⁶

As introduced, House Bill 88 and its subsequently filed companion, Senate Bill 14, also proposed to go far in altering the state's current spill response system for waterborne vessels and offshore and waterfront oil terminal facilities. All covered oil terminal facilities would be required to obtain an annual "discharge prevention and response certificate" upon proof that the facility has an adequate discharge prevention and response plan and can provide equipment and personnel sufficient to execute the plan.³⁷⁷ A similar plan would be maintained by all covered vessels.³⁷⁸ The Commissioner would establish standards for discharge prevention, response readiness, facility inspections, discharge reporting, cleanup protocols, and a host of other requirements. A network of state response centers would also be established to carry out a state response plan.³⁷⁹ Thus, House Bill 88 and Senate Bill 14 would move Texas marine and coastal spill prevention policy in the same direction OPA has sent federal policy.

In other ways, however, the original versions of House Bill 88 and Senate Bill 14 did not represent any different ground than the Advisory Committee majority covered. The bills did not propose to alter the laws and regulations applicable to inland oil storage facilities. The Advisory Committee majority endorsed the bill's proposal to boost the spill response fund to \$35 million.³⁸⁰ The bills' proposed cleanup responsibilities,³⁸¹ fund reimbursement procedures,³⁸² and financial responsibility provisions³⁸³ would be essentially the same as existing federal and state policy. Most significantly, the liability of responsible persons would still be capped in most cases at \$5 million,³⁸⁴ thus keeping Texas out of the

374. *Id.*

375. TEX. H.B. 88, 72nd Leg. (1990).

376. *Id.* §§ 5(a)-(b).

377. *Id.* § 6.

378. *Id.* § 7.

379. *Id.* § 10.

380. *Id.* § 12. See also FINAL REPORT, *supra* note 97, at 13.

381. TEX. H.B. 88, 72nd Leg., § 9 (1990).

382. *Id.* § 11, 13.

383. *Id.* § 14.

384. *Id.* § 15(a) (The cap would not apply in cases of "willful misconduct").

ranks of those states which have added the specter of unlimited liability to their oil spill laws. Only the provision for stiff civil penalties³⁸⁵ represented a meaningful departure from the Advisory Committee majority's recommendations.

A competing measure introduced in January 1991 involved a substantially different mix of proposals than House Bill 88 and Senate Bill 14. Senate Bill 272³⁸⁶ proposed to divide responsibility for oil and hazardous substance spill prevention and liability between the GLO Commissioner and TWC.³⁸⁷ The Commissioner would be given authority to issue and regulate vessel and terminal facility discharge prevention and response capability certificates.³⁸⁸ The Commissioner would also administer the reimbursement of response costs from a proposed \$25 million spill fund created by a marine terminal crude oil transfer fee.³⁸⁹ Significantly, unlike the other measures, Senate Bill 272 proposed to remove the \$5 million liability cap.³⁹⁰ Under Senate Bill 272, TWC would retain its position as the lead agency for spill response.³⁹¹ TWC also would take charge of the state spill contingency plan,³⁹² and approve qualified private discharge cleanup organizations.³⁹³ Hence, by enhancing GLO's role in oil spill prevention policy, Senate Bill 272 would give Commissioner Mauro part of what he sought; however, it proposed to leave the state's spill response policy firmly in the hands of TWC.

As the legislative session progressed, it became clear that the bills favoring the GLO-based oil spill program would prevail. The vehicle became Senate Bill 14, which passed the Texas Senate on February 13, 1991 and ultimately was adopted by both houses without amendment as a Conference Committee Report on March 27, 1991.³⁹⁴ Enacting what is to be known as the Oil Spill Prevention and Response Act of 1991 ("OS-

385. *Id.* at § 17. The penalty for violation of the Act would be \$50,000 per day per violation; however, no penalty could be assessed if a discharge was "promptly reported and removed by the responsible person in accordance with the rules, regulations, and orders authorized in this Act if the discharge causes no harm to personal or real property or to the natural resources, waters, estuaries, tidal flats, beaches, and lands of this state." *Id.*

386. TEX. S.B. 272, 72nd Leg. (1991).

387. *Id.* (proposed amendment to TEX. NAT. RES. CODE § 40.005).

388. *Id.* (proposed amendment to TEX. NAT. RES. CODE § 40.101).

389. *Id.* (proposed amendment to TEX. WATER CODE §§ 26.2641-2642).

390. *Id.* (proposed amendment to TEX. WATER CODE § 26.265).

391. *Id.* (proposed amendment to TEX. WATER CODE § 26.264).

392. *Id.* (proposed amendment to TEX. WATER CODE § 26.269).

393. *Id.* (proposed amendment to TEX. WATER CODE § 26.270).

394. See Statement of Chief Clerk of the House accompanying TEX. S.B. 14, 72d Leg., reprinted in 1991 Tex. Sess. Law. Serv. 36 (Vernon). The House initially had passed the Senate bill with amendments in which the Senate refused to concur. *Id.* The House thereafter relented and passed the Senate's version unanimously. *Id.*

PRA”),³⁹⁵ the legislature divested TWC of most of its oil spill response powers and handed them, and virtually all the newly-created authority in GLO, explicitly recognizing GLO as “the State’s lead agency for response to actual or threatened discharged of oil and for cleanup of pollution from unauthorized discharges of oil.”³⁹⁶ GLO thus will become the state’s principal source of authority in such matters, covered in OSPRA’s principal subchapters, as discharge response,³⁹⁷ oil spill prevention and response,³⁹⁸ payment of costs and damages,³⁹⁹ liability of persons responsible,⁴⁰⁰ and enforcement.⁴⁰¹

OSPRA contains several important provisions relating to discharge response. GLO must prepare a new state coastal discharge contingency plan which, among other things, shall develop regional response committees consisting of a “broad-based representation” available “to advise and provide input in the development of site-specific discharge contingency response plans.”⁴⁰² OSPRA thus carries the regionalized national response approach of OPA at the state level.

With respect to spill response, OSPRA requires persons responsible for oil spills immediately to notify GLO and to “undertake all reasonable actions to abate, contain, and remove pollution from the discharge.”⁴⁰³ GLO may conduct such actions when no responsible person does so,⁴⁰⁴ and in either case “may appoint a state-designated on-scene coordinator to” represent GLO in the response.⁴⁰⁵ GLO may also certify “discharge cleanup organizations” for the purpose of responding and who, on GLO’s approval, may be compensated by the OSPRA-established fund for the qualifying costs and expenses of their activities.⁴⁰⁶

The prevention provisions center around the “discharge prevention and response certificate[s]” each terminal facility must obtain to continue

395. Oil Spill Prevention and Response Act of 1991, ch. 10, § 1, 1991 Tex. Sess. Law Serv. 13 (Vernon) (to be codified at TEX. NAT. RES. CODE ANN. § 40.001) [hereinafter OSPRA]. OSPRA adopts the significant OPA definitions verbatim. OSPRA § 40.003, 1991 Tex. Sess. Law Serv. 13-16.

396. OSPRA § 40.004, 1991 Tex. Sess. Law Serv. 16. TWC principally retains its jurisdiction over spills of “predominantly a hazardous substance.” OSPRA § 40.052 and Subch. G, Tex. Sess. Law Serv. 17, 34-35.

397. OSPRA Subch. B, 1991 Tex. Sess. Law Serv. 17-18.

398. OSPRA Subch. C, 1991 Tex. Sess. Law Serv. 18-23.

399. OSPRA Subch. D, 1991 Tex. Sess. Law Serv. 23-26.

400. OSPRA Subch. E, 1991 Tex. Sess. Law Serv. 26-28.

401. OSPRA Subch. E, 1991 Tex. Sess. Law Serv. 28-31.

402. OSPRA § 40.053, 1991 Tex. Sess. Law Serv. 17. The plan must also include prescribed organizational, training, operation, and response provisions. *Id.*

403. OSPRA § 40.101, 1991 Tex. Sess. Law Serv. 18.

404. *Id.*

405. OSPRA § 40.102, 1991 Tex. Sess. Law Serv. 19.

406. OSPRA § 40.103, 1991 Tex. Sess. Law Serv. 19.

operations.⁴⁰⁷ To obtain the certificate the facility must demonstrate compliance with OPA and OSPRA prevention provisions and plans⁴⁰⁸ and must provide facility information to GLO.⁴⁰⁹ Similarly, a vessel must "maintain a written vessel-specific discharge prevention and response plan"⁴¹⁰ that it may be required to show in order to enter a Texas port.⁴¹¹

The actual establishment and administration of the spill response fund is based on a fee on the transfer of crude oil between vessels and marine terminals.⁴¹² The fund may not to exceed \$50 million,⁴¹³ and the fund may be disbursed only for specified activities, principally GLO's operational expenses and other qualified private persons' costs of responding to and abating oil spills.⁴¹⁴ When GLO designates a responsible person, however, private claims over \$50,000 must be directed first to the responsible person, then to the OPA fund, then to the OSPRA fund.⁴¹⁵

OSPRA liability provisions establish financial responsibility assurance procedures⁴¹⁶ and the limits of and defenses to liability.⁴¹⁷ The limits for vessel owners are complex, based on cargo and tonnage.⁴¹⁸ Terminal facilities are liable for response costs up to \$5 million, except

407. OSPRA § 40.109, 1991 Tex. Sess. Law Serv. 20.

408. *Id.*

409. OSPRA § 40.111, 1991 Tex. Sess. Law Serv. 21.

410. OSPRA § 40.114, 1991 Tex. Sess. Law Serv. 21-22.

411. OSPRA § 40.115, 1991 Tex. Sess. Law Serv. 23.

412. OSPRA § 40.154, 1991 Tex. Sess. Law Serv. 24.

413. OSPRA § 40.151, 1991 Tex. Sess. Law Serv. 23.

414. OSPRA § 40.152, 1991 Tex. Sess. Law Serv. 23. Persons incurring response costs qualifying for compensation must file a claim with GLO. OSPRA § 40.157, 1991 Tex. Sess. Law Serv. 25.

415. OSPRA § 40.159, 1991 Tex. Sess. Law Serv. 25-26. Private claims under \$50,000 need not be presented to the OPA fund. *Id.*

416. OSPRA § 40.201, 1991 Tex. Sess. Law Serv. 26.

417. OSPRA § 40.202, 1991 Tex. Sess. Law Serv. 27.

418. OSPRA § 40.202(a), 1991 Tex. Sess. Law Serv. 27, provides:

(1) all response costs from the actual or threatened discharge to an amount not to exceed \$1 million for vessels of 300 gross tons or less that do not carry oil as cargo, to an amount not to exceed \$5 million for vessels of 8,000 gross tons or less or, for vessels greater than 8,000 gross tons, to an amount equal to \$600 per gross ton of such vessel, not to exceed the aggregate amount of the fund established under section 40.151(b) of this code; and

(2) in addition to response costs, all damages other than natural resources damages from the actual or threatened discharge to an amount not to exceed \$1 million for vessels of 300 gross tons or less that do not carry oil as cargo, to an amount not to exceed \$5 million for vessels of 8,000 gross tons or less, for vessels greater than 8,000 gross tons, or less or, for vessels greater than 8,000 gross tons, to an amount equal to \$600 per gross ton of such vessel, not to exceed the aggregate amount of the fund established under section 40.151(b) of this code.

offshore drilling or production facilities, for which liability is unlimited;⁴¹⁹ liability for all other damages except natural resources damages is limited to \$5 million, except again for unlimited exposure for offshore drilling and production facilities.⁴²⁰ In all cases, gross negligence or wilful misconduct removes all limits.⁴²¹ Finally, liability for natural resource damages is unlimited in all cases.⁴²² The defenses to the liability provisions are extremely narrow.⁴²³

Enforcement penalties under OSPRA are stiff, although certain specified infractions are punishable as misdemeanors.⁴²⁴ Knowing failure to report a discharge incurs civil penalties up to \$250,000 for individuals and \$500,000 for corporations.⁴²⁵ Causing a discharge or failure to properly respond and abate subjects a party to fines of up to \$25,000 per day, per violation.⁴²⁶ All such penalties may also be assessed through an administrative penalty assessment authority.⁴²⁷

419. OSPRA § 40.202(b)(1), 1991 Tex. Sess. Law Serv. 27.

420. OSPRA § 40.202(b)(2), 1991 Tex. Sess. Law Serv. 27.

421. OSPRA § 40.202(c)(1), 1991 Tex. Sess. Law Serv. 27.

422. OSPRA § 40.203, 1991 Tex. Sess. Law Serv. 27-28.

423. OSPRA § 40.204, 1991 Tex. Sess. Law Serv. 28, provides:

Sec. 40.204. DEFENSES. The only defense of a person responsible for an actual or threatened unauthorized discharge of oil shall be to plead and prove that the discharge resulted solely from any of the following or any combination of the following:

- (1) an act of war or terrorism;
- (2) an act of government, either state, federal, or local;
- (3) an unforeseeable occurrence exclusively occasioned by the violence of nature without the interference of any human act or omission; or
- (4) the wilful misconduct or a negligent act or omission of a third party, other than an employee or agent of the person responsible or a third party whose conduct occurs in connection with a contractual relationship with the responsible person, unless the person failed to exercise due care and take precautions against foreseeable conduct of the third party.

424. OSPRA § 40.251, 1991 Tex. Sess. Law Serv. 28, provides:

Sec. 40.251. PENALTIES. (a) A person who intentionally commits any of the following acts in violation of Subchapter C, D, or E, of this chapter shall be guilty of a Class A misdemeanor:

- (1) operating a terminal facility or vessel without a discharge prevention and response plan;
- (2) operating a terminal facility or vessel without establishing and maintaining financial responsibility;
- (3) causing, allowing, or permitting an unauthorized discharge of oil;
- (4) making a material false statement with a fraudulent intent in an application or report; or
- (5) with respect to the person in charge of a vessel from which an unauthorized discharge of oil emanates, taking the vessel from the jurisdiction of the commissioner prior to proving financial responsibility.

425. OSPRA § 40.251(b), 1991 Tex. Sess. Law Serv. 28.

426. OSPRA § 40.251(c)-(d), 1991 Tex. Sess. Law Serv. 28-29.

427. OSPRA § 40.252, 1991 Tex. Sess. Law Serv. 29. Procedures for administrative penalty assessment are prescribed in OSPRA § 40.254, 1991 Tex. Sess. Law Serv. 30.

Clearly, OSPRA represents a major step for Texas in the administration of oil spill prevention and response. Whether it will achieve all that GLO Commissioner Mauro promised remains to be seen. What is certain, however, is that OPA was the impetus for Texas' reply to the call for better oil spill response, and other states are likely to follow.

V. CONCLUSION — THE FAR-REACHING IMPACT ON INDUSTRY

As this discussion of OPA's provisions indicates, the effects of the Act are extensive and affect both domestic and international interests in the oil production and transportation industry beyond the obvious vessel owner segment.⁴²⁸ Over one year after the measure's enactment, it is uncertain how extensive OPA's effects will be. However, it is clear that those directly and indirectly affected by its terms must take note of the potential liabilities the Act imposes. Several important concerns about liability can be raised even at this early stage of OPA's life.

A. *Lending Transactions*

OPA's definition of "owner or operator" remains open to interpretation. In the context of oil production and transportation industry lending transactions, the interpretation of these terms may ultimately result in certain lenders being held liable under OPA for all damages and removal costs resulting from an oil discharge. In the absence of a lender's actual participation in the management of a vessel or facility, two ways a court could find a lender liable within the terms of OPA are: 1) by finding that just documents evidencing a security interest alone are sufficient to constitute ownership; or 2) that the specific terms of the security documents contain conditions sufficient to provide the lender enough potential control over the borrower for liability to attach.

Under the first possible basis for finding liability, the court could hold that the lender who holds title or other indicia of ownership to a vessel or facility primarily to protect a security interest therein is an owner or operator. Even lenders that do not participate in the manage-

428. Indeed, prior to passage of OPA, oil vessel owners had realized and reacted to the fact that they were the central target of increased liability requirements and regulatory burdens. In June 1990, for example, Shell Oil Company announced that it would use company-owned vessels only for discharging at the Louisiana Offshore Port, using chartered vessels for all future oil shipments to mainland terminals. Other oil producing and shipping companies announced a boycott of U.S. mainland ports. Vessel companies generally cited the vastly increased risks and costs of business as the reason for this strong backlash, claiming that they would be forced to rely on highly insulated "single vessel" corporations to protect the mother company from such exposure. Rodriguez & Jaffe, *THE OIL POLLUTION ACT OF 1990 AND AN OVERVIEW OF U.S. WATER POLLUTION LAW*, 24-27 (1991) (presented at the Tenth New Orleans Maritime Seminar, New Orleans, Louisiana, Jan. 21, 1991).

ment or operation of the vessel or facility, or in the production or transportation of the oil, would still be considered owners or operators, and thus responsible parties. In the original House-approved version of OPA, such lenders were expressly exempted from the definition of "owner."⁴²⁹ Presumably, the intent of that exemption was the same as that under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁴³⁰ CERCLA has created tremendous debate on that issue.⁴³¹ However, the original Senate-approved version of OPA did not include such an exemption.⁴³² In the compromise version, the conferees used the same definition of "owner or operator" as contained in Section 311(a) of FWPCA⁴³³ and adopted the House version's

429. See H.R. 1465, 101st Cong., 1st Sess. (1989) § 1001(23).

430. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, 9601(20)(A) (1988). CERCLA was passed after section 311 of the FWPCA was first enacted and since that time has overshadowed its companion response statute. The tremendous amount of litigation under CERCLA has led to liberal interpretation and application of the statute to effectuate the public policies supporting adequate waste contamination response actions. To the extent OPA adopts definitions and terms similar to those used in CERCLA (even if they may also have been used in section 311 of the FWPCA), an argument could be made that Congress intended to adopt the CERCLA case law interpretations of those definitions, and OPA provisions could be burdened by the baggage of their CERCLA counterparts. For example, the definition of "person" is almost the same in both laws. Compare CERCLA § 101(21), 42 U.S.C. § 9601(21) (1988) with Oil Pollution Act of 1990, Pub. L. No. 101-380, § 1001(27), 104 Stat. 484, 488 (1990) (to be codified at 33 U.S.C. § 2701(27)). Arguably, then, the tumultuous case law regarding corporate parent, successor, officer, director, and shareholder liability under CERCLA should be of concern to entities subject to OPA. See Aronousky and Fuller, *Liability of Parent Corporation for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421 (1990) (article discussing legal problems of CERCLA); Note, *CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard*, 68 TEX. L. REV. 1237 (1990) (liability of successor corporations).

431. The circumstances under which the CERCLA secured creditor exemption applies has been the subject of disagreement among courts and commentators. Compare *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990) (secured creditor is potentially an owner if it has "capacity to influence . . . [the borrower's] treatment of hazardous waste") *cert. denied*, 111 S.Ct. 752 (1991) with *In re Bergsoe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990) (to be treated as owner, secured creditor must exercise "some actual management of the facility") (emphasis in original); see also Corash & Behrendt, *Lender Liability Under CERCLA: Search for a Safe Harbor*, 43 Sw. L. J. 863 (1990) (risk under CERCLA to lenders); Comment, *Limiting Liability of the Passive Lender Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980*, 26 TULSA L. J. 75 (1990) (liability under CERCLA and passive lenders). EPA proposed regulations for interpreting how the provisions would apply to lending related activity such as foreclosure workout, and other operational involvement in the facility. 56 Fed. Reg. 28,798 (1991) (to be codified at 40 C.F.R. Part 300). It remains to be seen, however, how Congress, the courts, and EPA will resolve the issue under CERCLA.

432. S. REP. NO. 101-686, 101st Cong., 2d Sess. 9679 (1990).

433. H.R. CONF. REP. NO. 101-653, 101st Cong., 2d Sess. 101-02 (1990).

definition of "responsible party."⁴³⁴ It is unclear whether Congress, by rejecting any language specifically exempting secured creditors, intended to include them as potentially responsible parties *per se*. Given the Conference Committee's specific statement that the term "owner or operator" should receive the same interpretation as used under section 311(a) of FWPCA, it seems reasonable that the current practices of those holding indicia of ownership primarily to protect a security interest in a vessel or facility may continue to employ the same practices as used under section 311(a) of FWPCA and will not be subject to additional liability as an "owner or operator" than they were under prior law. However, OPA's extensive liability provisions and Congress' apparent rejection of the secured creditor exemption warrant heightened concern from lenders in the oil shipping industry.

Moreover, less drastic means for a court to hold a lender liable would be for the court to find that the lender, through the specific terms of the loan documents, is liable because it has the "power to direct the activities of persons who control the mechanisms causing the pollution."⁴³⁵ It is possible, as has been suggested under CERCLA,⁴³⁶ that a court could interpret the loan documents themselves or supervisory actions by the lender as evidencing sufficient power over the borrower for liability to attach.⁴³⁷ Such a determination would depend on the specific terms of the documents or actions taken. However, this issue raises the question of how a lender may protect its collateral without imposing so

434. H.R. REP. NO. 101-653, 101st Cong., 2d Sess. 101(29) (1990); H.R. CONF. REP. NO. 101-653, 2d Sess. 101 (1990).

435. *United States v. Mobil Oil Corp.*, 464 F.2d 1124, 1127 (5th Cir. 1972).

436. *See United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991). In that case, the court adopted the standard whereby a secured creditor could incur CERCLA liability "by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes." *Id.* at 1557. In *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990), the court said that "there must be *some* actual management of the facility before a secured creditor will fall outside the [secured creditor] exception." *Id.* at 672 (emphasis in original). Whether a court applying OPA would follow the same reasoning used under CERCLA is unclear. In addition, it is unclear what, if any, impact the Environmental Protection Agency's proposed rule regarding lender liability under CERCLA might have on cases applying OPA. *See* 56 Fed. Reg. 28,798 (1991).

It should be noted that, in *Fleet Factors*, the court stated "[i]n order to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities." *United States v. Fleet Factors*, 901 F.2d 1550, 1557 (footnote omitted), *cert. denied*, 111 S. Ct. 752 (1991). If this policy were applied to OPA, then it would result in greater lender liability being realized under OPA than under CERCLA since the OPA does not have a secured creditor exemption.

437. *See United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1556 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

many requirements that liability attaches. It is not yet clear under CERCLA or OPA exactly how this balance will be struck.

Indeed, lenders will undoubtedly respond to OPA with a heightened sense of a need to protect the security interest collateral through increased involvement in the borrower's business. In addition to the increased liability limits, the extensive regulatory requirements OPA recently imposed on vessel and facility owners translate into additional ways to violate the law and expose the borrower to civil and criminal penalties. This in turn increases the lender's risk of facing a nonviable borrower. The most drastic penalty of all — vessel seizure — directly threatens a lender's collateral security. Hence, the tension between the lender's desire to increase the extent of control over the borrower's operations conflicts with the desire to avoid constructive ownership as a result of the provisions in the security documents that confer the level of control sought. Careful document drafting and restraint on the part of lenders may be necessary, but will surely result in a higher price to borrowers in obtaining financing.

B. Ship Manufacturers

Title IV of OPA provides various requirements regarding the construction and outfitting of certain vessels. However, one issue which the Act does not address is the liability of those who manufacture vessels, facilities, or components thereof. For example, if a component of a vessel or facility malfunctions and the malfunction causes a discharge, what statutory liability will the manufacturer face? It appears possible that the manufacturer, through the Act's third-party liability provisions, could face overwhelming liability. In addition, it is not clear how long a manufacturer would be liable for the products built and sold. Conceivably, the prospect of liability could continue as long as the part is in use. Ship manufacturers and component manufacturers thus will want to re-examine their contractual allocation of responsibility and liability with vessel purchasers so as to clearly define who bears such liabilities.

C. Insurers

Similar to the situation for lenders, OPA's increased liability and regulatory burdens on both vessel owners and vessel construction standards will affect the way in which insurers at all levels of oil transportation view the economics of their industry. Protection and Indemnity Clubs, the traditional insurers of vessel owners, must factor the increased liability limits into the equation, which necessarily will result in more

expensive and less available insurance.⁴³⁸ Similarly, insurers of vessel manufacturers must account for the possibility of increased claims by vessel owners against the manufacturers for failure to comply with OPA's construction standards. Insurers who take efforts to monitor and control their insured's activities to protect against such losses may face the same concern lenders face of potentially being construed an owner within the meaning of the Act.

D. Recovery of Lost Profits

OPA fails to provide sufficient guidance on how a plaintiff may prove what profits, if any, were lost due to an oil spill. This raises many issues, including how a plaintiff must prove what profits were lost and what level of causation the plaintiff must prove — e.g., that the oil discharge definitely caused the lost profits, probably did so, may have done so, or some other level of causation. In addition, it is unclear how many other factors the plaintiff must negate. It is doubtful that Congress intended those subject to OPA's liability provisions to be responsible for local, regional, national or international downturns in the economy. However, the level of proof regarding causation required of a plaintiff could result in just that.

Another issue is what duty a plaintiff has to mitigate his damages. For example, if a plaintiff who would have worked part-time at a beach t-shirt shop cannot do so because the beach is closed due to an oil spill, does that plaintiff have a duty to show that he was unable to find any work elsewhere before he can recover his lost wages? What if the plaintiff worked at a different job for more or less money? The possible hypotheticals one can develop seem endless and the answers to them will undoubtedly consume a great deal of time and effort in the courts.

E. The Use of a Required Notification

As discussed above, Title IV of OPA amends prior law to allow the use of information contained in a required notification of an oil discharge

438. Protection & Indemnity Club representatives have pointed to the increased liability limits, and even more so to the broadened categories of awardable damages, as raising the cost of vessel insurance to unmanageable levels. *See, e.g.,* CASSEDY, *THE AMERICAN CLUB ADDRESS* (1991) at 2. (presented to the Tenth New Orleans Maritime Seminar, New Orleans, Louisiana, Jan. 21, 1991). Protection & Indemnity Clubs claim that the potential exposure for oil spills in the United States after the OPA will be about \$2,000 per spilled barrel, an amount alleged to be \$1,500 more per barrel than spills in other countries. *Id.* at 2. The result, it is argued, will be higher insurance premiums imposed on vessels operating in United States waters and a refusal by some insurers to provide certification of shipowner financial responsibility certifications. *Id.* at 3-5. At present, no resolution of this potential stalemate appears near at hand.



or secondary information derived therefrom against the notifier in certain cases. This amendment raises not only Fifth Amendment concerns regarding one's ability to avoid incriminating oneself, but also raises concerns regarding how thorough the notifications will be. OPA requires and makes it advantageous for a party to promptly provide notification of a covered discharge because the failure to provide the notification may subject one to civil and criminal penalties and negate the Act's liability limitations. However, it may be in the notifying party's best interest to report only the bare minimum required in order to avoid inadvertently including information that might later be used against him in criminal proceedings. Surely the public interest is better served by prompt, *complete* notification of a discharge. The extent to which this amendment will defeat that public interest will become clear only in the future.

F. *Cargo Owner Liability*

In what would have been the most dramatic effect of the new legislation, the House version of OPA contained a provision exposing the vessel *cargo* owner to shared liability for oil spills when damages exceed specified levels and when other conditions are present.⁴³⁹ That proposal sent a veritable shock wave through the oil production and trading industries. Ultimately, the Senate version, which omitted any such reference,⁴⁴⁰ prevailed and the question of cargo owner liability under federal law was put to rest for a considerable time to come. The fact that cargo owner liability was an issue, however, suggests that producers and traders should remain aware of state legislative initiatives which may go beyond the scope of OPA.

Clearly, even without cargo owner liability, OPA has heralded a substantial reconstruction of the oil production and transportation industries. The enactment of additional state laws and promulgation of federal regulations will continue this reconstruction. However, those affected by these changes should refuse to throw up their hands in despair, forsaking their current opportunities to become involved in making OPA's requirements more realistically feasible. As the discussion of OPA's provisions points out in many places, the Act requires the promulgation of many new regulations and the initiation of numerous studies. These regulations and studies have the potential to substantially influence how OPA affects the oil industry. As a result, those touched by OPA should seek not only to understand its current provisions but to actively participate in

439. H.R. REP. NO. 101-653, 101st Cong., 2d Sess., §§ 1001(32), 1002(a) (a cargo owner could be construed as being a responsible party).

440. 135 CONG. REC. 59679 (daily ed. Aug. 3, 1989).

the development of the regulations and studies which will affect them in the future. Through these regulations and the future legislation that will be based on the studies required by OPA, it may be possible to remedy the inadequacies and clarify the uncertainties presented by the OPA.