Oil Pollution Act of 1990 (OPA): Liability of Responsible Parties

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Summary

The Oil Pollution Act of 1990 (OPA) establishes a framework that addresses the liability of responsible parties in connection with the discharge of oil into the navigable waters of the United States, adjoining shorelines, or the exclusive economic zone. Among other provisions, OPA limits certain liabilities of a responsible party in connection with discharges of oil into such areas. The liability limitations established by OPA are currently the subject of significant congressional interest in the wake of the Deepwater Horizon oil spill in the Gulf of Mexico.

A responsible party is strictly liable for removal costs plus damages resulting from an oil spill incident under OPA. A responsible party's liability under OPA is confined to specific categories of damages. Pursuant to OPA, the total liability for damages in connection with an oil spill is limited based on the type of vessel or facility involved, and the amount of oil discharged. OPA provides limited defenses which, if applicable, allow a responsible party to discharge its liability to persons injured by a discharge of oil into the navigable waters of the United States, adjoining shorelines, or the exclusive economic zone.

Claims for removal costs and certain damages must, with limited exception, be presented directly to the responsible party. In the event that a claim for removal costs or certain damages is not paid by the responsible party within 90 days, a claimant may present such a claim directly to the Oil Spill Liability Trust Fund or file suit in court. OPA and its regulations establish procedures for recovering removal costs and damages against the Oil Spill Liability Trust Fund.

This report addresses liability under OPA for removal costs and damages, and the basic procedure for recovering removal costs and damages from the Oil Spill Liability Trust Fund in the event that the responsible party fails to settle such claims.

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Background

The Oil Pollution Act of 1990 (OPA) establishes a framework that addresses the liability of responsible parties in connection with the discharge of oil into the navigable waters of the United States, adjoining shorelines, or the exclusive economic zone.[1] Among other provisions, OPA limits certain liabilities of a responsible party in connection with discharges of oil into such areas.[2]

OPA replaced the liability limitations established in Clean Water Act section 311[3] with much higher ones and expanded the class of persons authorized to recover removal costs from the responsible party to "any person" who has incurred removal costs in connection with a discharge of oil into covered waters.[4] Under the Clean Water Act, only the federal government could recover removal costs from the responsible party. Additionally, OPA created categories of damages for which the responsible party would be liable, within specified limits, based on the type of vessel or facility involved in the oil spill incident.[5] The following sections of this report will discuss liability under OPA for removal costs and damages, and the basic procedure for recovering removal costs and damages from the Oil Spill Liability Trust Fund[6] in the event that the responsible party fails to pay such claims.

Liability of Responsible Parties[7]

Under OPA, a responsible party is strictly and jointly and severally liable for removal costs plus damages in connection with a discharge of oil into covered waters.[8] A responsible party's liability for damages, however, is limited under OPA.[9] The Oil Pollution Act of 1990 also states that additional liability may be imposed upon a responsible party under state law.[10]

[1] 33 U.S.C. § 2701 *et seq*. Under OPA, the term "navigable waters" means "the waters of the United States, including the territorial sea." 33 U.S.C. § 2701(21).

[2] A recently introduced bill in the Senate, S. 3305, would raise OPA's limitation on liability for offshore facilities from $75 million to $10 billion, if enacted. The House companion bill to S. 3305, H.R. 5214, would amend OPA's limitation on liability for offshore facilities in the same manner as S. 3305, if enacted.

[3] 33 U.S.C. § 1321.

[4] 33 U.S.C. § 2702(b)(1)(B).

[5] 33 U.S.C. § 2702(b)(2)(A)-(F).

[6] The Oil Spill Liability Trust Fund is a federally administered trust fund that is financed by a per-barrel tax on petroleum products produced for consumption within the United States. 26 U.S.C. §§ 4611.

[7] Under OPA, the term "responsible party" refers to the owner or operator of a vessel or facility from which oil is discharged. 33 U.S.C § 2701(32). *See* **Appendix A** for OPA's definition of the term "responsible party."

[8] Under OPA, the terms "liable" and "liability" are "construed to be the standard of liability which obtains under section 311 of the [Clean Water Act]." Courts have interpreted section 311 of the Clean Water Act as imposing strict liability on parties responsible for the discharge of oil or hazardous substances into the waters of the United States. *See* United States v. New York, 481 F. Supp. 4 (D.N.Y. 1979).

[9] Unlike removal costs, which are uncapped, the responsible party's liability for damages under OPA is limited based on the type of vessel or facility involved, and the amount of oil discharged. 33 U.S.C. §§ 2704(a) and (b).

[10] 33 U.S.C. §§ 2718(a) and (c).

Responsible Party Liability for Removal Costs

A responsible party in an oil spill incident is liable for removal costs[11] under OPA:

> Notwithstanding any other provision or rule of law, and subject to the provisions of [OPA], each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the *removal costs* and damages … that result from such incident.[12]

Removal costs may be recovered from a responsible party by the United States, affected states and Indian tribes, and by any person, to the extent that such person has undertaken removal actions pursuant to the National Contingency Plan, mandated by Clean Water Act section 311.[13] In general, claims for removal costs must be presented first to a responsible party.[14] If the party to whom the claim is presented denies all liability for the claim, or if the claim is not settled by payment within 90 days after the claim was presented, the claimant may elect either to initiate an action in court[15] against the responsible party or to present the claim directly to the Oil Spill Liability Trust Fund.[16]

In limited situations, however, certain claims for removal costs may be presented initially to the Oil Spill Liability Trust Fund.[17] For example, if the President (acting through the Director of the National Pollution Funds Center) advertises or otherwise notifies claimants in writing, then such claimants may bypass the responsible party and present claims for removal costs directly to the Fund.[18] A responsible party may also present claims for removal costs directly to the Fund.[19] The Governor of an affected state may present a claim directly to the Fund for removal costs incurred by that state.[20] Finally, a "United States claimant" may present a claim for removal costs in the

[11] Under OPA, the term "removal costs" means "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." 33 U.S.C. § 2701(31).

[12] 33 U.S.C. § 2702(a) (emphasis supplied).

[13] 33 U.S.C. §§ 2702(b)(1)(A) and (B). The National Contingency Plan is authorized by Clean Water Act § 311(d). 33 U.S.C. § 1321(d). The implementing regulations promulgated by the Environmental Protection Agency are set forth at 40 CFR § 300.1 *et seq.*

[14] 33 U.S.C. § 2713(a). Under OPA, the term "claim" means "a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an [oil spill] incident." 33 U.S.C. § 2701(3).

[15] The Oil Pollution Act of 1990 provides federal district courts with "exclusive original jurisdiction over all controversies arising under [OPA]." 33 U.S.C. § 2717(b). State courts "of competent jurisdiction" may consider claims for damages or removal costs arising under OPA or applicable state law. 33 U.S.C. § 2717(c).

[16] 33 U.S.C. § 2713(c). Claims for removal costs must be presented within six (6) years after the date of completion of all removal activities related to the oil spill incident. 33 U.S.C. § 2712(h)(1). A guide for filing claims against the Oil Spill Liability Trust Fund can be found on the U.S. Coast Guard's National Pollution Fund Center website at http://www.uscg.mil/npfc/Claims/default.asp (last visited May 24, 2010).

[17] 33 U.S.C. § 2713(b).

[18] 33 U.S.C. § 2713(b)(1)(A); 33 CFR § 136.103(b)(1).

[19] 33 U.S.C. § 2708 (responsible party entitled to recover against Fund). *See* 33 U.S.C. § 2713(b)(1)(B); 33 CFR § 136.103(b)(2).

[20] 33 U.S.C. § 2713(b)(1)(C); 33 CFR § 136.103(b)(3).

event that a foreign offshore unit has discharged oil causing damage for which the Fund is otherwise liable.[21]

In the event that a person presents a claim for removal costs to the Fund, in addition to the aforementioned procedural requirements the claimant must establish (1) that the actions taken were necessary to prevent, minimize, or mitigate the effects of the oil spill incident; (2) that the removal costs were incurred as a result of the actions taken to prevent, minimize, or mitigate the effects of the oil spill incident; and (3) that the actions taken were determined by the Federal On-Scene Coordinator to be consistent with the National Contingency Plan, or were otherwise directed by the Federal On-Scene Coordinator.[22] The amount of compensation for removal cost claims against the Fund is "the total of uncompensated reasonable removal costs of actions taken that were determined by the [Federal On-Scene Coordinator] to be consistent with the National Contingency Plan or were directed by the [Federal On-Scene Coordinator]."[23]

Removal activities for which costs are being claimed must be coordinated by the Federal On-Scene Coordinator, except in "exceptional circumstances."[24] Accordingly, costs incurred for removal activities that are not coordinated with, or directed by, the Federal On-Scene Coordinator may not be recoverable against the Fund.[25]

Responsible Party Liability for Damages

Under OPA, responsible parties are liable for certain damages resulting from an oil spill incident.[26]

> Notwithstanding any other provision or rule of law, and subject to the provisions of [OPA], each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and *damages* … that result from such incident.[27]

[21] 33 U.S.C. § 2713(b)(1)(D); 33 CFR § 136.103(b)(4). The term "United States claimant" is not specifically defined by OPA or its implementing regulations.

[22] 33 U.S.C. § 2713(e); 33 CFR §§ 136.203(a), (b), and (c). The Federal On-Scene Coordinator of the Deepwater Horizon oil spill in the Gulf of Mexico is U.S. Coast Guard 8th District Deputy Commander, Rear Admiral James A. Watson.

[23] 33 U.S.C. § 2713(e); 33 CFR § 136.205.

[24] *Id.*

[25] Costs incurred for removal activities that are not coordinated with or directed by the Federal On-Scene Coordinator, however, may be presented by any claimant to the responsible party. 33 U.S.C. § 2713(a).

[26] Under OPA, the term "damages" means "damages specified in [33 U.S.C. § 2702(b)], *and includes the costs of assessing these damages*." 33 U.S.C. § 2701(5) (emphasis supplied). The standards and procedures for conducting natural resource damage assessments are set forth in regulations promulgated by the National Oceanic and Atmospheric Administration pursuant to OPA. 33 U.S.C. § 2706(e); 15 C.F.R. §§ 990.10 through 990.66.

[27] 33 U.S.C. § 2702(a) (emphasis supplied).

Generally, claims for damages must be presented first to a responsible party.[28] If the party to whom the claim is presented denies all liability for the claim, or if the claim is not settled by payment within 90 days after which the claim was presented, the claimant may elect either to initiate an action in court against the responsible party, or to present the claim directly to the Oil Spill Liability Trust Fund.[29]

As discussed below, some categories of damages are available for any person affected by the oil spill incident, while other categories of damages are only recoverable by the United States, states, and/or political subdivisions of states. Unlike removal costs, which are also determined on a per-incident and per-responsible party basis but are uncapped, damages are capped under OPA on a per-incident and per-responsible party basis, unless certain exceptions apply.[30] In the event that an exception applies to a particular oil spill incident, a responsible party's liability for damages under OPA is unlimited.[31] Although the act does not expressly prohibit the recovery of punitive damages against the responsible party, courts that have considered the issue have held that punitive damages are not recoverable against a responsible party under the act.[32]

Limits on Liability

Limitations on liability for damages under OPA are determined on a per-responsible party and per-incident basis.[33] The act further limits a responsible party's liability for damages based on the type of vessel or facility from which the discharge of oil flows. Specifically, the act provides different liability limits for (1) tank vessels; (2) vessels, generally; (3) offshore facilities (other than deepwater ports); (4) onshore facilities and deepwater ports; and (5) mobile offshore drilling units.[34]

For example, the Deepwater Horizon rig, which exploded in the Gulf of Mexico on April 20, 2010, and sank two days later, is classified as a mobile offshore drilling unit.[35] Initially, a mobile offshore drilling unit is deemed to be a tank vessel for the purposes of determining the responsible party's liability.[36] In the event that damages exceed the liability limits for discharges

[28] 33 U.S.C. § 2713(a). Under OPA, the term "claim" means "a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an [oil spill] incident." 33 U.S.C. § 2701(3).

[29] 33 U.S.C. § 2713(c). Claims for the recovery of damages for an oil spill incident must be presented within three years of the oil spill incident. 33 U.S.C. § 2712(h)(2). A guide for filing claims against the Oil Spill Liability Trust Fund can be found on the U.S. Coast Guard's National Pollution Fund Center website at http://www.uscg.mil/npfc/Claims/default.asp (last visited May 24, 2010).

[30] *See* 33 U.S.C. § 2704(c) (list of exceptions to liability limitations).

[31] *Id.*

[32] *See* South Port Marine, LLC v. Gulf Oil, LP, 234 F.3d 58 (1st Cir. 2000) (OPA displaces maritime-law punitive damages); Clausen v. M/V New Carissa, 171 F. Supp. 2d 1127 (D. Or. 2003) (OPA provides exclusive federal remedy for property damage claims resulting from oil spill, and thus precludes award of punitive damages for any claim for which the act could provide relief).

[33] 33 U.S.C. § 2704(a).

[34] *Id.* For definitions of the types of facilities covered by OPA, *see* **Appendix A**.

[35] *See* http://www.deepwaterinvestigation.com/go/doc/3043/558647/ (U.S. Coast Guard and Minerals Management Service joint press release referring to Deepwater Horizon oil rig as a mobile offshore drilling unit) (last visited on May 24, 2010).

[36] 33 U.S.C. § 2704(b)(1). The Federal On-Scene Coordinator designates the source of the discharge for the purposes of determining liability under OPA. 33 U.S.C § 2714(a); 33 C.F.R. § 136.305. The Federal On-Scene Coordinator of the ongoing oil spill in the Gulf of Mexico is U.S. Coast Guard 8th District Deputy Commander, Rear Admiral James A. (continued...)

from tank vessels, the mobile offshore drilling unit is deemed to be an offshore facility.[37] Thus, if damages in the Gulf of Mexico exceed the liability limit established for tank vessels under OPA,[38] the Deepwater Horizon would be deemed an offshore facility, and the liability for the "responsible party" could be limited to removal costs plus $75 million.[39]

The limitations on liability mentioned above, however, are subject to several exceptions. Specifically, if the Deepwater Horizon oil spill incident is determined to be the result of gross negligence, willful misconduct, or violation of federal safety, construction, or operating regulations by a responsible party, then the relevant liability limitation is not applicable.[40] Additionally, the liability limitations established by the act are not applicable as to the responsible party if the responsible party fails or refuses to (a) report the incident (as required by law), (b) cooperate with federal removal activities, or (c) comply with the National Contingency Plan.[41]

Natural Resources

Responsible parties are liable to the United States, states, Indian tribes, or foreign governments for the harm to natural resources caused by an oil spill incident under OPA.[42] The term "natural resources" is broadly defined by the act to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the United States (including the resources of the exclusive economic zone), any state or local government, any Indian tribe, or any foreign government.[43]

Although the term "natural resources" is defined broadly, damages for "injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damages" are only recoverable by trustees acting on behalf of the United States, states, Indian tribes, or foreign governments.[44]

Generally, claims for natural resource damages must be presented directly to the responsible party. If not paid by the responsible party, OPA and its implementing regulations establish a procedure through which uncompensated natural resource damages may be recovered by affected claimants from the Oil Spill Liability Trust Fund.[45]

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[37] 33 U.S.C. § 2704(b)(2).

[38] For the purposes of determining the liability limitation for a specific vessel or facility, OPA uses a formula that is based on the weight of the vessel or facility owned or operated by the responsible party. *See* **Appendix B** for OPA limitations on liability.

[39] 33 U.S.C. § 2704(b)(2).

[40] 33 U.S.C. §§ 2704(c)(1)(A) and (B).

[41] 33 U.S.C. §§ 2704(c)(2)(A), (B), and (C).

[42] 33 U.S.C. § 2702(b)(2)(A).

[43] 33 U.S.C. § 2701(20).

[44] 33 U.S.C. § 2702(b)(2)(A).

[45] 33 U.S.C. § 2713(e); 33 CFR Part 136, subparts B and C.

Real or Personal Property

Responsible parties are liable to claimants under OPA for harm to real or personal property resulting from an oil spill incident.[46] Specifically, a claimant who owns or leases an affected property may recover damages from the responsible party "for injury to, or economic losses resulting from destruction of, real or personal property."[47]

In the event that the responsible party fails to settle a claim for damages to real or personal property within 90 days, a claimant may present such a claim directly to the Oil Spill Liability Trust Fund. To recover damages against the Fund for "injury" to real or personal property, a claimant must prove (1) property ownership or control; (2) property damage or injury; (3) the cost of repairing or replacing the property; and (4) the property values before and after the oil spill incident.[48]

To recover damages against the Fund for "economic loss resulting from the destruction" of real or personal property, in addition to the aforementioned requirements listed above, a claimant must prove (1) that the affected property was not available for use, and if it had been available for use, the value of that use; (2) the availability of substitute property, and if used in lieu of the injured property, the costs associated with such use; and (3) a nexus between the economic losses claimed and the injury to the property.[49]

Loss of Subsistence Use

Under OPA, responsible parties are liable to claimants for the "loss of subsistence use of natural resources."[50] Any claimant who "uses natural resources [for subsistence purposes] which have been injured, destroyed, or lost" as a result of an oil spill incident may recover damages from the responsible party.[51]

In the event that a responsible party fails to settle a claim for damages for loss of subsistence use of natural resources within 90 days, a claimant may present such a claim directly to the Oil Spill Liability Trust Fund. To recover against the Fund, a claimant must (1) identify each specific natural resource for which compensation for loss of subsistence use is claimed; (2) describe the actual subsistence use made of each natural resource; (3) describe how and to what extent the subsistence use was affected by the oil spill incident; (4) describe the mitigation efforts undertaken by the claimant; and (5) describe alternative sources or means of subsistence available to the claimant during the period of time for which loss of subsistence is claimed, and any compensation available to the claimant for loss of subsistence.

[46] 33 U.S.C. § 2702(b)(2)(B).

[47] 33 U.S.C. § 2702(b)(2)(B).

[48] 33 U.S.C. § 2713(e); 33 CFR §§ 136.215(a)(1)-(4).

[49] 33 U.S.C. § 2713(e); 33 CFR §§ 136.215(b)(1)-(3).

[50] 33 U.S.C. § 2702(b)(2)(C).

[51] *Id.*

Government Revenues

Under OPA, responsible parties are liable for damages "equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources."[52] Only the United States, states, and political subdivisions of states may recover damages from the responsible party for lost government revenues.[53] Accordingly, private entities may not recover damages, either against the responsible party or against the Oil Spill Liability Trust Fund, under this section of the act.

In the event that a responsible party fails to settle a claim for damages for lost government revenues within 90 days, a claimant may present such a claim directly to the Oil Spill Liability Trust Fund. To recover against the Fund, a claimant must (1) identify and describe the economic loss for which compensation is claimed; (2) prove a causal nexus between the loss of revenue and the destruction of real or personal property, or natural resources; (3) provide the total assessment or revenue collected for comparable revenue periods; and (4) establish the net loss of revenue.[54]

The total compensation allowable for lost government revenue claims presented directly to the Fund is the total net revenue actually lost as a result of the oil spill incident.[55]

Profits and Earning Capacity

Damages "equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources" are recoverable by any claimant against the responsible party under OPA.[56] As mentioned above, the act broadly defines the term "natural resources" to include land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and "other such resources."[57]

In the event that a responsible party fails to settle a claim for damages for lost profits and earning capacity within 90 days, a claimant may present such a claim directly to the Oil Spill Liability Trust Fund. To recover against the Fund, a claimant must prove (1) that real or personal property or natural resources have been injured, destroyed, or lost; (2) that the claimant's income was reduced as a consequence of the injury, and the amount of the reduction; (3) the amount of profits or earnings in comparable periods as compared to the period when the claimed loss was suffered; and (4) whether alternative employment or business was available and undertaken.[58]

The amount of compensation allowable for "lost profits and earning capacity" claims presented directly to the Fund is limited to the actual net reduction or loss of earnings or profits suffered.[59]

[52] 33 U.S.C. § 2702(b)(2)(D).

[53] *Id.*

[54] 33 U.S.C. § 2713(e); 33 CFR §§ 136.227(a)-(d).

[55] 33 U.S.C. § 2713(e); 33 CFR § 136.229.

[56] 33 U.S.C. § 2702(b)(2)(E).

[57] 33 U.S.C. § 2701(20).

[58] 33 U.S.C. § 2713(e); 33 CFR §§ 136.233(a)-(d).

[59] 33 U.S.C. § 2713(e); 33 CFR § 136.235.

Public Services

In the event that an affected state or political subdivision of an affected state incurs costs related to the provision of "increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil," the responsible party is liable for such costs.[60] Under OPA, only states and their political subdivisions may recover the costs associated with providing increased or additional public services (to the extent that such states are affected by the discharge of oil).[61] Accordingly, the United States is precluded from recovering costs related to the provision of public services from the responsible party under the act.

In the event that a responsible party fails to settle a claim for damages related to the provision of increased or additional public services within 90 days, a claimant may present such a claim directly to the Oil Spill Liability Trust Fund. To recover against the Fund, a claimant must establish (1) the specific type of the public services provided and the need for such services; (2) that the public services occurred during removal activities; (3) that the services were provided as a result of the oil spill incident and would have not otherwise been provided; and (4) the total costs for the provision of public services and the methods used to compute such costs.[62]

The total amount of compensation allowable for claims presented directly to the Fund for the increased or additional provision of public services is the net cost of the increased or additional service provided by the affected state or political subdivision of the affected state.[63]

Defenses to Liability

OPA provides limited defenses to liability. A responsible party is not liable for removal costs or the damages mentioned above if it can establish—by a preponderance of the evidence—that the discharge or substantial threat of discharge of oil and the resulting damages or removal costs were caused solely by

> (1) an act of God; (2) an act of war; (3) an act or omission of a third party, other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party—(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions; or (4) any combination of paragraphs (1), (2), (3).[64]

[60] 33 U.S.C. § 2702(b)(2)(F).

[61] 33 U.S.C. § 2702(b)(2)(F).

[62] 33 U.S.C. § 2713(e); 33 CFR §§ 136.239(a)-(d).

[63] 33 U.S.C. § 2713(e); 33 CFR § 136.241.

[64] 33 U.S.C. § 2703(a). For the purposes of determining whether the "act of God" complete defense is available to a responsible party, the term "act of God" means an "unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight." 33 U.S.C. § 2701(1). In the event that the upcoming hurricane season exacerbates the Deepwater Horizon oil spill, the question arises as to whether a hurricane in the Gulf of Mexico could be (continued...)

In other words, OPA requires a responsible party to pay for removal costs plus certain damages resulting from the oil spill, unless the incident was caused by a serious and unanticipated naturally occurring event (e.g., earthquake, hurricane, tornado, etc.), an act of war, an act or omission by a third party with no contractual relationship to the responsible party, or any combination of the aforementioned circumstances. For the "act or omission of a third party" defense to be available to the responsible party, the responsible party must have been operating its facility or vessel in a non-negligent manner.[65]

Pursuant to OPA, these defenses to liability are not available to a responsible party who fails or refuses (a) to report the oil spill incident as required by law, (b) to provide reasonable cooperation and assistance with removal activities, or (c) to comply, without sufficient cause, with the President's general removal authority.[66] Additionally, if a responsible party has actual knowledge of a discharge or a substantial threat of a discharge of oil, it cannot escape liability for removal costs or damages by transferring ownership of the facility (or property upon which the facility is located) to an innocent third party.[67]

Oil Spill Liability Trust Fund

Although the Oil Spill Liability Trust Fund is not the focus of this report, the purpose and operation of the Fund should be briefly explained. The Oil Spill Liability Trust Fund is a federally administered trust fund that may be used to pay costs related to federal and state oil spill removal activities; costs incurred by federal, state, and Indian tribe trustees for natural resource damage assessments; and unpaid damages claims.[68] The Fund is financed by a per-barrel tax on crude oil received at United States refineries, and on petroleum products imported into the United States for consumption.[69] The maximum amount of money that may be withdrawn from the Fund is $1 billion per incident.[70] Such money may be used to pay claims up to and beyond the responsible party's liability limit, if any. The United States Attorney General, however, may commence an action on behalf of the Fund, against a responsible party, to recover any money paid by the Fund to any claimant pursuant to OPA, up to the responsible party's liability limit.[71]

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considered an "unanticipated" natural phenomenon. Analysis and consideration of this question, however, are beyond the scope of this CRS report.

[65] 33 U.S.C. §§ 2703(a)(3)(A) and (B).

[66] 33 U.S.C. § 2703(c).

[67] 33 U.S.C. § 2703(d)(5).

[68] 33 U.S.C. § 2712. The standards and procedural requirements for claims filed against the Fund are set forth in the Coast Guard's OPA regulations. *See* 33 C.F.R. §§ 136.1 through 136.241.

[69] 26 U.S.C. §§ 4611(a)(1) and (2). The Oil Spill Liability Trust fund is also financed by a per-barrel tax on domestic crude oil "used in or exported from the United States." 26 U.S.C. § 4611(b)(1)(A).

[70] 26 U.S.C. § 9509(c)(2)(A).

[71] 33 U.S.C. § 2715(c).

Appendix A. Oil Pollution Act of 1990: Definitions

The Oil Pollution Act of 1990 defines the key terms used throughout the act. For the reader's convenience, this appendix provides definitions of key terms as they appear in 33 U.S.C. § 2701.

Definitions

For the purposes of this Act, the term—

(1) "**act of God**" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

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

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

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

(5) "**damages**" means damages specified in section 1002(b) of this Act [33 U.S.C. § 2702(b)], and includes the cost of assessing these damages;

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

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

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

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

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

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

(12) "**gross ton**" has the meaning given that term by the Secretary under part J of title 46, United States Code [46 U.S.C. §§ 14101 *et seq*.];

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

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

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

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

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

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

(19) "**National Contingency Plan**" means the National Contingency Plan prepared and published under section 311(d) of the Federal Water Pollution Control Act [33 USCS § 1321(d)], as amended by this Act, or revised under section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9605);

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

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

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

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

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

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

(26) "**owner or operator**"—

(A) means—

(i) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel;

(ii) in the case of an onshore or offshore facility, any person owning or operating such facility;

(iii) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment;

(iv) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand;

(v) notwithstanding subparagraph (B)(i), and in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including for purposes of liability under section 1002, any State or local government that has caused or contributed to a discharge or substantial threat of a discharge of oil from a vessel or facility ownership or control of which was acquired involuntarily through—

(I) seizure or otherwise in connection with law enforcement activity;

(II) bankruptcy;

(III) tax delinquency;

(IV) abandonment; or

(V) other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign;

(vi) notwithstanding subparagraph (B)(ii), a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person—

(I) exercises decision making control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for oil handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility—

(aa) for the overall management of the vessel or facility encompassing day-to-day decision making with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance; and

(B) does not include—

(i) A unit of state or local government that acquired ownership or control of a vessel or facility involuntarily through—

(I) seizure or otherwise in connection with law enforcement activity;

(II) bankruptcy;

(III) tax delinquency;

(IV) abandonment; or

(V) other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign;

(ii) a person that is a lender that does not participate in management of a vessel or facility, but holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility; or

(iii) a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a removal action under section 311(c) of the Federal Water Pollution Control Act (33 U.S.C. § 1321(c)) or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition, if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements;

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

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

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

(30) "**remove**" or "**removal**" means containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches;

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

(32) "**responsible party**" means the following:

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

(B) Onshore facilities. In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

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

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

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

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

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

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

(A) is a vessel of the United States;

(B) operates on the navigable waters; or

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

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

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

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

(38) "**participate in management**"—

(A) (i) means actually participating in the management or operational affairs of a vessel or facility; and

(ii) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations; and

(B) does not include—

(i) performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility;

(ii) holding a security interest or abandoning or releasing a security interest;

(iii) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(iv) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(v) monitoring or undertaking one or more inspections of the vessel or facility;

(vi) requiring a removal action or other lawful means of addressing a discharge or substantial threat of a discharge of oil in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(vii) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(viii) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(ix) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(x) conducting a removal action under 311(c) of the Federal Water Pollution Control Act (33 U.S.C. § 1321(c)) or under the direction of an on-scene coordinator appointed under the National

Contingency Plan, if such actions do not rise to the level of participating in management under subparagraph (A) of this paragraph and paragraph (26)(A)(vi);

(39) "**extension of credit**" has the meaning provided in section 101(20)(G)(i) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601(20)(G)(i));

(40) "**financial or administrative function**" has the meaning provided in section 101(20)(G)(ii) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601(20)(G)(ii));

(41) "**foreclosure**" and "**foreclose**" each has the meaning provided in section 101(20)(G)(iii) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601(20)(G)(iii));

(42) "**lender**" has the meaning provided in section 101(20)(G)(iv) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601(20)(G)(iv));

(43) "**operational function**" has the meaning provided in section 101(20)(G)(v) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601(20)(G)(v)); and

(44) "**security interest**" has the meaning provided in section 101(20)(G)(vi) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601(20)(G)(vi)).

Appendix B. Oil Pollution Act of 1990: Limitations on Liability

The Oil Pollution Act of 1990 establishes limitations on the liability of responsible parties for certain damages caused by a discharge of oil into the navigable waters of the United States. For the reader's convenience, this appendix provides the liability limitation language as it appears in 33 U.S.C. § 2704.

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 [33 USCS § 2702] 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) with respect to a single-hull vessel, including a single-hull vessel fitted with double sides only or a double bottom only, $3,000 per gross ton;

(B) with respect to a vessel other than a vessel referred to in subparagraph (A), $1,900 per gross ton; or

(C) (i) with respect to a vessel greater than 3,000 gross tons that is—

(I) a vessel described in subparagraph (A), $22,000,000; or

(II) a vessel described in subparagraph (B), $16,000,000; or

(ii) with respect to a vessel of 3,000 gross tons or less that is—

(I) a vessel described in subparagraph (A), $6,000,000; or

(II) a vessel described in subparagraph (B), $4,000,000;

(2) for any other vessel, $950 per gross ton or $800,000, whichever is greater;

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

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

(b) Division of liability for mobile offshore drilling units.

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

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

(c) Exceptions.

(1) Acts of responsible party. Subsection (a) does not apply if the incident was proximately caused by—

(A) gross negligence or willful misconduct of, or

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

(2) Failure or refusal of responsible party. Subsection (a) does not apply if the responsible party fails or refuses—

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

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

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

(3) OCS facility or vessel. Notwithstanding the limitations established under subsection (a) and the defenses of section 1003 [33 U.S.C. § 2703], all removal costs incurred by the United States Government or any State or local official or agency in connection with a discharge or substantial threat of a discharge of oil from any Outer Continental Shelf facility or a vessel carrying oil as cargo from such a facility shall be borne by the owner or operator of such facility or vessel.

(4) Certain tank vessels. Subsection (a)(1) shall not apply to—

(A) a tank vessel on which the only oil carried as cargo is an animal fat or vegetable oil, as those terms are used in section 2 of the Edible Oil Regulatory Reform Act [33 U.S.C. § 2720]; and

(B) a tank vessel that is designated in its certificate of inspection as an oil spill response vessel (as that term is defined in section 2101 of title 46, United States Code) and that is used solely for removal.

(d) Adjusting limits of liability.

(1) Onshore facilities. Subject to paragraph (2), the President may establish by regulation, with respect to any class or category of onshore facility, a limit of liability under this section of less

than $350,000,000, but not less than $8,000,000, taking into account size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks posed by the class or category of facility.

(2) Deepwater ports and associated vessels.

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

(B) Report. Not later than 1 year after the date of the enactment of this Act [enacted Aug. 18, 1990], the Secretary shall submit to the Congress a report on the results of the study conducted under subparagraph (A).

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

(3) Periodic reports. The President shall, within 6 months after the date of the enactment of this Act [enacted Aug. 18, 1990], and from time to time thereafter, report to the Congress on the desirability of adjusting the limits of liability specified in subsection (a).

(4) Adjustment to reflect Consumer Price Index. The President, by regulations issued not later than 3 years after the date of enactment of the Delaware River Protection Act of 2006 [enacted July 11, 2006] and not less than every 3 years thereafter, shall adjust the limits on liability specified in subsection (a) to reflect significant increases in the Consumer Price Index.

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