Senate Commerce Committee Nominee Questionnaire, 118th Congress
Instructions for the nominees: The Senate Committee on Commerce, Science, and Transportation (the "Committee") asks you to provide typed answers to each of the following questions. It is requested that the nominee type the question in full before each response. Do not leave any questions blank. Type "None" or "Not Applicable" if a question does not apply to the nominee. Begin each section (i.e., "A", "B", etc.) on a new sheet of paper. Electronically submit your completed questionnaire to the Committee in PDF format and ensure that sections A through E of the completed questionnaire are in a text searchable and that any hyperlinks can be clicked. Section F may be scanned for electronic submission and need not be searchable.

A. BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

1. Name (Include any former names or nicknames used):

   Rebecca Feemster Dye
   Maiden Name: Rebecca Lynn Feemster
   Nickname: "Becky"

2. Position to which nominated:

   Commissioner, Federal Maritime Commission

3. Date of Nomination:

   January 3, 2023

4. Address (List current place of residence and office addresses):

   Home: [redacted]

   Office: 800 North Capitol Street, N.W.
   Washington, D.C. 20573

5. Date and Place of Birth:

   May 8, 1952
   Charlotte, North Carolina

6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).

   I am divorced. My daughter is Caroline Lytton Jones, age 33.

7. List all college and graduate schools attended, whether or not you were granted a degree by the institution. Provide the name of the institution, the dates attended, the degree received, and the date of the degree.

   University of North Carolina at Greensboro
   Attended 1970-1972

   University of North Carolina at Chapel Hill
   Bachelor of Arts awarded May 1974

   University of North Carolina School of Law
   Juris Doctorate awarded May 1977

8. List all post-undergraduate employment, including the job title, name of employer, and inclusive dates of employment, and highlight all management-level jobs held and any non-managerial jobs that relate to the position for which you are nominated.

   December 2002-Present
   Commissioner
   Federal Maritime Commission

   January 1995-December 2002
   Counsel and Subcommittee Staff Director
   Committee on Transportation and Infrastructure
   U.S. House of Representatives

February 1987-January 1995
Minority Counsel
Committee on Merchant Marine and Fisheries
U.S. House of Representatives

June 1985-February 1987
Legislative Attorney
Legislation Division, Office of the Chief Counsel
Maritime Administration of the U.S. Department of Transportation

August 1983-June 1985
Law Instructor
United States Coast Guard Academy

June-August 1983
Legislative Attorney
Office of the Assistant Counsel for Legislation
United States Department of Transportation

1980-1983
Legislative Attorney
Legislation Division, Office of the Chief Counsel
United States Coast Guard Headquarters

1979-1980
Assistant Division Chief
Legal Administration Division, Office of the Chief Counsel
United States Coast Guard Headquarters

1978-1979
Attorney Project Coordinator
Legal Services of North Carolina

1977-1978
Special Counsel
Broughton Psychiatric Hospital

1977 (Part-time)
Instructor
Reading Research Foundation

1976-1977 (Part-time)
Sales Clerk
Belk-Leggett Co.

1975-1976 (Part-time)
UNC School of Law library

1975 (Part-time)
Instructor
Reading Research Foundation

9. Attach a copy of your resume.

See attached.

10. List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments, other than those listed above after 18 years of age.

None.

11. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational, or other institution.

Executive Women in Government (Nonprofit):
Vice President, 2012-2013

12. Please list each membership you have had after 18 years of age or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religiously affiliated organization, private club, or other membership organization. (For this question, you do not have to list your religious affiliation or membership in a religious house of worship or institution.). Include dates of membership and any positions you have held

with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age, or disability.

- **Kappa Kappa Gamma, 1973 to 1974;**
- **North Carolina State Bar, 1977 to Present;**
- **White House Military Aides Association, 1983 to Present;**
- **Executive Women in Government, 2012 to Present (Vice President 2012-2013);**
- **International Women's Forum, Washington, D.C., 2014 to Present;**
- **Women's International Shipping and Trading Association (WISTA), 2008 to Present;**
- **Loudoun County Republican Women's Club, December 2012 to 2013;**
- **Federalist Society, 2012 to Present;**
- **The Falls Church Anglican, 2010 to Present;**
- **American Bar Association, 2021 to Present; and**
- **European Maritime Law Organization, 2016 to Present.**

It is my understanding that the groups above do not restrict membership on the basis of sex, race, color, religion, national origin, age, or disability. It is also my understanding that Kappa Kappa Gamma does not discriminate on the basis of national origin, religion, disability, age, gender identity or sexual orientation.

13. Have you ever been a candidate for and/or held a public office (elected, non-elected, or appointed)? If so, indicate whether any campaign has any outstanding debt, the amount, and whether you are personally liable for that debt.

No.

14. List all memberships and offices held with and services rendered to, whether compensated or not, any political party or election committee within the past ten years. If you have held a paid position or served in a formal or official advisory position (whether compensated or not) in a political campaign within the past ten years, identify the particulars of the campaign, including the candidate, year of the campaign, and your title and responsibilities.

None.

15. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $200 or more for the past ten years.

- **Romney for President (Paul D. Ryan)-$1000;**
- **Romney Victory, Inc.-$2500;**
- **Romney Victory, Inc.-$1000;**
- **Romney Victory, Inc.-$500;**
- **Romney for President-$1000;**
- **Romney for President-$1500;**
- **Romney for President-$1000;**
- **Romney for President-$500;**
- **McConnell for Senate Committee-$1000;**
- **McConnell for Senate Committee-$1000;**
- **Ed Gillespie for Senate-$500;**
- **Cruz for President-$1000;**
- **Cruz for President-$1000;**
- **Cruz for President-$700;**
- **National Republican Senatorial Committee-$700;**
- **Ted Cruz for Senate-$500.00;**
- **Donald J. Trump for President (WinRed)-$800;**
- **Donald J. Trump for President (WinRed)-$1000;**
- **Donald J. Trump for President (WinRed)-$1800;**
- **Donald J. Trump for President (WinRed)-$1350;**
- **Republican National Committee-$500.00;**
- **Donald J. Trump for President (WINRED)-$500;**
- **Youngkin for Governor - $500; and**
- **Youngkin for Governor - $500.**

16. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognition for outstanding service or achievements.

- **Coast Guard Commendation Medal;**
- **Coast Guard Achievement Medal;**
- **Coast Guard Meritorious Public Service Award;**
- **2016 Outstanding Woman of the Year in International Trade from Women in International Trade, Los Angeles; (October 6, 2016)**
- **2016 Agricultural Transportation Coalition Award for Exemplary Leadership;**
- **2018 Women's Leadership in Supply Chain Award, USC Marshall School of Business, Global Supply Chain Management;**
- **2018 Supply Chain Dive Regulator of the Year;**
- **2019 Bi-State Motor Carriers Malcolm McLean Memorial Award;**
- **2020 Agricultural Transportation Coalition "Person of the Year" Award;**
- **2021 Lloyd's List One Hundred People, The Most Influential People in Shipping;**
- **2021 Lloyd's List Top Ten in Regulation; and**
- **2023 Harbor Trucking Association Champions Award.**

17. List each book, article, column, letter to the editor, Internet blog posting, or other publication you have authored, individually or with others. Include a link to each publication when possible. If a link is not available, provide a digital copy of the publication when available.

- **"Slick Work: An Analysis of the Oil Pollution Act of 1990"; Published in 1992 by the Journal of Energy, Natural Resources and Environmental Law; Coauthored with Cynthia M. Wilkinson and Lisa Pittman. (See attached document.)**
- **Fact Finding 26 – Vessel Capacity and Equipment Availability in the United States Export and Import Liner Trades**
    - **Order of Investigation, March 17, 2010.** https://www.fmc.gov/wp-content/uploads/2018/09/FactfindingOrder26.pdf

- **Vessel Capacity and Equipment Availability Report Recommends Collaborative Approaches to Develop Supply Chain Reliability Solutions, December 8, 2010.** https://www.fmc.gov/vessel-capacity-and-equipment-availability-report-recommends-collaborative-approaches-to-develop-supply-chain-reliability-solutions/

- **International Ocean Transportation Supply Chain Engagement**
  - **Order of Investigation on International Ocean Transportation Supply Chain Engagement, February 1, 2016.** https://www.fmc.gov/wp-content/uploads/2018/10/OrderSupplyChainEngagement.pdf
  - **Remarks of Commissioner Dye to the Commission on Innovation Teams Initiative Update, November 8, 2017.** https://www.fmc.gov/remarks-of-commissioner-dye-to-the-commission-fmc-innovation-teams-initiative-update/
  - **"Dear Colleague Letter" on Fact Finding Investigation and Final Report on Commission's Supply Chain Innovation Teams Initiative, December 5, 2017.** https://www.fmc.gov/wp-content/uploads/2018/08/SCITFinalReport-reduced.pdf

- **Fact Finding 28 - Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce**
  - **Order of Investigation. Fact Finding Investigation No. 28, March 5, 2018.** https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/
  - **White Paper: The Memphis Supply Chain Innovation Team – A Single Gray Chassis Pool Fosters Fluid Commerce and Improves Supply Chin Velocity. May 22, 2019.** https://www.fmc.gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf
  - **"Dear Colleague Letter" on Fact Finding Investigation No. 28, August 27, 2019.** https://www.fmc.gov/wp-content/uploads/2019/09/FF28FinalReportLetter.pdf
  - **Fact Finding Investigation No. 28 Interim Report, Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce, September 4, 2018.** https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf/
  - **Fact Finding Investigation No. 28 Final Report, Conditions and Practices Relating to Detention, Demurrage, and Free Time in International Oceanborne Commerce December 3, 2018.** https://www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf/

- **Fact Finding 29:**
  - **Fact Finding No. 29 – Order of Investigation, March 31, 2020.** https://www2.fmc.gov/readingroom/docs/FFno29/FF29_Order.pdf/
  - **Fact Finding No. 29 – Supplemental Order November 19, 2020.** https://www2.fmc.gov/readingroom/docs/FFno29/FF29_41102(c)_%20Supplemental_Order.pdf/
  - **Executive Summary of Fact Finding 29, Presented as part of the Record submitted by Commissioner Dye to the Subcommittee on Coast Guard and Maritime Transportation, June 15, 2021.** https://www.fmc.gov/wp-content/uploads/2021/06/061021DyeTestimonyExecutiveSummary.pdf
  - **Fact Finding Investigation No. 29 Interim Recommendations, July 28, 2021.** https://www2.fmc.gov/ReadingRoom/docs/FFno29/FF29%20Interim%20Recommendations.pdf/
  - **Fact Finding Investigation Final Report – Effects of Covid-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement ad Possible Violations of 46 U.S.C. 41102(c), May 31, 2002.** https://www.fmc.gov/wp-content/uploads/2022/06/FactFinding29FinalReport.pdf

18. List all speeches, panel discussions, and presentations (e.g., PowerPoint) that you have given on topics relevant to the position for which you have been nominated. Include a link to each publication when possible. If a link is not available, provide a digital copy of the speech or presentation when available.

In the past, I have been asked to give remarks concerning current issues related to my position. I speak from notes for the appearances, and do not keep copies of my notes or the dates of appearances. Following are the speeches for which I have retained prepared remarks:

- **September 2007: Comments Before the National Custom Brokers and Forwarders Association of America;** https://www.fmc.gov/comments-of-commissioner-rebecca-dye-at-ncbfaa-government-affairs-conference/
- **April 2008: Comments Before the National Industrial Transportation League;** https://www.fmc.gov/comments-of-commissioner-rebecca-dye-at-nitl-spring-policy-forum/
- **April 2009: Remarks at the Global Liner Shipping Conference;** https://www.fmc.gov/dye-global-liner-2009/

- **April 2009: Comments before the National Custom Brokers and Forwarders Association of America, Inc.;** https://www.fmc.gov/comments-of-u-s-federal-maritime-commissioner-rebecca-dye-at-ncbfaa-annual-conference-2/
- **October 2009: Comments Before the National Association of Waterfront Employers;** https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-dye-national-association-of-waterfront-employers/
- **April 2010: Comments before the National Custom Brokers and Forwarders Association of America, Inc.;** https://www.fmc.gov/comments-of-fmc-commissioner-rebecca-f-dye-at-the-2010-ncbfaa-annual-conference/
- **October 2010: Comments before the Midwest Specialty Grains Conference and Trade Show;** https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-2010-midwest-specialty-grains-conference-and-trade-show/
- **October 2010: Comments before the American Metal Market Scrap and Scrap Substitutes Conference;** https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-american-metal-market-scrap-and-scrap-substitutes-conference/
- **November 2010: Comments at the Western Cargo Conference (WESCCON);** https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-western-cargo-conference-wesccon/
- **November 2010: Comments at the Northeast Cargo Symposium;** https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-northeast-cargo-symposium-in-boston/
- **December 2011: Comments at the American Metal Market Moving Metals Conference;** https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-american-metal-market-moving-metals-conference/
- **June 2012: Comments before the Canadian American Business Council;** https://www.fmc.gov/comments-of-fmc-commissioner-rebecca-f-dye-at-the-canadian-american-business-council-the-dragon-in-the-room-chinas-impact-on-canada-u-s-issues/

- **September 2013: Comments before the National Customs Brokers and Freight Forwarders Association of America, Inc. (NCBFAA);** https://www.fmc.gov/commissioner-rebecca-dyes-comments-delivered-at-the-ncbfaa-government-affairs-conference/
- **May 2014: Remarks at the European Maritime Law Organisation;** https://www.fmc.gov/commissioner-dyes-prepared-remarks-to-the-european-maritime-law-organization-spring-seminar-in-valletta-malta/
- **June 2014: Remarks to the Propeller Club of the United States;** https://www.fmc.gov/commissioner-dyes-prepared-remarks-to-the-propeller-club-of-the-united-states-port-of-washington-d-c/
- **January 2015: Statement to the FMC's Gulf Coast Port Forum;** https://www.fmc.gov/commissioner-dyes-statement-to-the-port-forum-in-new-orleans/
- **December 2015: Remarks to the Navy League Northern Virginia Council;** https://www.fmc.gov/remarks-by-commissioner-rebecca-dye-navy-league-northern-virginia-council/
- **July 2016: Remarks to the National Maritime Interagency Advisory Group Meeting;** https://www.fmc.gov/commissioner-dyes-prepared-remarks-to-national-maritime-interagency-advisory-group-meeting/
- **October 2016: Remarks to the General Stevedoring Council;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-general-stevedoring-council-luncheon/
- **December 2016: Remarks at the Journal of Commerce's Port Performance North American Conference;** https://www.fmc.gov/information-infrastructure-is-key-to-american-economic-competitiveness/
- **January 2017: Remarks at the National Industrial Transportation League (NITL) Transportation Summit;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-national-industrial-transportation-league-transportation-summit/
- **May 2017: Remarks at the Washington Council on International Trade;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-washington-council-on-international-trade/
- **June 2017: Address at the Agricultural Transportation Coalition Annual Meeting;** https://www.fmc.gov/commissioner-dye-addresses-agricultural-transportation-coalition-annual-meeting/
- **September 2017: Address to the Global Liner Shipping Asia Forum;** https://www.fmc.gov/commissioner-dye-addresses-global-liner-shipping-asia-forum-in-singapore-on-supply-chain-visibility-and-us-regulatory-reform/

- **September 2017: Remarks at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Government Affairs Conference;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-ncbfaa-government-affairs-conference/
- **October 2017: Remarks at the American Association of Port Authorities (AAPA) Annual Convention;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-aapa-annual-convention/
- **October 2017: Panel Remarks at the American Association of Port Authorities (AAPA) Annual Convention;** https://www.fmc.gov/commissioner-dye-participates-on-panel-at-aapa-annual-convention-in-long-beach/
- **October 2017: Address at the Pacific Northwest Waterways Association (PNWA) Annual Meeting;** https://www.fmc.gov/commissioner-dye-addresses-pnwa-annual-meeting/
- **January 2018: Statement on Hearings on the Petition for Fair Port Practices;** https://www.fmc.gov/statement-of-commissioner-rebecca-dye-hearings-on-the-petition-of-the-coalition-for-fair-port-practices/
- **March 2018: Remarks at the 18th TPM Annual Conference;** https://www.fmc.gov/remarks-of-commissioner-dye-to-the-18th-tpm-annual-conference/
- **April 2018: Comments at the Global Liner Shipping Conference;** https://www.fmc.gov/comments-of-u-s-federal-maritime-commissioner-rebecca-dye-at-global-liner-shipping-conference/
- **April 2018: Comments at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Annual Conference;** https://www.fmc.gov/comments-of-u-s-federal-maritime-commissioner-rebecca-dye-at-ncbfaa-annual-conference/
- **April 2018: Remarks at U.S.-China Bilateral Maritime Consultations;** https://www.fmc.gov/commissioner-dye-represents-fmc-at-us-china-bilateral-maritime-consultations/
- **May 2018: Address at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Annual Conference;** https://www.fmc.gov/commissioner-dye-addresses-ncbfaa-annual-conference/
- **May 2018: Keynote Address to the Global Shippers Forum Annual Conference;** https://www.fmc.gov/commissioner-dyes-keynote-address-to-the-global-shippers-forum-annual-conference/

- **June 2018: Address at the Transportation Research Board's (TRB) Maritime Research & Development Conference;** https://www.fmc.gov/commissioner-dye-addressed-the-trbs-maritime-research-development-conference/
- **July 2018: Remarks at the Maritime Administrative Bar Association (MABA);** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-at-the-maba-luncheon/
- **September 2018: Remarks to the National Retail Federation's (NRF) Strategic Supply Chain Council & Trade Advisory Committee;** https://www.fmc.gov/commissioner-dye-meets-with-nrfs-strategic-supply-chain-council-trade-advisory-committee/
- **September 2018: Remarks at the Port of New York and New Jersey's 18th Annual Port Industry Day;** https://www.fmc.gov/commissioner-dyes-remarks-at-the-port-of-new-york-new-jerseys-18th-annual-port-industry-day/
- **September 2018: Remarks at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Conference;** https://www.fmc.gov/commissioner-dye-discusses-carrier-service-contract-filing-exemption-fact-finding-28-at-ncbfaa-conference/
- **October 2018: Remarks at Vessel Ceremony at the Port of Baltimore;** https://www.fmc.gov/commissioner-dye-christens-ship-operating-in-the-us-europe-trade/
- **October 2018: Remarks at the International Bar Association, Annual Conference;** https://www.fmc.gov/remarks-of-commissioner-dye-international-bar-association-annual-conference-2018/
- **October 2018, Remarks to the European Maritime Law Organisation, 24th Annual Conference;** https://www.fmc.gov/remarks-of-commissioner-dye-european-maritime-law-organization-24th-annual-conference/
- **October 2018: Remarks at the Association of Transportation Law Professionals (ATLP);** https://www.fmc.gov/remarks-of-commissioner-dye-association-of-transportation-law-professionals-transportation-forum-xv/
- **December 2018: Remarks at Journal of Commerce Port Performance North America;** https://www.fmc.gov/remarks-of-commissioner-dye-joc-port-performance-north-america/
- **March 2019, Remarks to Women's Traffic and Tourism Club Dinner;** https://www.fmc.gov/remarks-of-fmc-commissioner-rebecca-dye-womens-traffic-and-tourism-club-dinner-baltimore-maryland/

- **March 2019, Remarks of Commissioner Rebecca Dye American Association of Port Authorities;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-american-association-of-port-authorities/
- **April 2019, Remarks to National Customs Brokers & Forwarders Association of America, Inc. (NCBFFA) Annual Conference;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-ncbffa-annual-conference-san-antonio-texas/
- **May 2019, Remarks to American Trucking Association Conference;** https://www.fmc.gov/dye-american-trucking-association/
- **May 2019, Remarks to Dye American Cotton Shippers Association;** https://www.fmc.gov/dye-american-cotton-shippers-association/
- **May 2019, Statement Before the U.S. Surface Transportation Board Oversight Hearing on Demurrage and Accessorial Charges;** https://www.fmc.gov/statement-of-dye-stb-demurrage/
- **June 2019, Remarks at the National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Conference;** https://www.fmc.gov/fmc-commissioner-rebecca-dye-remarks-at-the-ncbfaa-conference/
- **September 2019, Remarks to Retail Industry Leaders Association's (RILA) Transportation Executives;** https://www.fmc.gov/dye-addresses-rila-transportation-executives/
- **September 2019, Malcom McLean Award Acceptance Remarks;** https://www.fmc.gov/dye-malcolm-mclean-award-acceptance-remarks/
- **September 2020: Remarks at National Customs Brokers & Forwarders Association of America, Inc. (NCBFAA) Panel: A Conversation with FMC;** https://www.fmc.gov/three-commissioners-participate-in-ncbfaa-panel-a-conversation-with-fmc/
- **October 2021, Remarks to the 2021 South Carolina International Trade Conference;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-2021-south-carolina-international-trade-conference/ **and**
- **October 2022, Remarks at Western Cargo Conference (WESCCON);** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-at-wesccon-in-san-diego/**.**

19. List all public statements you have made during the past ten years, including statements in news articles and radio and television appearances, which are on topics relevant to the position for which you have been nominated, including dates. Include a link to each statement when possible. If a link is not available, provide a digital copy of the statement when available.

- **Commissioner Dye Releases Final Report for Fact Finding No. 29, May 31, 2022;** https://www.fmc.gov/commissioner-dye-releases-final-report-for-fact-finding-no-29/
- **FMC Receives Fact Finding No. 29 Final Recommendations & Intermodal Equipment Report, May 19, 2022;** https://www.fmc.gov/fmc-receives-fact-finding-29-final-recommendations-intermodal-equipment-report/
- **FMC Launches Instructional Video on How to File Complaints, April 25, 2022;** https://www.fmc.gov/fmc-launches-instructional-video-on-how-to-file-complaints/
- **Testimony of Commissioner Dye before Congress: "Executive Session and Ocean Shipping Reform Act Hearing," March 3, 2022;** https://www.fmc.gov/testimony-of-commissioner-dye-before-congress-executive-session-and-ocean-shipping-reform-act-hearing/
- **Commissioner Dye Explains Options for Filing Complaints at FMC, February 15, 2022;** https://www.fmc.gov/commissioner-dye-explains-options-for-filing-complaints-at-fmc/
- **Commission Invites Comments on Benefits of New Demurrage & Detention Rule, February 4, 2022;** https://www.fmc.gov/commission-invites-comments-on-benefits-of-new-demurrage-detention-rule/
- **New Supply Chain Initiatives Announced at FMC Meeting, November 17, 2021;** https://www.fmc.gov/new-supply-chain-initiatives-announced-at-fmc-meeting/
- **Remarks of Commissioner Rebecca Dye on Fact Finding No. 29 Interim Recommendations, July 28, 2021;** https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-on-fact-finding-29-interim-recommendations/
- **FMC Hears Proposals Addressing Supply Chain and Cruise Issues, July 28, 2021;** https://www.fmc.gov/fmc-hears-proposals-addressing-supply-chain-and-cruise-issues/

- **Testimony of Commissioner Dye before Congress: "Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain" with Executive Summary of Fact Finding No. 29, June 15, 2021;** https://www.fmc.gov/testimony-of-commissioner-dye-before-congress-impacts-of-shipping-container-shortages-delays-and-increased-demand-on-the-north-american-supply-chain/
- **Statement of Commissioner Rebecca F. Dye Applauding the Creation of the FMC National Shipper Advisory Committee, May 19, 2021;** https://www.fmc.gov/statement-of-commissioner-rebecca-f-dye-applauding-the-creation-of-the-fmc-national-shipper-advisory-committee/
- **Information Demand on Detention & Demurrage Practices to be Issued, February 17, 2021;** https://www.fmc.gov/information-demand-on-detention-demurrage-practices-to-be-issued/
- **Fact Finding No. 29: Advice to the Trade, December 17, 2020;** https://www.fmc.gov/fact-finding-29-advice-to-the-trade/
- **FMC Receives Briefings at December Meeting, December 10, 2020;** https://www.fmc.gov/fmc-receives-briefings-at-december-meeting/
- **Commission Approves Supplemental Order Expanding Fact Finding 29 Authority, November 20, 2020;** https://www.fmc.gov/commission-approves-supplemental-order-expanding-fact-finding-29-authority/
- **Commission Extends Temporary Exemption of Certain Service Contract Filing Requirements, October 1, 2020;** https://www.fmc.gov/commission-extends-temporary-exemption-of-certain-service-contract-filing-requirements/
- **Three Commissioners Participate in NCBFAA Panel: A Conversation with the FMC, September 29, 2020;** https://www.fmc.gov/three-commissioners-participate-in-ncbfaa-panel-a-conversation-with-fmc/
- **Commissioner Dye Completes Work in NY & NJ, Turns Attention to New Orleans, August 4, 2020;** https://www.fmc.gov/commissioner-dye-completes-work-in-ny-nj-turns-attention-to-new-orleans/
- **Dye Covid-19 Supply Chain Investigation Shifts Focus to NY/NJ in Phase Two, July 16, 2020;** https://www.fmc.gov/dye-covid-19-supply-chain-investigation-shifts-focus-to-ny-nj-in-phase-two/
- **Commissioner Dye Announces Findings of San Pedro Bay Discussions, June 17, 2020;** https://www.fmc.gov/commissioner-dye-announces-findings-of-san-pedro-bay-discussions/

- **Shipper Group Recognizes Commissioner Dye for Her Leadership on Supply Chain Issues, May 29, 2020;** https://www.fmc.gov/shipper-group-recognizes-commissioner-dye-for-her-leadership-on-supply-chain-issues/
- **Fact Finding No. 29 Innovation Teams Identify Information Helpful to Mitigating Covid-19 Impacts on Supply Chain, May 14, 2020;** https://www.fmc.gov/fact-finding-29-teams-covid-19-impacts-supply-chain/
- **Commission Issues New Guidance on Detention & Demurrage, April 28, 2020;** https://www.fmc.gov/new-guidance-detention-demurrage/
- **Commission Provides Temporary Relief from Certain Service Contract Filing Requirements, April 27, 2020;** https://www.fmc.gov/commission-provides-temporary-relief-service-contract-filing/
- **Fact Finding No. 29 Supply Chain Innovation Teams to Begin Work, April 6, 2020;** https://www.fmc.gov/fact-finding-29-teams-to-begin-work/
- **Commissioner Dye Leading FMC Initiative to Address Urgent COVID-19 Supply Chain Impacts, March 31,2020;** https://www.fmc.gov/dye-leading-fmc-initiative-address-urgent-covid-19-supply-chain-impacts/
- **Malcom McLean Award Presented to Commissioner Dye, September 13, 2019;** https://www.fmc.gov/malcom-mclean-award-presented-to-commissioner-dye/
- **Commissioner Rebecca Dye's Malcom McLean Award Acceptance Remarks, September 9, 2019;** https://www.fmc.gov/dye-malcolm-mclean-award-acceptance-remarks/
- **Proposed Interpretive Rule on Demurrage and Detention Issued, September 13, 2019;** https://www.fmc.gov/proposed-interpretive-rule-on-demurrage-and-detention-issued/
- **Commission Approves Dye's Final Recommendations on Detention and Demurrage, September 6, 2019;** https://www.fmc.gov/commission-approves-dyes-final-recommendations-on-detention-and-demurrage/
- **Commissioner Dye Addresses RILA Transportation Executives, September 5, 2019;** https://www.fmc.gov/dye-addresses-rila-transportation-executives/
- **Commissioner Dye Represents the Federal Maritime Commission at the U.S.-Japan Maritime Bilateral Meeting in Washington, DC, September 5, 2019;** https://www.fmc.gov/dye-maritime-bilateral-dc/
- **Dye to Begin Last Phase of Detention & Demurrage Investigation, March 1, 2019;** https://www.fmc.gov/dye-to-begin-last-phase-of-detention-demurrage-investigation/

- **Acting Chairman Khouri & Commissioner Dye Address Transportation Legal Professionals, November 5, 2018;** https://www.fmc.gov/acting-chairman-khouri-commissioner-dye-address-transportation-legal-professionals/
- **Commissioner Dye Christens Ship Operating in the U.S.-Europe Trade, October 3, 2018;** https://www.fmc.gov/commissioner-dye-christens-ship-operating-in-the-us-europe-trade/
- **Port of New York & New Jersey Added to Detention & Demurrage Field Interview Itinerary, October 3, 2018;** https://www.fmc.gov/port-of-new-york-new-jersey-added-to-detention-demurrage-field-interview-itinerary/
- **Detention & Demurrage Filed Interview Locations Announced, September 28, 2018;** https://www.fmc.gov/detention-demurrage-field-interview-locations-announced/
- **Commissioner Dye Discusses Carrier Service Contract Filing Exemption and Fact Finding 28 at NCBFAA Conference, September 28, 2018;** https://www.fmc.gov/commissioner-dye-discusses-carrier-service-contract-filing-exemption-fact-finding-28-at-ncbfaa-conference/
- **Commissioner Dye's Remarks at the Port of New York & New Jersey's 18th Annual Port Industry Day, September 24, 2018;** https://www.fmc.gov/commissioner-dyes-remarks-at-the-port-of-new-york-new-jerseys-18th-annual-port-industry-day/
- **Commission Reviews Work on Fact Finding 28 & Regulatory Reform Initiative, September 19, 2018;** https://www.fmc.gov/commission-reviews-work-on-fact-finding-28-regulatory-reform-initiative/
- **Commissioner Dye Meets with NRF's Strategic Supply Chain Council & Trade Advisory Committee, September 5, 2018;** https://www.fmc.gov/commissioner-dye-meets-with-nrfs-strategic-supply-chain-council-trade-advisory-committee/
- **Commissioner Dye Represents FMC at U.S.-China Bilateral Maritime Consultations, April 25, 2018;** https://www.fmc.gov/commissioner-dye-represents-fmc-at-us-china-bilateral-maritime-consultations/
- **FMC Issues Information Demands in Detention & Demurrage Investigation, April 2, 2018;** https://www.fmc.gov/fmc-issues-information-demands-in-detention-demurrage-investigation/
- **Commission Orders Formal Investigation in Detention & Demurrage Case, March 5, 2018;** https://www.fmc.gov/commission-orders-formal-investigation-in-detention-demurrage-case/

- **Statement of Commissioner Rebecca Dye at Hearings on the Petition of the Coalition for Fair Port Practices, January 16, 2018; https://www.fmc.gov/statement-of-commissioner-rebecca-dye-hearings-on-the-petition-of-the-coalition-for-fair-port-practices/**
- **Supply Chain Innovation Teams Report Published, December 7, 2017;** https://www.fmc.gov/supply-chain-innovation-teams-report-published/
- **Commissioner Dye Addresses Pacific Northwest Waterways Association's (PNWA) Annual Meeting, October 18, 2017;** https://www.fmc.gov/commissioner-dye-addresses-pnwa-annual-meeting/
- **Commissioner Dye Participates on Panel at AAPA Annual Convention, October 3, 2017;** https://www.fmc.gov/commissioner-dye-participates-on-panel-at-aapa-annual-convention-in-long-beach/
- **Commissioner Dye Addresses Global Liner Shipping Asia Forum in Singapore on Supply Chain Visibility and U.S. Regulatory Reform, September 5, 2017;** https://www.fmc.gov/commissioner-dye-addresses-global-liner-shipping-asia-forum-in-singapore-on-supply-chain-visibility-and-us-regulatory-reform/
- **FMC Launches Export Phase of Supply Chain System Information Initiative, July 11, 2017;** https://www.fmc.gov/fmc-launches-export-phase-of-supply-chain-system-information-initiative/
- **Commissioner Dye Addresses Agricultural Transportation Coalition Annual Meeting, June 8, 2017;** https://www.fmc.gov/commissioner-dye-addresses-agricultural-transportation-coalition-annual-meeting/
- **U.S. Senate Subcommittee Hearing on Maritime Transportation, May 9, 2017;** https://www.fmc.gov/senate-subcommittee-hearing-on-maritime-transportation/
- **Commissioner Dye Testifies to Congress Regarding Maritime Transportation: Opportunities and Challenges for the Maritime Administration and Federal Maritime Commission, May 9, 2017;** https://www.fmc.gov/commissioner-rebecca-dye-testifies-to-congress-regarding-maritime-transportation-opportunities-and-challenges-for-the-maritime-administration-and-federal-maritime-commission/
- **Information Infrastructure is Key to American Economic Competitiveness, December 6, 2016;** https://www.fmc.gov/information-infrastructure-is-key-to-american-economic-competitiveness/
- **Statements on Passing of Former FMC Chairman Helen Bentley, August 8, 2016;** https://www.fmc.gov/statements-on-passing-of-former-fmc-chairman-helen-bentley/

- **FMC Votes on Rulemakings, Provides Briefings on Global Shipping Issues, July 21, 2016;** https://www.fmc.gov/fmc-votes-on-rulemakings-provides-briefings-on-global-shipping-issues/
- **Senate Confirms Three to Serve on Federal Maritime Commission, June 30, 2016;** https://www.fmc.gov/senate-confirms-three-to-serve-on-federal-maritime-commission/
- **FMC's Supply Chain Innovation Teams Launched Today, May 3, 2016.** https://www.fmc.gov/fmcs-supply-chain-innovation-teams-launched-today/
- **FMC Briefed on Supply Chain Innovation Team Launch and Seeks Comment on Two Rulemakings, April 20, 2016;** https://www.fmc.gov/fmc-briefed-on-supply-chain-innovation-team-launch-and-seeks-comment-on-two-rulemakings/
- **Commissioner Dye Updates FMC on Supply Chain Initiative, April 20, 2016;** https://www.fmc.gov/commissioner-dye-updates-fmc-on-supply-chain-innovation-initiative/
- **Supply Chain Innovation Team Launch Scheduled, March 24, 2016;** https://www.fmc.gov/supply-chain-innovation-team-launch-scheduled/
- **Chairman Cordero Announces Commissioner Dye to Lead Supply Chain Innovation Project, February 1, 2016.** https://www.fmc.gov/chairman-cordero-announces-commissioner-dye-to-lead-supply-chain-innovation-project/
- **Commissioner Dye Votes Against Final Rule Concerning OTIs, October 22, 2015;** https://www.fmc.gov/commissioner-dye-votes-against-final-rules-concerning-otis/
- **Public Forum- Gulf Coast Ports, October 27, 2014;** https://www.fmc.gov/public-forum-gulf-coast-ports/
- **Statement of Commissioner Rebecca Dye on Docket 13-05 Regulations Governing Ocean Transportation Intermediaries, September 26, 2014;** https://www.fmc.gov/statement-of-commissioner-rebecca-dye-on-docket-13-05-regulations-governing-ocean-transportation-intermediary-licensing/
- **Statement of Commissioner Rebecca Dye on Revised Timetable for Retrospective review of Existing Rules to Include Service Contract Rules, February 13, 2013;** https://www.fmc.gov/statement-of-commissioner-rebecca-dye-revised-timetable-for-retrospective-review-of-existing-rules-to-include-service-contract-rules/

- **Statement of Commissioner Rebecca Dye: Passenger Vessel Financial Responsibility Requirements, February 13, 2013;** https://www.fmc.gov/statement-of-commissioner-rebecca-dye-passenger-vessel-financial-responsibility-requirements/
- **Statement of Commissioner Rebecca Dye: Ocean Transportation Intermediary Advanced Notice of Proposed Rulemaking, December 19, 2012.** https://www.fmc.gov/statement-of-commissioner-rebecca-dye-ocean-transportation-intermediary-advanced-notice-of-proposed-rulemaking-2/
- **Statement of Commissioner Rebecca Dye on Study of U.S. Inland Containerized Cargo Moving Through Canadian and Mexican Seaports, July 27, 2012;** https://www.fmc.gov/statement-of-fmc-commissioner-dye-on-study-of-u-s-inland-containerized-cargo-moving-through-canadian-and-mexican-seaports/
- **Comments of FMC Commissioner Rebecca F. Dye at the Canadian American Business Council, The Dragon in the Room: China's Impact on Canada/U.S. Issues, June 7, 2012;** https://www.fmc.gov/comments-of-fmc-commissioner-rebecca-f-dye-at-the-canadian-american-business-council-the-dragon-in-the-room-chinas-impact-on-canada-u-s-issues/
- **Statement of Commissioner Rebecca Dye on Review of NVOCC Negotiated Rate Arrangements April 18, 2012, April 24, 2012;** https://www.fmc.gov/statement-of-commissioner-rebecca-dye-on-review-of-nvocc-negotiated-rate-arrangements-april-18-2012/
- **Comments of Federal Maritime Commissioner Rebecca F. Dye at the American Metal Market Moving Metals Conference, December 9, 2011;** https://www.fmc.gov/comments-of-federal-maritime-commissioner-rebecca-f-dye-at-the-american-metal-market-moving-metals-conference/
- **Statement of Commissioner Rebecca Dye regarding Revisions to the Commission's Passenger Vessel Regulations on September 8, 2011, September 14, 2011;** https://www.fmc.gov/statement-of-commissioner-rebecca-dye-regarding-revisions-to-the-commissions-passenger-vessel-regulations-on-september-8-2011/
- **Senate Confirms Rebecca F. Dye and Mario Cordero as FMC Commissioners, April 15, 2011;** https://www.fmc.gov/senate-confirms-rebecca-f-dye-and-mario-cordero-as-fmc-commissioners/

Prior to 2011, the Commission's Press Releases were limited in scope and Commissioner Statements and Remarks were not posted with the same regularity or frequency as in recent years.

20. List all digital platforms (including social media and other digital content sites) on which you currently or have formerly operated an account, regardless of whether or not the account was held in your name or an alias. Include the full name of an "alias" or "handle", including the complete URL and username with hyperlinks, you have used on each of the named platforms. Indicate whether the account is active, deleted, or dormant. Include a link to each account if possible.

None.

21. Please identify each instance in which you have testified orally or in writing before Congress in a governmental or non-governmental capacity and specify the date and subject matter of each testimony.

- **Committee on Commerce, Science, and Transportation, U.S. Senate, four appearances:**
  - **July 31, 2002, Nomination Hearing;**
  - **November 30, 2010, Nomination Hearing;** https://www.fmc.gov/statement-of-commissioner-rebecca-f-dye-before-the-senate-committee-on-commerce-science-and-transportation/
  - **May 9, 2017, Opportunities and Challenges for the Maritime for Administration and the Federal Maritime Commission** https://www.fmc.gov/commissioner-rebecca-dye-testifies-to-congress-regarding-maritime-transportation-opportunities-and-challenges-for-the-maritime-administration-and-federal-maritime-commission/**; and**
  - **March 3, 2022, Ocean Shipping Reform Act.** https://www.fmc.gov/testimony-of-commissioner-dye-before-congress-executive-session-and-ocean-shipping-reform-act-hearing/

- **Subcommittee on Coast Guard and Maritime Transportation, Committee on Transportation and Infrastructure, U.S. House of Representatives, six appearances:**
  - **April 15, 2008, Fiscal Year 2009 Federal Maritime Commission Budget Request;**
  - **June 19, 2008, Management of the Federal Maritime Commission;**
  - **May 13, 2009, Fiscal Year 2010 Federal Maritime Commission Budget Request;**

- **March 17, 2010, Capacity of Vessels to Meet U.S. Import and Export Requirements;** https://www.fmc.gov/chairman-lidinsky-testifies-to-congress-regarding-vessel-capacity-issues-and-fmc-fact-finding-investigation/
- **June 30, 2010, Update on Federal Maritime Commission's Examination of Vessel Capacity;** https://www.fmc.gov/commissioner-dye-testifies-to-congress-regarding-ocean-vessel-capacity-shipping-container-availability-and-fact-finding-investigation-number-26/**; and**
- **June 15, 2021, Impacts of Shipping Container Shortages, Delays, and Increased Demand on the North American Supply Chain.** https://www.fmc.gov/testimony-of-commissioner-dye-before-congress-impacts-of-shipping-container-shortages-delays-and-increased-demand-on-the-north-american-supply-chain/

22. Given the current mission, major programs, and major operational objectives of the department/agency to which you have been nominated, what in your background or employment experience do you believe affirmatively qualifies you for appointment to the position for which you have been nominated, and why do you wish to serve in that position?

I believe my over 40 years of knowledge in matters concerning maritime law and policy, including my experience as a Federal Maritime Commissioner, qualifies me for this position. If confirmed, I believe that my in-depth expertise and other qualifications will allow me to successfully discharge the responsibilities of the position for which I have been nominated. I believe it is an honor to serve the people of the United States in the position for which I have been nominated.

23. What do you believe are your responsibilities, if confirmed, to ensure that the department/agency has proper management and accounting controls, and what experience do you have in managing a large organization?

If confirmed, I will continue to cooperate with the Chairman of the Federal Maritime Commission to ensure that the Commission has proper management and accounting controls. In the absence of a Federal Maritime Commission Chairman from November 2006 to June 2009, I performed the management duties of Chairman for the agency in cooperation with my fellow commissioners and am familiar with all management and accounting requirements of the agency.

24. What do you believe to be the top three challenges facing the department/agency, and why?

As a small agency, the Federal Maritime Commission is challenged to enforce the law strategically in order to use limited resources wisely. As an independent agency, the Federal Maritime Commission is challenged to enforce the law independently after considering all relevant viewpoints and other legal mandates of the Commission. Finally, the Commission is challenged today to enforce the law and other requirements of the agency, including working to improve the U.S. international ocean shipping freight delivery system, in accordance with the purposes of our organic statute, the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, and the Ocean Shipping Reform Act of 2022.

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers. Please include information related to retirement accounts, such as a 401(k) or pension plan.

   None.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation, or practice with any business, association, or other organization during your appointment? If so, please explain.

   None.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated. Explain how you will resolve each potential conflict of interest.

   None.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last ten years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. Explain how you will resolve each potential conflict of interest.

   None.

5. Identify any other potential conflicts of interest, and explain how you will resolve each potential conflict of interest.

   I am unaware of any potential conflicts of interest at this time. If any potential conflicts arise, I will recuse myself from consideration of the matters involved.

6. Describe any activity during the past ten years, including the names of clients represented, in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy.

None.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics, professional misconduct, or retaliation by, or been the subject of a complaint to, any court, administrative agency, the Office of Special Counsel, an Inspector General, professional association, disciplinary committee, or other professional group?

   No.

   If yes:

   a. Provide the name of court, agency, association, committee, or group;
   b. Provide the date the citation, disciplinary action, complaint, or personnel action was issued or initiated;
   c. Describe the citation, disciplinary action, complaint, or personnel action;
   d. Provide the results of the citation, disciplinary action, complaint, or personnel action.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity, other than for a minor traffic offense? If so, please explain.

   No.

3. Have you or any business or nonprofit of which you are or were an officer ever been involved as a party in an administrative agency proceeding, criminal proceeding, or civil litigation? If so, please explain.

   I was the Plaintiff in a civil divorce proceeding for which a Final Divorce Decree was issued on August 27, 2008.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, please explain.

   No.

5. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion, or any other basis? If so, please explain.

   No.

6. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination.

   None.

D. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees, and that your department/agency endeavors to timely comply with requests for information from individual Members of Congress, including requests from members in the minority?

   Yes.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistleblowers from reprisal for their testimony and disclosures?

   Yes.

3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee?

   Yes.

4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?

   Yes.

(Nominee is to include this signed affidavit along with answers to the above questions.)

F. AFFIDAVIT

Rebecca F. Dye being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Signature of Nominee

Subscribed and sworn before me this 10th day of Feb, 2023.

Notary Public

REBECCA F. DYE

[redacted] [redacted]

PROFESSIONAL BACKGROUND

Federal Maritime Commission, Washington, DC
Commissioner
December 2002 – Present
Nominated by President George W. Bush and renominated and confirmed by the United States Senate for successive terms to the Federal Maritime Commission.

Oversee international system of ocean transportation of over $ 4 trillion annually in containerized import and export cargo.

Enforce the Shipping Act competition regime among container vessel operators, US seaports, and marine terminals.

Developed and execute successful commercial supply chain innovation initiative to increase US international freight delivery system performance; involve ocean carriers, U.S. importers and exporters, seaports and marine terminal operators, truckers, shipping intermediaries, and railroads.

- Prioritize regulatory deregulation to benefit the US economy.
- Champion free market solutions for transportation inefficiency.
- Conduct groundbreaking investigations with shipping reforms for American exporters, importers, truckers, and shipping intermediaries.

Transportation and Infrastructure Committee, U.S. House of Representatives
Subcommittee Counsel and Staff Director
January 1995 – December 2002
Supervised development and execution of over $7 billion in annual Federal budget authority for maritime transportation programs.

Supervised Subcommittee staff performance in all matters related to Subcommittee Jurisdiction.

Advanced the policies of members of Congress on all matters related to maritime transportation. Exercised oversight over ocean transportation, marine environmental pollution, maritime and waterways safety, law enforcement, International Maritime Organization agreements, and other matters related to maritime transportation of passengers, goods, and commodities.

Developed and negotiated enactment of major maritime legislation, including the Ocean Shipping Reform Act of 1998, which successfully deregulated international ocean shipping, and the Maritime Transportation Security Act of 2002, which established a port and vessel security regime following the attacks of September 11, 2001.

Merchant Marine and Fisheries Committee, U.S. House of Representatives
Minority Counsel
February 1987 – January 1995
Supervised development and execution of over $5 billion in annual Federal budget authority for maritime transportation programs. Advanced the policies of members of Congress on all matters related to maritime transportation. Exercised leadership role in enactment of Oil Pollution Act of 1990, following the Exxon Valdez oil spill in Prince William Sound, Alaska.

Office of the Chief Counsel, Maritime Administration, Washington, DC
Legislative Attorney
June 1985 – February 1987
Developed and coordinated clearance of Maritime Administration legislation, policy positions, and Congressional testimony. Provided legal and policy advice, including on matters related to Federal ship financing and cargo preference.

United States Coast Guard Academy, New London, CT
Commissioned Officer, Law Instructor
August 1983 – June 1985
Instructed Coast Guard cadets on a variety of legal topics, including the legislative process, military law and procedure, tort liability, and selected administrative, law enforcement, and international law topics.

Office of the General Counsel, United States Department of Transportation, Washington, DC
Commissioned Officer, Legislative Attorney
June-August 1983
Developed and coordinated clearance of Department of Transportation maritime legislation, policy positions, and Congressional testimony. Provided legal and policy advice concerning Carriage of Goods at Sea and other transportation matters.

Office of the Chief Counsel, United States Coast Guard Headquarters, Washington, DC
Commissioned Officer, Legislative Attorney
August 1979-June 1983
Developed and coordinated clearance of Coast Guard legislation, policy positions, and Congressional testimony. Provided legal and policy advice concerning Coast Guard authority over vessel and waterways safety and Federal user fee financing. Certified as Trial and Defense Counsel in General and Special Courts-Martial. Served as Chief Coast Guard White House Military Social Aide.

EDUCATION

University of North Carolina at Chapel Hill, Bachelor of Arts Degree
University of North Carolina School of Law, Juris Doctorate Degree

BAR MEMBERSHIP

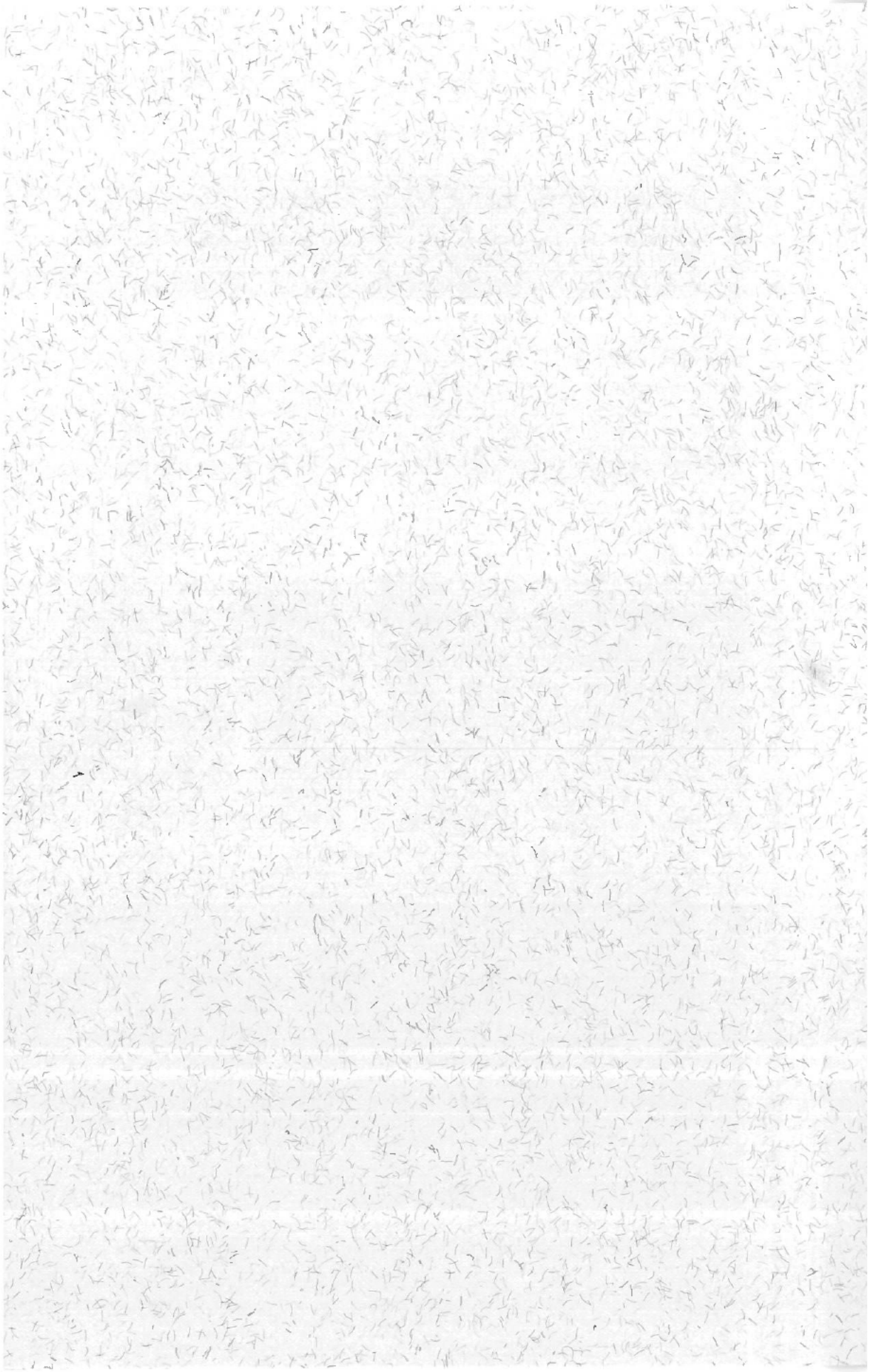
Admitted to North Carolina State Bar

Journal of Energy, Natural Resources & Environmental Law

Slick Work: An Analysis of the Oil Pollution Act of 1990

Cynthia M. Wilkinson
L. Pittman
Rebecca F. Dye

Vol. 12, No. 1 1992 **University of Utah College of Law**



Slick Work: An Analysis of the Oil Pollution Act of 1990

Cynthia M. Wilkinson[*]
L. Pittman[**]
Rebecca F. Dye[***]

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[*] Majority Counsel, Merchant Marine and Fisheries Committee, U.S. House of Representatives, Washington, D.C. The views expressed by the authors do not necessarily reflect those of the members of the Merchant Marine and Fisheries Committee or the United States House of Representatives.

[**] Minority Counsel, Merchant Marine and Fisheries Committee, U.S. House of Representatives, Washington, D.C.

[***] Minority Counsel, Merchant Marine and Fisheries Committee, U.S. House of Representatives, Washington, D.C.

I. INTRODUCTION

Long before there was an Exxon Valdez spewing over ten million gallons of crude oil into cold Alaskan waters on March 24, 1989,[1] there was a law establishing a comprehensive compensation and liability scheme for oil discharges into United States waters.[2] For fifteen years, Congress had debated the need to improve that scheme to no avail.[3] Then came the Exxon Valdez oil spill, an incident that highlighted the inadequacies of the existing legal regime as never before, raising the level of national concern and the severity of the congressional response — perhaps too far in light of the actual environmental harm caused by the vast majority of spills each year. More than anything else, that incident provided the driving force for a revamped oil spill law. The Oil Pollution Act of 1990[4] (OPA), signed by President Bush on August 18, 1990, reflected a new sensitivity to those harmed by oil spills, as well as a pro-environmental stance, triggered in part by a uniform anger at "Big Oil." The resulting legislation forcefully addresses the shortcomings of the pre-OPA law: inadequate measures for preventing spills; unrealistic and confused clean up plans; weak liability provisions; and a lack of federal monies for cleanup.

This Article begins by providing an overview of the state of the law before passage of the OPA. The OPA is then discussed in-depth, contrasting and comparing it to the pre-existing law and offering insight into the Act's key controversies and their resolutions in Congress. Discussion of the OPA begins by looking at provisions of the Act dealing with oil spill prevention and preparedness by addressing federal removal authority, oil spill contingency plan requirements, and double hull requirements for tank vessels. Next follows a discussion of the OPA's liability regime, exploring a number of significant provisions: compensation for removal costs and damage incurred, defenses to liability, oil spill trust fund monies, extent of cleanup requirements,

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[1] *See generally Topics Concerning the Exxon Valdez Oil Spill into the Prince William Sound, Alaska, Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 20 (1989) [hereinafter *Exxon Valdez Hearing*].

[2] Federal Water Pollution Control (Clean Water) Act § 311, 33 U.S.C. § 1321 (1988) (originally enacted as Act of October 18, 1972, Pub. L. No. 92-500, § 2, 86 Stat. 862).

[3] Jones, *Oil Spill Compensation and Liability Legislation*, 19 ENVTL. L. REP. 10,333, 10,333 (1989).

[4] Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified as amended in scattered sections of the U.S.C.).

claims procedure against responsible parties, limitations on liability, financial responsibility requirements, penalties, natural resource damage compensation, jurisdiction and venue requirements, and preemption. The Article concludes with a discussion of the 1984 Oil Spill Protocols, which attempt to address the problem of oil spills at the international level, and the failure of the United States to ratify the Protocols.

II. THE LAW BEFORE THE OIL POLLUTION ACT OF 1990

Prior to the OPA, section 311 of the Clean Water Act[5] constituted the chief strategy for cleaning up and recompensing those who had been damaged by a release of oil.[6] Discharges of oil into or upon the navigable waters of the United States,[7] the contiguous zone of the United States,[8] or shorelines adjoining these areas were prohibited under this section, as were discharges potentially affecting natural resources claimed by the United States.[9] As the United States has claimed jurisdiction over fishery resources located within the 200-mile

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[5] 33 U.S.C. § 1321 (1988). Citations to section 311 of the Clean Water Act (CWA) may be found at 33 U.S.C. § 1321 (1988); subsections of the CWA correspond identically to those found in the United States Code. The official statutory name of the Act is the Federal Water Pollution Control Act.

[6] Section 311 also covers discharges of hazardous substances, but the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988), generally establishes liability and response actions for those incidents. This paper is restricted to a discussion of oil discharges only, although several provisions of the Oil Pollution Act, most notably contingency planning and increased penalties, have ramifications for activities under CERCLA.

[7] Navigable waters are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (1988). In turn, "waters of the United States" are broadly defined by regulation to include all waters susceptible now or in the past for use in interstate or foreign commerce, all interstate waters, all other waters affecting interstate or foreign commerce, impoundments of waters otherwise meeting the definition, tributaries to any of these waters, the territorial sea, and wetlands which abut any of these waters. 33 C.F.R. § 328.3(a) (1990). "Territorial seas" is defined in the Clean Water Act as extending from the ordinary low water mark seaward three miles. 33 U.S.C. § 1362(8) (1988). President Reagan extended the territorial sea, for purposes of international law only, to 12 miles in late 1988. Proclamation No. 5928, 54 Fed. Reg. 777 (1988), *reprinted in* 43 U.S.C. § 1331 note (1988) (Authorization of Appropriations).

[8] The contiguous zone may extend 12 miles seaward from the baseline from which the territorial sea is measured. Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 1612. *See also* 40 C.F.R. § 300.5 (1990). *See supra* note 7 for the meaning of territorial seas.

[9] 33 U.S.C. § 1321(b)(1) (1988).

United States Exclusive Economic Zone[10] and continental shelf, as well as migrating anadromous species even beyond these ocean areas,[11] this latter reference to natural resources was an important seaward extension of liability for oil discharges.

If a discharge of oil had occurred under the pre-OPA regime, the owners and operators of a vessel or facility from which oil was discharged were required to report the spill[12] to the United States Coast Guard.[13] Failure to report a spill subjected a discharger to a fine of up to $10,000 or imprisonment of up to one year.[14] For the discharge itself, civil penalties of up to $5,000 could be assessed by the Coast Guard.[15] In lieu of a Coast Guard administrative penalty, the Administrator of the Environmental Protection Agency (EPA) was empowered to pursue more stringent action in court if the discharge was the result of willful negligence or willful misconduct within the privity or knowledge of the owner or operator. In that case, penalties could rise to $250,000 per incident.[16] Section 311(f)(5) authorized the President to designate federal trustees on behalf of the public for any natural resource which was damaged by the oil spill and allowed suits by these trustees to recover the costs of restoring or replacing harmed natural resources.

Once a covered discharge occurred, or if there was a substantial threat of a discharge, the Clean Water Act authorized various federal responses. The most basic authority was found under section 311(c)(1), where the President was authorized to "remove or arrange for the removal" of the discharge. While logic dictates that removal cannot occur if only a threat of a discharge exists, "remove" was (and is) defined to include actions necessary to minimize or mitigate damage to the public health or welfare.[17] This could include assembling cleanup equipment at the site, protecting vulnerable coastal areas with

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[10] Proclamation No. 5030, 48 Fed. Reg. 10,605 (1983), *reprinted in* 16 U.S.C.A. § 1453, note (West 1985).

[11] 16 U.S.C.A. § 1811 (West Supp. 1991).

[12] The Clean Water Act requires that only discharges of "harmful" quantities of oil must be reported. 33 U.S.C. § 1321(b)(3), (5) (1988). This has been defined by regulation to mean any amount of oil which violates a water quality standard or causes a sheen on the water. 40 C.F.R. § 110.4 (1990).

[13] Exec. Order No. 11,735, 38 Fed. Reg. 21,243 (1973), *amended by* Exec. Order No. 12,418, 48 Fed. Reg. 20,891 (1983).

[14] 33 U.S.C. § 1321(b)(5) (1988).

[15] *Id.* § 1321(b)(6)(A).

[16] *Id.* § 1321(b)(6)(B).

[17] *Id.* § 1321(a)(8).

containment boom, or relocating birds or animals away from a potential spill area. The President was given this authority rather than a specific federal agency head to allow delegation to the appropriate entity, recognizing the respective jurisdictions of the United States Coast Guard and the EPA.[18] In addition, other federal agencies have been employed to assist in cleanup activities, most notably the Department of Defense.[19] If the President acted under the foregoing authority, funding for removal actions came from a federal fund established under section 311(k) of the Clean Water Act.

The President was not required to act if he determined that the owner or operator was capable of properly cleaning up the discharge. This latter course of action is the norm, as the vast majority of oil spills are small and more easily contained and removed by the operator of the vessel or facility who is almost always physically closest to the discharge.[20] Additionally, the federal government may be slow to "federalize" a spill if a financially solvent spiller is available to foot the bill for cleanup, as federal dollars for this purpose have been extremely limited.[21]

Under the pre-OPA scheme, discharges from vessels in certain circumstances appeared to be covered by separate but similar authority. Section 311(d) of the Clean Water Act provided that, the federal government may "coordinate and direct" efforts to clean up or minimize the threat of a discharge caused by a marine disaster. In addition, authority was provided to remove and destroy the vessel, notwithstanding limitations posed by employment and appropriations laws. Additional special authority to handle "imminent and substantial threats" of discharges from facilities could be found in section 311(e). Under this subsection, the President was authorized to secure any

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[18] Exec. Order No. 11,735, *supra* note 13. Division of authority is determined by the source of the spill. If a vessel or transportation-related facility discharges oil, the Commandant of the Coast Guard is in charge. Other spills are handled by the EPA Administrator.

[19] *The Ability of the Federal, State, and Local Governments to Respond to Oil Spills, Methods of Cleanup, Oil Spill Prevention, and Contingency Planning Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 46 (1989) [hereinafter *Ability Hearing*].

[20] *Id.* at 45. *See also H.R. 1465—To Establish Limitations on Liability for Damages Resulting from Oil Pollution, to Establish a Fund for the Payment of Compensation for Such Damages, and for Other Purposes Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 40 (1989) [hereinafter *H.R. 1465 Hearing*].

[21] *See* discussion regarding Clean Water Act § 311(k), *infra* notes 35-40 and accompanying text.

necessary relief in federal court, such as an injunction, through the appropriate United States attorney. Finally, Section 311(b)(6)(c) specifically authorizes the EPA Administrator to mitigate the damage caused by an oil spill to the public health or welfare.

These diverse authorities appear on their face to be overlapping at best, and possibly conflicting. However, the National Contingency Plan (NCP) attempted to untangle the various roles by assigning duties to federal actors. Section 311(c)(2) of the Clean Water Act required the President to promulgate the NCP.[22] It served as the game plan for the federal government to minimize the damage from an oil spill. Beyond providing a delineation of federal responsibilities, the Clean Water Act required the NCP to address key components of an oil spill response strategy: specification of removal techniques;[23] creation of oil spill strike teams to respond to oil spills;[24] establishment of a national coordination center for oil spill response;[25] procedures governing the use of dispersants;[26] and delegation of authority to the states to react to oil spills.[27] The President was also directed under subsection 311(j) of the Clean Water Act to supplement the NCP with regulations establishing: procedures for removing spilled oil; criteria for regional and local oil spill removal contingency plans; oil spill prevention requirements; and vessel inspection requirements for oil-carrying tankers. Violations of these regulations subjected the owner or operator of a facility to a civil penalty of up to $5,000.

Under section 311(f) of the Clean Water Act the owner or operator of the vessel or facility (both onshore and offshore) was liable for the removal costs incurred by any of the authorized federal parties, as well as costs incurred by the United States or a state to restore or replace damaged natural resources.[28] Liability costs were limited to, in the case of a facility, $50 million; for inland barges the greater of $125 per gross ton or $125,000; for tankers which carry oil as cargo, the greater of $150 per gross ton or $250,000; and for all other vessels, $150 per

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[22] The NCP prior to the Oil Pollution Act is found at 40 C.F.R. § 300 (1989).

[23] *Id.* §§ 300.51-.58 (1989).

[24] *Id.* § 300.34 (1989).

[25] *Id.* § 300.36 (1989). The National Response Center is located at the U.S. Coast Guard headquarters in Washington, D.C.

[26] *Id.* §§ 300.81-.86 (1989).

[27] 40 C.F.R. § 300.24 (1989).

[28] Only this limited cause of action running to government entities is provided by the Clean Water Act. Private claims can be pursued under state or common law.

gross ton.[29] Additionally, the President was authorized at his discretion to lower limits of liability for classes of facilities to $8 million.[30]

These limits of liability could be breached if the discharge was caused by willful negligence or by willful misconduct within the privity and knowledge of the owner or operator.[31] On the other hand, owners and operators could completely absolve themselves of responsibility if they could prove that the discharge was caused solely by an act of God, an act of war, or negligence on the part of the federal government. The owner or operator could also escape liability if she could prove that a third party was the sole cause of the discharge, in which case liability attached to the third party.[32] If the owner or operator of a discharging vessel or facility incurred removal costs, and could prove that he or she was entitled to a defense to liability, the owner or operator could recover removal expenses from the United States under subsection 311(i).

The pre-OPA scheme required owners and operators of all vessels over 300 tons which used any United States port to provide evidence of sufficient finances to cover the applicable liability limits.[33] Vessels which did not provide evidence of financial responsibility could be denied entry to, or be detained in, United States ports. The owners or operators of such vessels could be subject to a $10,000 fine.[34]

Federal activities under section 311 were paid from a revolving fund established under subsection 311(k).[35] Appropriations of $35 million were authorized for the fund,[36] a sum which would be wholly inadequate to fund federal actions for all of the thousands of spills reported each year.[37] In addition, actual appropriations never even

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[29] 33 U.S.C. § 1321 (1988).

[30] *Id.* § 1321(q).

[31] *Id.* § 1321(g).

[32] *Id.* However, the owner or operator must pay first and then bring suit against the third party to recover those costs.

[33] *Id.* § 1321(p)(1). Barges that are not self-propelled and that do not carry oil or fuel as cargo are excepted.

[34] 33 U.S.C. § 1321(p)(4) (1988).

[35] Another federal fund for oil spill costs existed prior to enactment of the Oil Pollution Act. 26 U.S.C. § 9509 (1988). However, the availability of this fund was contingent upon the enactment of a comprehensive oil spill act such as the Oil Pollution Act of 1990.

[36] 33 U.S.C. § 1321(k)(1) (1988), *repealed by* Oil Pollution Act of 1990, Pub. L. No. 101-380, § 2002(b)(2), 104 Stat. 507. As a revolving fund, sums paid out of the fund are to be recovered from the responsible spillers, but this has not proved out in practice. *H.R. 1465 Hearing, supra* note 20, at 202.

[37] This number has been variably given as 5,700, 8,500, or 8,800. *H.R. 1465 Hearing, supra* note 20 at 40; *Ability Hearing, supra* note 19, at 23 & 45.

reached that paltry amount.[38] At the time of the Exxon Valdez disaster, the section 311(k) fund had been depleted to less than $4 million at a time when Exxon was spending $1 million a day.[39] Such shortages can easily lead to a less than enthusiastic federal response effort.[40]

Other oil spill liability schemes and accompanying funds were provided for in the Deepwater Port Act of 1974[41] for deepwater ports,[42] title III of the Outer Continental Shelf Lands Act Amendments of 1978[43] for outer continental shelf oil and gas facilities,[44] and the Trans-Alaska Pipeline Authorization Act[45] for oil carried through the trans-Alaska pipeline.[46] In addition to these federal laws, states were not prohibited from establishing their own liability regimes and funds. Many states have liability laws for oil spills and several have established dedicated funds for oil spill removal and compensation.[47] This patchwork of federal and state laws set the stage for the development of an improved comprehensive oil pollution regime.

III. THE OIL POLLUTION ACT OF 1990

The nine titles of the Oil Pollution Act (OPA)[48] expand on the existing Clean Water Act liability scheme while adding substantial new provisions on oil spill prevention, increasing penalties for spills, and strengthening oil spill response capabilities.[49] For the first time, the OPA consolidates federal oil spill laws under a single program, with uniform federal liability and compensation schemes. Although beyond the scope of this paper, the Act also establishes new oil spill research

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[38] *H.R. 1465 Hearing*, *supra* note 20, at 202.

[39] *Exxon Valdez Hearing*, *supra* note 1, at 22-23; *see also H.R. 1465 Hearing*, *supra* note 20, at 202.

[40] *Exxon Valdez Hearing*, *supra* note 1, at 23.

[41] 33 U.S.C. §§ 1501-1524 (1988).

[42] *Id.* § 1507, *repealed by* OPA § 2003(a)(2).

[43] 43 U.S.C.A. §§ 1811-1824 (West 1988).

[44] *Id.* §§ 1811-1824, *repealed by* OPA § 2004.

[45] 43 U.S.C.A. §§ 1651-1655 (West 1988 & Supp. 1992).

[46] *Id.* § 1653.

[47] *See* Costello & Gurevitz, *Liability Provisions in State Oil Spill Laws: A Brief Summary, Congressional Research Service Report to Congress* (Oct. 1, 1990). Twenty-four states have specific oil spill laws. *Id.*

[48] PUB. L. NO. 101-380, 104 Stat. 484 (1990) (codified as amended in scattered sections of the U.S.C.).

[49] In many cases, the Oil Pollution Act amended existing Clean Water Act section 311 provisions. In other cases, new free-standing law was created.

programs,[50] and provides special protections for selected geographic areas,[51] including Prince William Sound, Alaska,[52] the site of the Exxon Valdez disaster.

A. Preparedness and Prevention of Oil Spills

For the first 14 years that oil spill liability legislation was considered by the Congress, the focus was solely on liability for oil spills and compensation ensuing after a spill occurred.[53] However, the magnitude of possible spills was highlighted by the Exxon Valdez situation, which indicated more than any other recent event that prevention of a spill should be the primary goal of oil spill legislation. Absent this, better preparedness for containment and cleaning up an oil spill is the key to minimizing the impacts from an oil spill. Accordingly, the liability and compensation regime found in previous oil spill bills was expanded to include substantial prevention and improved planning provisions.

1. Federal Removal Authority and Contingency Plans

From the beginning, the goal in developing comprehensive oil spill legislation was to ensure an integrated federal, state, local, and private industry system of response and removal. To achieve this end, the drafters of the OPA first had to establish clear lines of responsibility. A common concern voiced by environmentalists, the oil industry, federal officials, and others was that under the old system, no one was really in charge. As discussed above, under previous law, the President had two choices in dealing with an oil spill: monitor a spiller's cleanup effort or "federalize" the cleanup effort.[54] However, the legislative mandate triggering federalization was far from clear.

The OPA now requires the President, in accordance with the NCP, to ensure the "effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge . . . of

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[50] OPA § 7001, 33 U.S.C.A. § 2761 (West Supp. 1991).
[51] OPA §§ 8001-8302, 43 U.S.C.A. §§ 1651-1655 (West Supp. 1991).
[52] OPA §§ 5001-1507, 33 U.S.C.A. § 2731-2737 (West Supp. 1991).
[53] *See* Jones, *supra* note 3, at 10,337.
[54] 33 U.S.C. § 1321(c)(1) (1988). *See also supra* notes 17-21 and accompanying text.

oil."[55] Under the umbrella of this general mandate, a third option is available to the President. The President, in addition to monitoring the cleanup efforts of the spiller or federalizing the spill, may actually direct the activities of the responsible parties and others.[56] However, when the spill poses a substantial threat to the public health or welfare of the United States,[57] the President is limited to federalizing the spill or directing the spiller's removal efforts.[58]

The OPA also establishes limited immunity under federal law for persons involved in an oil spill cleanup, including those persons retained or directed by the Coast Guard, and those rendering care, assistance, or advice consistent with the NCP.[59] The authors did not want the federal government to bear the burden of cleaning up all spills. Thus, it was necessary to ensure that private contractors would be available to assist owners and operators of vessels and facilities when a spill occurs. This immunity provision was deemed to be indispensable to cleanup contractors and essential to ensuring a nationwide network of cleanup contractors.[60] Without it, legislators were told, it would be nearly impossible to assure an adequate number of cleanup contractors. When questioned about why there would be a problem when contractors had always been available in the past, one answer was always forthcoming—the Exxon Valdez had changed everything.

The contractor immunity provided for in the OPA, however, is limited: immunity does not extend to a responsible party, to a response action taken under the Comprehensive Environmental Response, Compensation and Liability Act, when there is personal injury or wrongful death, or if the contractor is grossly negligent or engages in willful misconduct.[61]

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[55] OPA § 4201(a), 33 U.S.C.A. § 1321(c)(1) (West Supp. 1991).

[56] OPA § 4201(a), 33 U.S.C.A. § 1321(c)(D)(B) (West Supp. 1991).

[57] The Exxon Valdez incident is, as would be expected, an example of the type of spill that would constitute a substantial threat to the public health or welfare. H.R. REP. NO. 653, 101st Cong., 2d Sess. 145-46 (1990).

[58] OPA § 4201(a), 33 U.S.C.A. § 1321(c)(2) (West Supp. 1991).

[59] OPA § 4201(a)(4)(A), 33 U.S.C.A. § 1321(c)(4)(A) (West Supp. 1991).

[60] In August 1990, about 20 oil companies created the Marine Spill Response Corporation (MSRC). MSRC is headquartered in Washington, D.C., and has established five regional response centers in the New York-New Jersey area; Port Everglades, Florida; Lake Charles, Louisiana; Port Hueneme, California; and Seattle, Washington. Each region will have four to six prestaging areas where equipment, and sometimes vessels and personnel, will be located. This will complement existing oil spill cooperatives and independent response contractors.

[61] 33 U.S.C.A. § 1321(c)(4)(B) (West Supp. 1991).

In addition to broadening the authority of the federal government to respond to an oil spill, the OPA also expands and strengthens the role of the NCP.[62] As stated above, the NCP already existed under the Clean Water Act,[63] but the Exxon Valdez spill highlighted the need to update the plan and provide for a better coordinated system of federal, state, local, and private response and preparedness.

The OPA requires the President to prepare and publish an NCP for addressing the removal of a worst case discharge[64] of oil and for mitigating or preventing a substantial threat of such a discharge.[65] Among other requirements are assignment of duties and responsibilities among federal agencies in coordination with state and local agencies and port authorities; identification, procurement, maintenance, and storage of equipment and supplies; identification of procedures and techniques to be used in removing oil; preparation of a schedule, in cooperation with the states, to deal with the use of dispersants; establishment of procedures to coordinate activities by the Coast Guard strike teams, Federal On-Scene Coordinators,[66] Coast Guard District Response Groups, and Area Committees; and development of a fish and wildlife response plan.[67] The President is required to revise and publish the updated NCP not later than one year after the date of enactment.[68]

Within this framework, the Act further establishes a multilayered

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[62] OPA § 4201(b), 33 U.S.C.A. § 1321(d) (West Supp. 1991). The NCP also applies to discharges of hazardous substances, and any changes made to it also will affect actions taken under the Comprehensive Environmental Response, Compensation, and Liability Act.

[63] 33 U.S.C. § 1321(c)(2) (1988). The existing federal regulatory structure designed to respond to spills of oil under the Clean Water Act is basically untouched by the Oil Pollution Act. The NCP establishes the National Response Team (NRT), which is a national planning, policy, and coordinating body. The NRT does not respond to spills, but provides guidance and assistance to others before and after a spill. It includes members from 14 federal agencies having environmental responsibilities. The NRT is chaired by the EPA and vice-chaired by the Coast Guard. The NCP also establishes 13 Regional Response Teams (RRTs). There are also planning and policy organizations which do not respond to spills. Each RRT is cochaired by the Coast Guard and EPA. *See* 33 U.S.C.A. § 1321(j) (West Supp. 1991). *See also* 40 C.F.R. § 300 (1990) (responsibility and organization for response under NCP).

[64] OPA § 4201(b), 33 U.S.C.A. § 1321(a)(24) (West Supp. 1991), defines a worst case discharge to mean "(A) in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and (B) in the case of an offshore facility or onshore facility, the largest foreseeable discharge in adverse weather conditions."

[65] OPA § 4201(b), 33 U.S.C.A. § 1321(d)(2)(J) (West Supp. 1991).

[66] 40 C.F.R. § 300.33 (1990) directs the Coast Guard and EPA to predesignate On-Scene Coordinators.

[67] OPA § 4201(b), 33 U.S.C.A. § 1321(d)(2) (West Supp. 1991).

[68] OPA § 4201(c), 33 U.S.C.A. § 1321(d)(1) (West Supp. 1991).

planning and response mechanism, the "National Planning and Response System." This System provides for a National Response Unit, Coast Guard District Response Groups, Area Committees, Area Contingency Plans, and Tank Vessel and Facility Response Plans.[69] A description of each follows.

(1) The *National Response Unit*[70] (renamed the National Strike Force Coordination Center) is a Coast Guard operation that was established in August 1991, at Elizabeth City, North Carolina. It will coordinate private and public responses to a spill. It will serve the important functions of compiling a list of oil spill removal resources, personnel, and equipment worldwide; administering the Coast Guard strike teams; training response personnel around the country; and reviewing contingency and response plans.

(2) A *Coast Guard District Response Group*[71] is established in each of the 10 Coast Guard Districts around the country. Each Group will be comprised of personnel and equipment on call 24 hours a day to respond to oil spills in every port within the district.

(3) *Area Committees*[72] will be comprised of individuals from federal, state, and local agencies whose function will be to prepare Area Contingency Plans. The President is required to delineate by February 1991 geographic areas for which Area Committees are to be established. All navigable waters, adjoining shorelines, and waters of the Exclusive Economic Zone are to be covered by an Area Contingency Plan.

(4) The *Area Contingency Plans*[73] are to ensure the removal of a worst case spill from a vessel or facility operating in or near the area covered by the Plan. One of the chief responsibilities of the National Response Unit and the Area Committees in preparing and reviewing the Plans is ensuring that each Plan fits neatly into the overall response capabilities when implemented in conjunction with the other plans mandated under the OPA. Each Area Committee has 18 months after enactment to submit a Plan to the President, and the President has six months thereafter to review and approve the Plan.[74]

(5) *Tank Vessel and Facility Response Plans*[75] are to be designed

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[69] OPA § 4202, 33 U.S.C.A. § 1321(j) (West Supp. 1991).
[70] OPA § 4202(a), 33 U.S.C.A. § 1321(j)(2) (West Supp. 1991).
[71] OPA § 4202(a), 33 U.S.C.A. § 1321(j)(3) (West Supp. 1991).
[72] OPA § 4202(a), 33 U.S.C.A. § 1321(j)(4) (West Supp. 1991).
[73] *Id.*
[74] *Id.* § 4202(b), 33 U.S.C.A. § 1321 note (West Supp. 1991) (Implementation of National Planning and Response System).
[75] OPA § 4202(a), 33 U.S.C.A. § 1321(j)(5) (West Supp. 1991).

to allow an owner or operator to respond, to the maximum extent practicable, to a worst case discharge of oil or the substantial threat of such a discharge. The lesser standard, meeting a worse case discharge to the maximum extent practicable, was adopted in recognition of the more limited response and planning capabilities of an individual owner or operator as opposed to a port area. All United States flag tank vessels,[76] other than public vessels,[77] are required to develop a plan. All other tank vessels operating on the navigable waters of the United States or transferring oil in a port or place subject to the jurisdiction of the United States must also meet the Response Plan requirements.[78] Finally, offshore and onshore facilities must have Plans.[79] For onshore facilities, the requirement is limited to those that, because of their location, could reasonably be expected to cause substantial harm to the environment by discharging into the navigable waters, adjoining shorelines, or the Exclusive Economic Zone.[80]

The requirement that Tank Vessel and Facility Plans be developed consistently with the NCP and Area Contingency Plans and higher burden of response should ensure that even in the most disastrous circumstances there will be adequate response capabilities available, if not in the local area, then from federal strike teams, or other private resources around the country.

The Presidential regulations for these Tank Vessel and Facility Response Plans are due two years after enactment. The Response Plans themselves are required to be submitted for approval to the President not later than 30 to 36 months after enactment.[81] By then, the NCP will have been updated and the Area Contingency Plans will have been developed, allowing owners and operators to key into those contingency plans in preparing their individual Response Plans. The Coast Guard or the EPA will review each Response Plan, require amendments as necessary, and approve any plan that meets the

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[76] Tank vessels are defined as vessels that are constructed or adapted to carry, or that carry, oil as cargo or cargo residue. 46 U.S.C. § 2101(3g) (1988).

[77] A public vessel is defined as a vessel owned or bareboat chartered by the United States, a state, or a foreign country for noncommercial purposes. OPA § 1001(29), 33 U.S.C.A. § 2701(29) (West Supp. 1991).

[78] OPA § 4202, 33 U.S.C.A. § 1321(j)(5)(B)(i) (West Supp. 1991).

[79] OPA § 4202, 33 U.S.C.A. § 1321(j)(5)(B)(ii) and (iii) (West Supp. 1991).

[80] OPA § 4202, 33 U.S.C.A. § 1321(j)(5)(B)(iii) (West Supp. 1991).

[81] OPA § 4202(b)(4), 33 U.S.C.A. § 1321 note (West Supp. 1991) (Implementation of National Planning and Response System).

approval criteria.[82] In addition, in keeping with the concept of ongoing preparedness, the Response Plans have to be reviewed periodically thereafter.

Covered vessels and facilities are prohibited from operating without a submitted Response Plan beginning two-and-a-half years after enactment, and from operating without an approved Plan three years after enactment.[83] Both the Coast Guard and EPA were especially concerned about having to review and approve the large number of Response Plans expected to be submitted to them. The Coast Guard estimates that it alone will have 3,500 facilities and 4,500 tank vessels covered under this section.[84] This number may prevent review and approval before the deadlines. The drafters of the OPA believed that responsible owners and operators who submitted their Plans in a timely manner should not be punished by this possible government backlog. Therefore, the President is given the authority to allow a vessel or facility to operate up to two years after its Plan has been submitted, provided that the owner or operator certifies that private personnel and equipment have been secured by contract.[85]

In addition to the volume of Response Plans that have to be approved, the agencies were concerned about their potential liability. Specifically, they were apprehensive about putting their imprimatur on a plan only to have an operator who caused an accident point a finger at the federal government in an attempt to absolve herself from liability. For that reason, a provision was included that sets out clearly that the United States is not liable for any damages resulting from approval of a contingency plan.[86]

The authors of the OPA wanted to ensure that Tank Vessel and Facility Response Plans were comprehensive, effective, and workable. Rather than having a thick, detailed, complicated document on board each vessel and at each facility, the drafters opted for a simple approach. A person who has authority to implement the plan must be

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[82] The requirement for Presidential approval and review of Area Contingency Plans is found in section 4202(a) of the OPA, 33 U.S.C.A. § 1321(j)(4)(D) (West Supp. 1991). The requirement for Presidential review and approval for Tank Vessel and Facility Response Plans is found in section 4202(a) of the OPA, 33 U.S.C.A. § 1321(j)(5)(D) (West Supp. 1991).

[83] OPA § 4202(b)(4)(B), 33 U.S.C.A. § 1321 note (West Supp. 1991) (Implementation of National Planning and Response System).

[84] Telephone interview with Capt. W. F. "Biff" Holt, Division Chief, Marine Environmental Protection, U.S. Coast Guard (Dec. 7, 1990).

[85] OPA § 4202(a), 33 U.S.C.A. § 1321(j)(5)(F) (West Supp. 1991).

[86] OPA § 4202(a), 33 U.S.C.A. § 1321(j)(8) (West Supp. 1991).

designated. That person is responsible for contacting the appropriate federal official and contractors enlisted to provide equipment and personnel. The authors also considered it important to have adequate response capability on call, under contract, and capable of responding to a large spill. Therefore, all owners or operators are required to have private organizations under contract before a Response Plan can be approved.[87]

The Tank Vessel Response Plans must describe the training, equipment testing, and response actions to be carried out by personnel on the vessel to ensure the safety of the vessel. Personnel on board a vessel should first see to the safety of the vessel rather than devoting time and attention to responding to a spill. However, it is important that personnel know the rudiments of responding and do what they can to mitigate the threat of a spill consistent with the safety of the crew and the vessel. For this reason, the requirement for on-board oil spill response equipment was included in the OPA. The equipment must be compatible with the safe operation of the vessel.[88]

The Coast Guard is required to conduct drills, without prior notice, to test the workability of the layers of Contingency and Response Plans. Again, in keeping with the theme of an integrated response capability, federal, state, and local organization will participate as well as private industry. Afterwards, the relevant plans will be assessed and, if necessary, amended.[89]

2. Double Hulls

The requirement for double hulls on tank vessels resolved a contentious prevention issue that had undergone years of debate and discussion. Double hulls on vessels can provide an additional layer of protection for the oil cargo if the vessel should run aground or is otherwise punctured. However, opponents of double hulls claim that once the outer hull of a vessel is breached, water can enter into the space between the hulls, causing severe stability problems. This could impede salvage attempts or cause the vessel to capsize, losing the entire oil shipment.

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[87] H.R. REP. NO. 653, *supra* note 57, at 150. *See also supra* note 60 regarding creation of the Marine Spill Response Corporation.

[88] OPA § 4202(a), 33 U.S.C.A. § 1321(j)(6) (West Supp. 1991).

[89] OPA § 4202, 33 U.S.C.A. § 1321(j)(7) (West Supp. 1991).

The legislative history behind this measure is particularly instructive of the anti-Big Oil/pro-environment color of the OPA. In the 101st Congress, the Senate acted first in passing an oil spill bill, Senate Bill 686.[90] It required the Secretary of Transportation to determine whether double hulls or double bottoms would enhance oil tanker safety and environmental protection. The bill also required the Secretary to investigate alternative technologies.[91] Similarly, the House predecessor bill to the OPA, H.R. 1465,[92] directed the Secretary of Transportation to evaluate the efficacy of double hulls and double bottoms. The study was to emphasize their environmental safety record, and the associated costs and benefits. The Secretary was directed to consider alternative technologies as well.[93]

On November 9, 1989, the House of Representatives adopted two amendments to its bill that were purported to be complementary.[94] The first amendment required all new tank vessels to be equipped with a double hull. Existing vessels would have an additional 15 years after the bill's enactment to meet the double hull requirement.[95] The second amendment required new self-propelled tank vessels of at least 20,000 gross tons to be equipped with a double bottom. Existing self-propelled tank vessels were to retrofit with double bottoms within seven years.[96] Confusion over the effect of these amendments is apparent, given that double hulls include double bottoms, the weight class restrictions in the second amendment, and that self-propelled tank vessels are a subset of tank vessels.

A third double hull amendment was offered as a substitute for the previous two amendments which was identical to the Senate's double hull provision. Its author cited its strong support by the environmental community after adoption by the Senate months before.[97] However, the "greener than thou" fever that seemed to grip Members of the House of Representatives between Senate passage and House consider-

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[90] S. 686, 101st Cong., 1st Sess., 135 CONG. REC. S10,070-90 (daily ed. Aug. 4, 1989).

[91] S. 686, 101st Cong., 1st Sess., § 308(a), 135 CONG. REC. S10,406, S10,416 (daily ed. Aug. 15, 1989).

[92] H.R. 1465, 101st Cong., 1st Sess. (1989) (introduced by Congressman Walter B. Jones and others).

[93] H.R. 1465, 101st Cong., 1st Sess. § 420(8)(D) (1989).

[94] 135 CONG. REC. H8262 (daily ed. Nov. 9, 1989).

[95] *Id.* This amendment originally included a weight class restriction, but this provision was deleted by another amendment. *Id.* at H8272.

[96] *Id.* at H8263.

[97] *Id.* Rec. H8272.

ation of oil spill legislation was particularly evident during the November days when H.R. 1465 was before the House. After spirited debate, the third amendment was rejected by a voice vote, and the conflicting double hull amendments were passed as part of H.R. 1465.[98]

During the House-Senate Conference on this provision, the Senate made an offer on double hulls to the House that was even stronger than the House-passed bill. After wide circulation, the proposal was met with strong opposition,[99] and consequently, it was quickly withdrawn. A complicated compromise was arrived at by the House and Senate conferees based on an elaborate formula, taking into account vessel size, type, and age. However, there is no explicit legislative history on how this formula was arrived at.

The final version of the double hull provision is found in section 4115 of the OPA. It adds a new section 3703a to title 46, United States Code.[100] The new section provides that almost all newly-built tank vessels must be built with double hulls. This applies to all vessels carrying oil, regardless of their flag, when they are operating on waters subject to the jurisdiction of the United States, including the 200-mile Exclusive Economic Zone.[101]

Certain vessels are exempt from the double hull requirement.[102] Vessels used only to respond to an oil spill are not required to have double hulls because their capacity would be so reduced as to make them less effective. Vessels under 5,000 gross tons are also exempt from the double hull requirement, but must have a double containment system determined by the Secretary of Transportation to be as effective as a double hull for oil spill prevention.[103] This exemption will primarily affect inland tank barges. The justification for this exemption is that these vessels move more slowly in calmer waters and have a smaller carrying capacity, thus reducing the potential for a large spill.

A third category of exempt vessels are those that unload at

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[98] *Id.*

[99] *Tanker Bill May Not Cut Alaska Risk*, Anchorage Daily News, Mar. 29, 1990, at 2.

[100] Chapter 37 of title 46, United States Code, deals with the carriage of liquid bulk dangerous cargoes.

[101] OPA § 4115(a), 46 U.S.C.A. § 3703a(a) (West Supp. 1991).

[102] OPA § 4115(a), 46 U.S.C.A. § 3703a(b) (West Supp. 1991).

[103] In making this determination, the Secretary may consider vessel size and the environment in which the vessel operates. The Secretary may find that flexible bladders, double sides, or other combinations of technology are equally as effective as double hulls. H.R. REP. NO. 653, *supra* note 57, at 139.

deepwater ports.[104] However, these vessels are required to have double hulls after January 1, 2015.[105] This temporary exemption was allowed because deepwater ports move tanker traffic far offshore, thus reducing the risk of spills harming United States ports and shorelines.[106] This temporary exemption also applies to delivering vessels offloading oil more than sixty miles from shore. These activities will have to be conducted in lightering zones.[107] Again, the reason for the temporary exemption is the distance from shore and lower potential for collisions and groundings.

In the case of lightering vessels,[108] the authors of the OPA recognized that often there was not a direct nexus between the delivering vessel and the United States; this is not true for a receiving vessel which usually enters a United States port to offload the received oil. Because of international law implications and constraints, the OPA imposes various requirements on the delivering vessel through the receiving vessel. This is accomplished through amending section 3715(a) of title 46, United States Code. This amended section requires both delivering and receiving vessels engaged in lightering transfers that result in the delivery of oil to the United States to be in compliance with the double hull requirements of the OPA. This is accomplished by mandating that a receiving vessel may only receive oil from a delivering vessel that complies with section 3703a as well as other requirements of section 3715(a).[109]

The OPA provides for the phaseout of existing vessels beginning in 1995, based on age and size.[110] The age of an existing vessel is determined from the later of the date on which the vessel is delivered after original construction or is delivered after completion of a major

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[104] The only port currently licensed under the Deepwater Port Act is located off the coast of New Orleans, Louisiana. It is known as the Louisiana Offshore Oil Port (LOOP).

[105] OPA § 4115(a), 46 U.S.C.A. § 3703a(b)(3) (West Supp. 1991).

[106] The safety record and potential for collisions or groundings are significantly lower at deepwater ports. H.R. REP. NO. 653, *supra* note 57, at 139.

[107] OPA § 4115(a), 46 U.S.C.A. § 3703a(b)(3)(B) (West Supp. 1991).

[108] Lightering involves the transfer of cargo from a large vessel (the delivery vessel) to smaller ones (the receiving vessels). It often involves the use of huge supertankers which are incapable of maneuvering into shallow-draft United States ports for offloading.

[109] OPA § 4115(d)(3), 46 U.S.C.A. § 3715(a)(5) (West Supp. 1991). The other requirements are that the delivering and receiving vessels have evidence of financial responsibility under section 1016 of the OPA, and comply with the response plan requirements of section 311(j) of the Clean Water Act.

[110] OPA § 4115(a), 46 U.S.C.A. § 3703(c) (West Supp. 1991).

conversion.[111] The phaseout schedule was developed with the idea of getting vessels without double hulls out of the trade as quickly as possible without undue adverse impact on the transportation of oil, and to assure worldwide shipyard capacity to accommodate the new construction.

Vessels of at least 5,000 gross tons but less than 15,000 gross tons begin to be phased out in January 1995. Vessels in service after that date that are forty years old or older and have a single hull, or are forty-five years old or older and have a double bottom or double sides must be decommissioned. The phaseout is completed in 2005 when vessels twenty-five years of age or older with a single hull, or thirty years old or older with double bottoms or double sides, must have a double hull to transport oil in the United States.

The same five-year differentiation between single hulls and double bottoms and double sides applies to vessels of greater than or equal to 15,000 gross tons but less than 30,000 gross tons. This phaseout begins in 1995 with forty-year old vessels and ends in 2005 with twenty-five-year old vessels. For vessels of 30,000 gross tons and over, the phaseout begins in 1995 for vessels at least twenty-eight years old, and ends on January 1, 2000, with vessels twenty-three years old. In any case, after January 1, 2010, a vessel with a single hull, and after January 1, 2015, a vessel with a double bottom or double sides, may not operate in United States waters regardless of age or size.

B. Liability Regime

1. In General

Despite the best laid plans of oil transporters, some spills are inevitable. As stated above, the sheer magnitude of the Exxon Valdez spill provoked a severe congressional backlash against oil companies and their associated marine transporters. The Exxon Valdez spill also created great sympathy for those harmed by the spill, and a desire for retribution for the damage done to the once pristine Prince William Sound. Given these emotions, Congress basically threw out the liability

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[111] OPA § 4115(a), 46 U.S.C.A. § 3703a(c)(1) (West Supp. 1991). One exception to this rule is for a vessel that has been rebuilt under the Wrecked Vessel Act. 46 U.S.C. app. § 14 (1988). Its age is determined from the date on which the vessel had its appraised value determined by the Coast Guard and is qualified for documentation.

regime in section 311 of the Clean Water Act as it related to oil spills,[112] and authored a new, freestanding regime. This housecleaning also created an opportunity to unify the various federal oil spill laws.

Title I of the OPA establishes liability for discharges of oil,[113] as well as threats of discharges, from any source, including United States and foreign flag vessels, onshore and offshore facilities,[114] pipelines, and deepwater ports.[115] The geographic scope of liability for a discharge is also extended to the full extent of United States maritime jurisdiction—the 200-mile Exclusive Economic Zone.[116] This means that discharges beyond the twelve-mile contiguous zone no longer must affect United States natural resources before liability attaches;[117] the mere fact of the discharge triggers the application of the statute. Of course, liability for harm to natural resources of the United States continues unchanged under the Act as to geographic scope.[118]

Although the standard of liability is not explicitly defined by the OPA, the Act instructs that the terms "liable" or "liability" are to be construed to be "the standard of liability which obtains under section 311 of the Clean Water Act."[119] Some might wonder why the authors of the legislation retreated from a position taken by the House of Representative's predecessor bill to the OPA, where liability was clearly delineated as "joint, strict, and several."[120] On its face, the standard

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[112] Clean Water Act section 311 continues to apply to discharges of hazardous substances.

[113] "Oil" is now defined to exclude constituent portions of oil specifically listed as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act. OPA § 1001(23), 33 U.S.C.A. § 2701(23) (West Supp. 1991).

[114] "Facility" is defined in the OPA to include any structure used to explore, drill, produce, store, handle, transfer, process, or transport oil. OPA § 1001(9), 33 U.S.C. A. § 2701(9) (West Supp. 1991). Therefore, an oil delivery truck which topples off an elevated highway into a U.S. waterway and discharges oil would be captured by the OPA.

[115] OPA § 1001(32), 33 U.S.C.A. § 2701(32) (West Supp. 1991).

[116] This area is defined in the Oil Pollution Act to include the "eastern special areas" negotiated between the U.S. and the U.S.S.R. in June of 1990. OPA § 1001(8), 33 U.S.C.A. § 2701(8) (West Supp. 1991).

[117] *See supra* notes 5-11 and accompanying text.

[118] The OPA liability provisions do not apply to discharges covered by a government-issued permit, from a public vessel, or from an onshore facility subject to the Trans-Alaska Pipeline Authorization Act. OPA § 1002(c), 33 U.S.C.A. § 2702(c) (West Supp. 1991). However, once oil from the Trans-Alaska pipeline is transferred to a vessel, Oil Pollution Act coverage is engaged.

[119] OPA § 1001(17), 33 U.S.C.A. § 2701(17) (West Supp. 1991). This standard is reinforced by taking definitions of key terms under the Oil Pollution Act, such as "owner or operator," "liable," "onshore facility," "offshore facility," "public vessel," and "vessel" verbatim from the Clean Water Act. H.R. REP. NO. 653, *supra* note 57, at 101-02.

[120] H. R. 1465, 101st Cong., 1st Sess. § 102, 135 CONG. REC. HB124 (daily ed. Nov. 8, 1989).

of liability in the OPA appears to be a lesser one. However, the Conference Report which accompanies the Act states that the Clean Water Act liability standard has been determined repeatedly to be strict, joint, and several.[121] Reluctance to clearly state this critical element is curious, given the opportunity to clarify this point and the strong anti-Big Oil, pro-environment stance evident throughout the OPA.

Liability runs to the "responsible party" for a vessel or facility, a term defined generally to mean owner or operator,[122] with minor exceptions for governmental entities which own facilities but which lease them to others. Because "responsible party" is defined to include corporations, liability potentially could extend to shareholders or corporate officers. Such liability has been found in several incidents involving hazardous waste under CERCLA.[123] On the other hand, federal employees are specifically shielded from liability for acts or omissions occurring while the employee is acting in an official capacity.[124]

The OPA does not prohibit agreements to insure or hold harmless any person for liability under the Act. However, these agreements do not affect the attachment of liability under the OPA to a responsible party.[125] For example, a contract purporting to transfer responsibility for the safe transport of oil from an otherwise responsible party under the OPA to a third party will not relieve the responsible party from liability for removal costs and damages under the OPA. However, the agreement or contract may affect subrogation or other rights between the contracting parties.

The OPA did not alter existing law regarding parallel liability

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[121] H.R. REP. NO. 653, *supra* note 57, at 102.

[122] OPA § 1001(32), 33 U.S.C.A. § 2701(32) (West Supp. 1991). The House of Representatives predecessor bill to the OPA included a provision apportioning liability between the owner and operator of a spilling vessel, and the owner of the oil carried as cargo aboard the vessel. H.R. 1465, 101st Cong., 1st Sess. § 1004(b), 135 CONG. REC. H8124 (daily ed. Nov. 8, 1989). The intent behind this provision was to ensure that oil companies would select the most prudent carriers to transport their oil if the threat of shared liability in the event of a spill were present. This provision was dropped despite predictions that the greater liability risk inherent in the Oil Pollution Act would cause a proliferation of shell oil transportation corporations, whose only asset is a single tanker.

[123] United States v. Northeastern Pharmaceutical and Chem. Co., 810 F.2d 726 (8th Cir. 1986); United States v. Conservation Chem. Co., 628 F. Supp. 391 (W.D. Mo. 1985); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

[124] OPA § 1018(d), 33 U.S.C.A. § 2718(d) (West Supp. 1991). This provision could also protect a federal employee, such as a Federal On-Scene Coordinator or a U.S. Coast Guard Vessel Traffic Service System operator, from a third-party defense claim.

[125] OPA § 1010, 33 U.S.C.A. § 2710 (West Supp. 1991).

schemes for oil discharges under state law. Over twenty-four states have oil-specific liability schemes which authorize a cause of action for oil discharges in state waters.[126] This double layer of liability is an area of potential confusion which remains unresolved.[127]

2. Removal Costs and Damages Compensable Under the OPA

The responsible party must pay removal costs and damages specified in section 1002(b) of the OPA to claimants.[128] Two types of removal costs are compensable under the Act: (1) removal costs incurred by a governmental entity[129] under subsections 311(c), (d), (e), or (l) of the Clean Water Act, as amended by the OPA, under the Intervention on the High Seas Act,[130] or under state law;[131] and (2) removal costs incurred by any other person consistent with the NCP.[132] These categories of costs which may be recovered under the OPA are greatly expanded from those originally provided in Clean Water Act section 311. For the first time, removal costs are not restricted to those incurred by the federal government. Private parties are afforded protection under the OPA for their cleanup costs, as long as their actions are consistent with the NCP. Moreover, United States, state, or Indian tribe removal costs which are consistent with both the NCP and state law must be paid by a responsible party under the OPA. Under the previous Clean Water Act regime, liability to nonfederal parties could be based only on a showing of fault.

In addition to removal costs, monetary damages can be collected from a responsible party under the OPA. These are:

(1) damages to natural resources (including assessment costs) recoverable by a government trustee;

(2) damages for injury to real or personal property (including

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[126] Costello and Gurevitz, *supra* note 47, at 49.

[127] *See* discussion on preemption of state laws, *infra* notes 243-52 and accompanying text.

[128] 33 U.S.C.A. § 2702(a) (West Supp. 1991). Additionally, the responsible party is liable for interest for any claims paid under the OPA, as calculated under section 1005 of the OPA, 33 U.S.C.A. § 2705 (West Supp. 1991). Claimants may include foreign governments and other foreign claimants under certain conditions. OPA § 1007, 33 U.S.C.A. § 2707 (West Supp. 1991).

[129] This includes a state government or an Indian tribe.

[130] 33 U.S.C. §§ 1471-1487 (1988).

[131] OPA § 1002(b)(1)(A), 33 U.S.C.A. § 2702(b)(1)(A) (West Supp. 1991).

[132] OPA § 1002(b)(1)(B), 33 U.S.C.A. § 2702(b)(1)(B) (West Supp. 1991).

economic losses resulting from the injury) recoverable by the owner or lessee of the property;

(3) damages for loss of subsistence use of natural resources (ownership of resource not required);

(4) damages equal to the loss of revenues caused by the destruction of property or natural resources recoverable by a government entity;

(5) damages equal to lost profits or earning capacity because of injury to property or natural resources (ownership of property or resource not required); and

6) damages for net costs of providing increased public services during or after removal activities recoverable by a state or local government.[133]

The expanded realm of allowable monetary damages is obvious and is likely to be most troubling to the oil industry, given the possibility, however small, of another spill as disastrous as the Exxon Valdez. The most apparent change is that the OPA deletes a limitation which had previously existed under case law requiring that the claimant show physical damage to a proprietary interest before economic damage could be awarded.[134] This is readily seen in the authorization of damages for loss of profits or earning capacity, which may be had by anyone, not just the owners of the damaged property. The allowance for costs of increased public services can also be seen as a direct result of the experience with the Exxon Valdez. The small and isolated city of Valdez, Alaska, was overwhelmed with cleanup workers and the press, and city services such as fire department protection, water, and sewage, were severely strained.[135] Of course this provision, having no retroactive effect, cannot now benefit Valdez.

In addition, an innocuous "notwithstanding any other provision or rule of law" clause at the beginning of OPA section 1002[136] means that financial limits for harm posed by the 139 year-old Limited Liability Act,[137] which restricts claims against vessel owners to the value of the vessel and cargo involved, does not apply to actions brought

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[133] OPA § 1002(b)(2), 33 U.S.C.A. § 2702(b)(2) (West Supp. 1991).

[134] H.R. REP. NO. 653, *supra* note 57, at 103. *See also* Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985).

[135] *Ability Hearing*, *supra* note 19, at 33.

[136] 33 U.S.C.A. § 2702(a) (West Supp. 1991).

[137] 46 U.S.C. app. §§ 181-189 (1988).

under the OPA.[138] The OPA also abrogates the application of this law to states.[139] This will have a significant impact on oil tanker owners and their insurance providers, especially in waters where the state has no limits of liability for oil spills[140] or allows recovery of a broader range of removal costs or damages.[141]

3. Defenses to Liability

Despite the broadened scope of liability created by the OPA, the oil industry has not been left without a defense. Congress provided a complete defense to liability in the OPA if the responsible party proves by a preponderance of evidence that the discharge or threat of discharge was 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, agent, or contractee of the responsible party; or (4) any combination of these.[142] Further, the third party defense is made contingent upon the responsible party being able to prove, by a preponderance of the evidence, that he or she exercised due care regarding the nature of the oil discharged and took precautions against foreseeable acts or omissions of the third party.[143]

These defenses are in many ways much more circumscribed than those found in section 311 of the Clean Water Act. The OPA raises the burden of proof for proving a defense and deletes a defense afforded for the negligence of the United States Government.[144] More importantly, the Act greatly restricts the third party defense by decreasing the class

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[138] Section 1004 of the OPA, 33 U.S.C.A. § 2704 (West Supp. 1991), does limit a vessel's liability.

[139] OPA § 1018(a), 33 U.S.C.A. § 2718(a) (West Supp. 1991). *See, e.g., In re* Harbor Towing Corp., 335 F. Supp. 1150 (D. Md. 1971).

[140] Seventeen states have no limits of liability for oil spills. *Oil Spill Liability Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess. 173, 233 (1985).

[141] How any list could be broader is doubtful.

[142] OPA § 1003(a), 33 U.S.C.A. § 2703(a) (West Supp. 1991). An exception is created in the law for contracts involving the transportation of oil provided by a common carrier—a boon for railroad companies.

[143] *Id.* It should be recognized that the OPA's third party defense is essentially identical to that found in CERCLA for potentially responsible persons involved in the release of a hazardous substance. 42 U.S.C. § 9607(b)(3) (1988). Therefore, the case law defining the applicability and limitations of the CERCLA third party defense should be instructive in the context of the OPA. Importantly, that case law points out the difficulty in raising an effective third party defense. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988).

[144] Some have suggested that the third party defense retained under the OPA would include government actions. *H.R. 1465 Hearing, supra* note 20, at 189.

of third parties whose actions may provide a defense, and by requiring the exercise of due care in the selection and control of the actions of a third party. On the one hand, it is reasonable to question the fairness of imposing liability on the owner of an oil barge when the towing vessel is at fault, merely due to the existence of a contract between the two. On the other hand, the defense restrictions may induce the selection of a competent towing company. Additionally, a barge owner could protect against an unfair result by placing an indemnification clause in the contract to ensure that the towing company ultimately pays for its error.

If an alleged responsible party is successful in claiming a third party defense, the third party becomes the responsible party for purposes of the OPA. The third party would then be allowed to use the claims and defenses available to the original responsible party, including limits of liability.[145] Assertion of an eventually successful third party defense does not immediately relieve the original responsible party of her burden, however, because even if she alleges that a third party caused the oil spill, she must still pay the removal costs and damages up front for the incident. The original responsible party would then be entitled to subrogation for those claims against the third party or the Federal Oil Spill Liability Trust Fund, if necessary.[146]

Responsible parties also void any defense under the OPA if they fail to report a known reportable spill, to cooperate and assist responsible officials in removal actions, or to comply with an order issued under subsections 311(c) or (e) of the Clean Water Act as amended by the OPA, or under the Intervention on the High Seas Act.[147] These actions can also result in fines and imprisonment under the OPA and Clean Water Act.[148] On the other hand, responsible parties are not liable to claimants to the extent that those claimants are grossly negligent or engage in willful misconduct.[149] This represents an elevated comparative negligence standard, but it will not protect the pocketbook of the responsible party from merely negligent claimants.

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[145] OPA § 1002(d), 33 U.S.C.A. § 2702(d) (West Supp. 1991).

[146] OPA § 1008, 33 U.S.C.A. § 2708 (West Supp. 1991). This is another provision reflecting sympathy toward those harmed by a spill by allowing faster compensation from an identified source rather than delaying payment until the issue of liability has been settled.

[147] OPA § 1003(c), 33 U.S.C.A. § 2703(c) (West Supp. 1991).

[148] OPA § 4301(a), 33 U.S.C.A. § 1321(b)(5) (West Supp. 1991). *See* discussion on increased penalties, *infra* notes 205-22 and accompanying text.

[149] OPA § 1003(b), 33 U.S.C.A. § 2703(b) (West Supp. 1991).

4. *Federal Oil Spill Liability Trust Fund*

While the responsible party is monetarily liable for the harm caused by a spill, there is another source of money which is also available to pay necessary expenses in some circumstances. The Federal Oil Spill Liability Trust Fund (Federal Fund), is available to pay for oil-spill related costs when the spiller cannot be identified, when the spiller can successfully defend against a charge of liability, when the spiller can invoke liability limits and claims exceed those limits, when the spiller is not subject to United States jurisdiction (a foreign spiller), or when a spiller is insolvent or otherwise cannot make good on its obligations under the OPA.[150]

The Federal Fund, as amended by the OPA, is capitalized through several sources: (1) a five-cent per barrel tax on oil;[151] (2) excess natural resource damages recovered by trustees under section 1006(f) of the OPA;[152] (3) amounts recovered by the Fund through subrogation under section 1015 of the OPA;[153] (4) amounts transferred to the Fund from the Clean Water Act section 311(k) Fund, the Deepwater Port Liability Fund,[154] the Offshore Oil Pollution Compensation Fund,[155] and the Trans-Alaska Pipeline Liability Fund;[156] and (5) penalties collected under sections 311 and 309(c) of the Clean Water Act, the Deepwater Port Act of 1974, and section 207 of the Trans-Alaska Pipeline Authorization Act.[157]

Payments from the Federal Fund are restricted in several ways.

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[150] OPA § 9001, 26 U.S.C.A. § 9509 (West Supp. 1990). Prior to the OPA, liability expenses were funded through several separate sources. These sources have been consolidated by the OPA. *See infra* notes 151-57 and accompanying text.

[151] Omnibus Budget Reconciliation Act of 1989 § 7505(b), 26 U.S.C.A. § 4611(c)(2)(B) (West Supp. 1991) (triggering collection of this tax).

[152] 33 U.S.C.A. § 2706(f) (West Supp. 1991).

[153] 33 U.S.C.A. § 2715 (West Supp. 1991).

[154] This Fund was established under section 18(f) of the Deepwater Port Act of 1974, 33 U.S.C. § 1517(f) (1988), *repealed by* OPA § 2003, 33 U.S.C.A. §§ 1503, 1517 (West Supp. 1991), 26 U.S.C.A. § 9506 note (West Supp. 1991).

[155] This fund was established under section 302 of the Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1812 (1988), *repealed by* OPA § 2004, 26 U.S.C.A. § 9509 note (West Supp. 1991).

[156] This fund was established by section 204 of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c) (1988).

[157] These provisions were also amended in Title II of the Oil Pollution Act. OPA § 4304, 26 U.S.C.A. § 9509(b)(8) (West Supp. 1991).

First, a $1 billion per incident cap is established, and of this $1 billion, no more than $500 million can be paid for natural resource damages.[158] Additional borrowing authority is authorized for $1 billion. Although this is a significant increase over amounts authorized by the section 311(k) fund in existence before passage of the OPA, even this would not cover the obligations incurred by Exxon for the Exxon Valdez oil spill.[159] Perhaps this reflects Congress' understanding that most spills are small and will not require enormous federal backing for removal of the oil and damages. In addition, the Federal Fund is truly a secondary source of funding behind a responsible party.

Under section 1012 of the OPA,[160] the Fund is available, generally subject to appropriation by Congress,[161] to the President for:

(1) the payment of removal costs consistent with the NCP incurred by federal authorities;

(2) the payment of up to $250,000 to a state for removal costs consistent with the NCP for the immediate response to a discharge or threat of a discharge;[162]

(3) the payment of costs incurred by a natural resource trustee consistent with the NCP;

(4) the payment of removal costs consistent with the NCP as the result of a discharge from a foreign offshore source;

(5) the payment of uncompensated claims for removal costs determined by the President to be consistent with the NCP;[163]

(6) the payment of otherwise uncompensated damages;[164]

(7) the payment of federal administrative, operational, and personnel costs reasonably necessary for the implementation of the

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[158] OPA § 9001(c), 26 U.S.C.A. § 9509(c)(2) (West Supp. 1991).

[159] Exxon has spent over $2 billion in cleanup costs related to the Exxon Valdez oil spill. Telephone interview with Otto Harrison, General Manager of Alaska Operations, Exxon Corp. (Nov. 27, 1990). Additionally, Exxon agreed to a $1.2 billion dollar settlement to cover civil and criminal penalties. DeBenedicts, *Oil-Spill Settlement Okayed*, A.B.A.J., Dec. 1991, at 31.

[160] 33 U.S.C.A. § 2712 (West Supp. 1991).

[161] Up to $50 million is available without appropriation each year as an immediately accessible emergency fund to cover federal oil spill removal actions and to begin natural resource damage assessments. OPA § 6002, 33 U.S.C.A. § 2752 (West Supp. 1991).

[162] Eligibility for the emergency monies is contingent on the state entering into an agreement with the federal government under section 1012(d) of the OPA. This represents a retreat from a position taken by the House of Representatives in its predecessor bill which gave states "direct draw" access to the Federal Fund for emergency removal actions. H.R. 1465, 101st Cong., 1st Sess. § 1012(a), 135 CONG. REC. H8126 (daily ed. Nov. 8, 1989).

[163] No appropriation is needed for these costs.

[164] No appropriation is needed for these damages.

OPA;[165]

(8) expenses authorized under sections 5 and 7 of the Intervention on the High Seas Act;

(9) the payment of costs necessary for carrying out subsections 311(b), (c), (d), (j), and (l) of the Clean Water Act; and

(10) payment of liabilities incurred by other federal oil spill trust funds.

This section makes clear that the Federal Fund is open to much more limited claims than those to which a responsible party is subject. Consequently, states are likely to bear a greater portion of the costs. For example, a responsible party is open to claims made for removal costs incurred by a state consistent with state law. If the responsible party cannot or will not pay these costs, the state would be limited to Federal Fund reimbursement of $250,000 for emergency removal actions plus only those nonemergency removal expenses which are consistent with the NCP. Of course, a state could use its own resources to respond to a spill. Responsible parties who erroneously paid or overpaid claims for removal costs and damages can also seek compensation from the Fund under section 1008 of the OPA.[166]

The provision allowing for the payment of otherwise uncompensated damages from the Federal Fund would seem to allow open-ended claims. "Damages," however, is defined in the OPA to include only natural resource damages, harm to real or personal property, loss of subsistence use, net loss of revenues, loss of profits, and net costs of public services. This means that although a claimant may be entitled to payment under state law for damages, unless the claim falls within the definition of damages under the OPA, the claimant will not be paid from the Federal Fund. On the other hand, it is hard to imagine any category of damages which would not fall within the OPA's broad definition of damages.

Similar to a responsible party, the Federal Fund can limit its liability for removal costs or damages by demonstrating that the claimant was grossly negligent or otherwise engaged in willful misconduct.[167] Once payment is made by the Fund to a claimant, the Fund is subrogated to the rights of the claimant and may sue responsi-

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[165] This is further limited to $25 million per year to the U.S. Coast Guard, $30 million per year to establish the National Response System under Clean Water Act section 311(j), and $27.250 million per year for research under Title VII of the OPA.

[166] 33 U.S.C.A. § 2708 (West Supp. 1991).

[167] OPA § 1012(b), 33 U.S.C.A. § 2712(b) (West Supp. 1991).

ble parties or others for the recovery of sums paid.[168] The statute of limitations for filing Fund claims is six years from completion of removal actions for removal costs, and three years from discovery of injury for damages.[169] In addition, the OPA prohibits double recovery for removal costs and damages from the Fund.[170]

5. How Clean is Clean?

A major issue decided by the House-Senate oil spill Conferees was the extent to which officials of states affected by an oil spill would be involved in the decision by federal authorities to end oil spill removal operations. Section 106(d) of the Senate predecessor bill to the OPA[171] required the President to consult with affected states on the appropriate oil spill removal action to be taken. Under the Senate provision, the removal action was to be considered complete when so determined by the President and the governor or governors of the affected states.[172]

Section 1011 of the House predecessor bill to the OPA[173] required the President to consult with a natural resource trustee on the appropriate removal action to be taken. Under this approach, removal actions were considered to be complete when determined by the President in consultation with the affected governor or governors. Although this provision did not give states a veto over the decision of the President to end removal actions, the House approach allowed additional removal actions under state law to continue. The OPA adopted the House approach, but with the clarification that additional removal actions undertaken by states under state law may not be supported by the Federal Fund.[174]

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[168] OPA § 1012(f), 33 U.S.C.A. § 2712(f) (West Supp. 1991).

[169] OPA § 1012(h), 33 U.S.C.A. § 2712(h) (West Supp. 1991). This statute of limitations for Federal Fund claims must be differentiated from that allowed for the filing of actions under the OPA. Section 1017(f)(1) and (2) of the OPA, 33 U.S.C.A. § 2717(f)(1)-(2) (West Supp. 1991), allows only three years to file an action for both damages and removal costs. This means that a Federal Fund administrative claim for removal costs could be filed three years after the statute of limitations tolled for filing an action in court under the Oil Pollution Act to collect removal costs.

[170] OPA § 1012(i), 33 U.S.C.A. § 2712(i) (West Supp. 1991).

[171] S. 686, 101st Cong., 1st Sess., 135 CONG. REC. S10,412 (daily ed. Aug. 15, 1989).

[172] H.R. REP. NO. 653, *supra* note 57, at 111.

[173] H.R. 1465, 101st Cong., 1st Sess., 135 CONG. REC. H8126 (daily ed. Nov. 8, 1989).

[174] OPA § 1012(i), 33 U.S.C.A. § 2712(i) (West Supp. 1991). H.R. REP. NO. 653, *supra* note 57, at 111-112.

6. Claims

An elaborate claims procedure is provided by sections 1013 and 1014 of the OPA.[175] First, the President is to identify the responsible party for the oil discharge (or threat of discharge) and notify the responsible party and the party's guarantor of the designation. The responsible party then has fifteen days to advertise a procedure for paying claims. If the identified responsible party fails to advertise its procedures, the President will then determine and announce the procedures for the responsible party. The President will advertise the availability of the Federal Fund to pay claims if the responsible party and the party's guarantor both deny culpability within five days of receiving a notice of designation, if the spiller is a public vessel, or if the spiller cannot be identified.[176]

Claims must first be presented to the responsible party unless the President advertises the availability of the Federal Fund, the responsible party is presenting a claim,[177] or for claimants filing due to a discharge or threat of discharge from a foreign offshore facility. If a claim is not settled by a responsible party within ninety days of presentation or advertisement (whichever is later), the claimant may either pursue his or her case in court or look to the Federal Fund for compensation.[178] No claims may be paid by the Federal Fund while a court is considering the same claim.

7. Limits of Liability

Notwithstanding the broad statutory exposure for removal costs and damages, and the limited opportunity to evoke a complete defense to liability, responsible parties may still be able to invoke liability limits for costs and damages under section 1004 of the OPA.[179] However, the OPA establishes much higher liability limits than those which previously applied under section 311 of the Clean Water Act. The new

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[175] 33 U.S.C.A. §§ 2713-2714 (West Supp. 1991).

[176] OPA § 1014(c), 33 U.S.C.A. § 2714(c) (West Supp. 1991).

[177] Such a claim would be filed, for example, if the responsible party first compensated a claimant, and later successfully argued a defense or a limit of liability.

[178] This is yet another example where speedy compensation is provided to those harmed by a spill.

[179] 33 U.S.C.A. § 2704 (West Supp. 1991).

limits are the greater of $1,200 per gross ton or $10 million for tank vessels greater than 3,000 gross tons, $1,200 per gross ton or $2 million for tank vessels 3000 gross tons or less, and $600 per gross ton or $500,000 for other vessels. For offshore facilities, liability is limited to $75 million plus all removal costs.[180] For onshore facilities and deepwater ports, the limit is $350 million. The OPA allows certain liability limits to be adjusted downward. This is true for classes of onshore facilities,[181] and deepwater ports and the vessels calling on them.[182] All liability limits are to be adjusted at least once every three years to reflect changes in the Consumer Price Index.[183]

While extending these liability limits in subsection 1004(a), the OPA retracts them in certain instances in section 1004(c).[184] Limits of liability may be breached by gross negligence or willful misconduct on the part of the responsible party (or the party's agent, employee, or contractee) which proximately causes the oil spill. The previous Clean Water Act liability regime required that the gross negligence or willful misconduct must have been within the "privity or knowledge"[185] of the responsible party;[186] this requirement was deleted in the OPA.[187] The removal of this condition may have broad-reaching impacts for entities which arrange for the transportation of oil. Additionally, the OPA's use of the term "gross negligence" rather than the willful negligence standard of the Clean Water Act may lower the negligence standard required before liability limits can be breached. However,

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[180] The Oil Pollution Act applies a special rule for mobile offshore drilling units. OPA § 1004(a), 33 U.S.C.A. § 2704(a) (West Supp. 1991).

[181] Liability limits for onshore facilities may be reduced from $350 million to as low as $8 million, taking into consideration size, oil throughput, history of spills, type of oil handled, among other factors. OPA § 1004(d)(1), 33 U.S.C.A. § 2704(d)(1) (West Supp. 1991).

[182] The Secretary of Transportation must first conduct a study to determine if the risk of a spill is lessened by the use of these deepwater ports, which are located far offshore. If the Secretary finds that the use of deepwater ports results in a lower operational or environmental risk, the Secretary must set liability limits between $50 and $350 million. OPA § 1004(d)(2), 33 U.S.C.A. § 2704(d)(2) (West Supp. 1991).

[183] OPA § 1004(d)(4), 33 U.S.C.A. § 2704(d)(4) (West Supp. 1991).

[184] 33 U.S.C.A. § 2704(c) (West Supp. 1991).

[185] [P]rivity or knowledge of the fault which occasioned damages . . . must be actual and not merely constructive, and must involve a personal participation of the owner in some fault or act of negligence causing or contributing to the injury suffered. The words import actual knowledge of the things causing or contributing to the loss, or knowledge or means of knowledge of a condition of things likely to produce or contribute to the loss without adopting proper means to prevent it. BLACK'S LAW DICTIONARY 1080 (5th ed. 1979).

[186] 33 U.S.C. §1321(g) (1988).

[187] OPA § 1002(d), 33 U.S.C.A. § 2702(d) (West Supp. 1991).

some commentators have indicated that there is no practical difference between the two standards.[188]

The issue of simple versus gross negligence was one of the most hotly-contested battles during consideration of the predecessor bill to the OPA in the House of Representatives. The bill presented to the House had a gross negligence standard. During consideration of the bill, an amendment was offered that would have imposed simple negligence as the standard for voiding liability limits.[189] During debate on the amendment, one Member inquired, "Why after the Exxon Valdez should the Congress give the oil and shipping industries a reward for acting carelessly and unreasonably?"[190] This question may be seen as a reflection of the great anger toward the entire oil industry, not just Exxon, after the Exxon Valdez.[191] The proponents of the simple negligence standard argued that many states' oil spill laws had unlimited liability which had not disrupted the transportation of oil in those waters. In addition, there was some fear that claims would go unpaid if a spill caused catastrophic damage.

The opponents of the simple negligence standard argued that the gross negligence and willful misconduct standard is applied in other environmental laws, such as CERCLA, the Clean Water Act, and the Outer Continental Shelf Lands Act. They questioned why the OPA should have a significantly different standard. More importantly, it was argued, applying a simple negligence standard would effectively ensure that no operator would ever be able to limit liability, since almost every oil spill is caused by some level of negligence.[192] The amendment also ignored that even in the event a responsible party is able to invoke the liability limits, claimants would still be paid for their losses from the Federal Fund, primarily funded from taxes on oil companies. Finally, maritime interests noted that they would be unable to obtain insurance to operate oil tankers and barges without some type of reasonable cap on liability. Despite these arguments, initially, the simple negligence standard was adopted, 213 to 207.[193]

The day after the amendment passed, a separate vote was

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[188] BLACK'S LAW DICTIONARY 1034 (6th ed. 1990).

[189] 135 CONG. REC. H8157-65 (daily ed. Nov. 8, 1989).

[190] *Id.* at H8157.

[191] Some felt that environmentalists were determined to make the Oil Pollution Act the "Oil Punishment Act." Wall Street Journal, Oct. 10, 1989, at A18, col. 1.

[192] 135 CONG. REC. H8160 (daily ed. Nov. 8, 1989) (statement of Congressman Billy Tauzin).

[193] 135 CONG. REC. H8165 (daily ed. Nov. 8, 1989).

requested on the amendment in a parliamentary maneuver that permits the House to vote again on amendments previously adopted.[194] This time, the simple negligence standard was defeated by a vote of 197-185. This change of heart can be attributed to both intense lobbying — by the White House, the oil and shipping industries, and certain senior House members — and the fact that some members of Congress had left town for the weekend.

Liability limits are also breached by a violation of an applicable federal safety, construction, or operating regulation by the responsible party (or the party's agent, employee, or contractee) which proximately causes the oil spill.[195] This would mean, of course, that violation of a vessel operating standard such as the failure to carry a sufficient number of life preservers would not automatically breach a liability limit, as this type of violation would not likely be the proximate cause of a spill. On the other hand, failure by a vessel to have sufficiently trained personnel, where such inexperience leads to the grounding of the vessel and a subsequent release of oil, could trigger this exception.

Limits of liability can also be revoked for failure to report a known reportable spill or failure to cooperate with responsible officials during a removal action.[196] A special rule applies to vessels carrying oil as cargo from an OCS facility. Responsible parties for these vessels are liable for all removal costs incurred by government entities despite limits on liability and the existence of defenses.[197] Of course, as noted above, the responsible party for an OCS facility is also liable for all removal costs incurred by a government entity without limitation.

8. Financial Responsibility

Section 1016 of the OPA sets out financial responsibility requirements under the OPA.[198] Such requirements ensure that a potential spiller is able to meet financial liability limits. Evidence of financial responsibility can be supplied by proof of insurance, surety bond, guarantee, letter of credit, or qualification as a self-insurer.[199] Vessels affected by this requirement are those over 300 gross tons (except

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[194] 135 CONG. REC. H8286 (daily ed. Nov. 9, 1989).
[195] OPA § 1004(c)(1)(B), 33 U.S.C.A. § 2704(c)(1)(B) (West Supp. 1991).
[196] OPA § 1004(c)(2)(B), 33 U.S.C.A. § 2704(c)(2)(B) (West Supp. 1991).
[197] OPA § 1004(c)(3), 33 U.S.C.A. § 2704(c)(3) (West Supp. 1991).
[198] 33 U.S.C.A. § 2716 (West Supp. 1991).
[199] OPA § 1016(e), 33 U.S.C.A. § 2716(e) (West Supp. 1991).

barges not carrying oil as cargo or fuel) using any place subject to the jurisdiction of the United States or any vessels using the waters of the United States Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States.[200] If a person is a responsible party for more than one vessel, only evidence of financial responsibility to meet the greatest potential liability from the largest vessel is required.[201] Failure to provide evidence of financial responsibility can result in seizure and forfeiture of the vessel, denial of entry to United States ports or navigable waters, detention of the vessel, or refusal of clearance to leave a United States port by the Secretary of the Treasury under section 91 of the Appendix to Title 46.[202]

Section 1016(c) establishes the requirements for financial responsibility for offshore facilities. Financial responsibility of $150 million is required for offshore facilities, except where the President has reduced limits of liability for deepwater ports. In that case, evidence of financial responsibility for the lower limit would be required.

Where financial responsibility has been supplied through insurance or other guarantee by a person other than the responsible party, a claimant may assert a claim directly against the guarantor or insurer.[203] Guarantors or insurers may then avail themselves of all rights and defenses otherwise applicable to the responsible party or can avoid payment by successfully proving that the oil discharge was caused by the gross negligence or willful misconduct of the responsible party.[204]

9. Penalties

Subtitle C of title IV of the OPA contains the penalty provisions for violations of the OPA and other related statutes. In all cases penalties

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[200] OPA § 1016(a)(1)-(2), 33 U.S.C.A. § 2716(a)(1)-(2) (West Supp. 1991). Public vessels are not affected by this provision.

[201] *Id.* There is a drafting distinction in the Oil Pollution Act in how financial responsibility requirements are met for offshore facilities and deepwater ports. In these cases "each" lessee, permittee, or licensee is required to have evidence of financial responsibility to the limits of liability. However, logic would dictate that these facilities should be treated on a par with vessels and onshore facilities, so that in cases where there are multiple potentially responsible parties for a single facility, only one need supply evidence of financial responsibility up to the greatest liability limits.

[202] OPA § 1016(b), 33 U.S.C.A. § 2716(b) (West Supp. 1991).

[203] OPA § 1016(e), 33 U.S.C.A. § 2716(e) (West Supp. 1991). However, in no case may a guarantor or insurer be liable for more than the amount of the guarantee or insurance. *Id.*

[204] OPA § 1016(f), 33 U.S.C.A. § 2716(f) (West Supp. 1991).

are substantially increased, driven, as most other sections of the OPA are, by a desire not to appear soft on polluters. The hope that draconian penalties might lead to more careful behavior on the part of oil transporters and thus prevent more oil spills is another aim of subtitle C, although its effectiveness is questionable given the already enormous potential liability for cleanup costs and monetary damages.

Section 4301 of the OPA[205] amends section 311(b) of the Clean Water Act to increase penalties and prison terms for violations of that law. A person who fails to notify the appropriate federal official of a discharge will now be subject to a fine of not more than $250,000 for an individual and not more than $500,000 for an organization, imprisonment of not more than three years, or both. Prison sentences of five years are authorized in the case of subsequent convictions.[206]

For discharges of oil, failure to comply with Tank Vessel and Facility Response Plans, or failure to comply with orders of the President, the OPA greatly increases administrative, civil, and criminal penalties. Administrative penalty authority is now available to both the Coast Guard and EPA. Administrative penalties for a discharge and for violations of contingency plan requirements are increased from $5,000 to $10,000 for each offense, with a $25,000 maximum for a class I penalty.[207] The OPA also creates a new class II administrative penalty category. A class II offender may be fined $10,000 per day of violation, with a $125,000 maximum.

Before enactment of the OPA, the Clean Water Act had given the Administrator of EPA authority to commence a civil action against a person subject to the administrative penalties under that Act.[208] The Administrator considered certain factors in deciding whether to commence a civil action.[209] The penalty in such cases was limited to

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[205] 33 U.S.C.A. § 1321(b) (West Supp. 1991).

[206] OPA § 4301(a), 33 U.S.C.A. § 1321(b)(5) (West Supp. 1991). The previous penalty under this section was a maximum $10,000 fine, or one year in prison, or both. 33 U.S.C. § 1321(b)(5) (1988).

[207] Penalty classes are based on the severity of the offense.

[208] 33 U.S.C. § 1321(b)(6)(B) (1988).

[209] *Id.* The Administrator was to take into account the "gravity of the offense, and the standard of care manifested by the owner, operator, or person in charge." *Id.* In addition, the Administrator considered the

> size of the business of the owner or operator, the effect on the ability of the owner or operator to continue in business, the gravity of the violation, and the nature, extent, and degree of success of any efforts made by the owner, operator, or person in charge to minimize or mitigate the effects of such discharge.

Id.

$50,000; evidence of "willful negligence or willful misconduct within the privity and knowledge of the owner, operator, or person in charge," however, allowed for a maximum penalty of $250,000.

The OPA amends the Clean Water Act to make civil penalty assessment authority available to both EPA and the Coast Guard.[210] These penalties are increased to up to $25,000 per day of violation or up to $1,000 per barrel of oil discharged.[211] Failure to properly remove the oil or to comply with an order exposes a violator to a penalty of up to $25,000 per day of violation or an amount equal to three times the costs the Federal Fund incurs as a result of those failures.[212] Gross negligence or willful misconduct may subject the violator to a civil penalty of not less than $100,000 and not more than $3,000 per barrel of oil.[213]

The criminal penalties imposed under Clean Water Act section 309(c) are extended to include violations of section 311(b)(3) for a discharge of oil.[214] The penalties for negligent violations include fines of not less than $2,500 nor more than $25,000 per day of violation, imprisonment for not more than one year, or both.[215] For a violation committed after a first conviction, a person may be liable for not more than $50,000 per day of violation, imprisonment of not more than two years, or both. The penalties for knowing violations include fines of not less than $5,000 nor more than $50,000 per day of violation, imprisonment for not more than three years, or both.[216] Subsequent convictions could mean a fine of not more than $100,000 per day, imprisonment of not more than six years, or both. Finally, for knowing endangerment, the penalties include a fine of not more than $250,000, imprisonment of not more than fifteen years, or both.[217] An organization could be subject to a fine of not more than $1 million. For a subsequent conviction, the maximum fine or imprisonment could be

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[210] OPA § 4301(b), 33 U.S.C.A. § 1321(b)(7) (West Supp. 1991).

[211] *Id.* The $1,000 penalty also applies to each unit of hazardous substance discharged.

[212] OPA § 4301(b), 33 U.S.C.A. § 1321(b)(7)(B) (West Supp. 1991).

[213] OPA § 4301(b), 33 U.S.C.A. § 1321(b)(7)(D) (West Supp. 1991). If a person has been assessed an "administrative" civil penalty under 33 U.S.C. § 1321(b)(6), that person would not be subject to a penalty under 33 U.S.C. § 1321(b)(7). OPA § 4301(b), 33 U.S.C.A. § 1321(b)(7)(F) (West Supp. 1991). In addition, the OPA provides that penalties under section 311 may not be imposed if penalties have been imposed under section 309(c) for the same discharge. OPA § 4301(b), 33 U.S.C.A. § 1321(b)(11) (West Supp. 1991).

[214] OPA § 4301(b), 33 U.S.C.A. § 1321(c) (West Supp. 1991).

[215] 33 U.S.C.A. § 1319(c)(1) (West Supp. 1991).

[216] *Id.* § 1319(c)(2).

[217] *Id.* § 1319(c)(3).

doubled.

Penalties are also established for failure to comply with the financial responsibility requirements pursuant to section 1016 of the OPA.[218] The President may impose a civil penalty of not more than $25,000 per day of violation. In determining the amount of the penalty, various factors may be considered, such as the circumstances, nature, and gravity of the incident, prior violations, and ability to pay. In addition, the Attorney General may compel compliance with the requirements for financial responsibility by issuing an order to terminate operations.

Finally, numerous other penalties are covered in OPA section 4302.[219] Among other things, the penalties are increased for negligent operation of a vessel,[220] negligent pilotage,[221] and for violations of the Ports and Waterways Safety Act.[222]

10. Natural Resource Damages

The OPA offers much greater detail than previously existed regarding the authority of a designated governmental trustee to collect for harm done to natural resources belonging to, are managed by, controlled by, or appertaining to the United States . . . ."[223] This authorization for monetary damages is in addition to that allowed for economic damages suffered by private parties for harm to those resources.[224] Under pre-existing Clean Water Act section 311(f)(5), only federal and state trustees could bring an action for natural resource damages. The OPA expands the list of those who can recover for such damages to include Indian tribes and foreign governments.[225] The OPA delineates the duties of the trustee to include assessment of harm and development of a plan to restore, rehabilitate, or replace the damaged resource.[226]

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[218] OPA §§ 1016, 4303, 33 U.S.C.A. §§ 2716, 2716a (West Supp. 1991).
[219] OPA § 4302 (codified as amended in scattered sections of 33 U.S.C.A. and 46 U.S.C.A.).
[220] 46 U.S.C.A. § 2302 (West Supp. 1991).
[221] 46 U.S.C.A. § 8502 (West Supp. 1991).
[222] 33 U.S.C.A. § 1232 (West Supp. 1991).
[223] OPA § 1006(a), 33 U.S.C.A. § 2706(a) (West Supp. 1991).
[224] H.R. REP. NO. 653, *supra* note 57, at 108.
[225] OPA § 1006(a)(3)-(4), 33 U.S.C.A. § 2706(a)(3)-(4) (West Supp. 1991).
[226] OPA § 1006(c)(1)-(4), 33 U.S.C.A. § 2706(c)(1)-(4) (West Supp. 1991). The availability of money from the Federal Fund to repair natural resources must be in accordance with this plan. However, when emergency action is necessary, this requirement is waived. OPA § 1012(j), 33

The most important change to this area of the law is the formulation of how harm to a natural resource is measured. Under previous regulations for conducting natural resource damage assessments, the measure of damage is the lesser of the diminution of use of the resource or its replacement cost.[227] This standard was successfully challenged by several states in *Ohio v. United States Department of the Interior*.[228]

The new measure of damage provided in the OPA reflects the standard adopted by the court in *Ohio*: the cost of restoration, rehabilitation, or replacement *plus* the diminution in value of the resources pending restoration.[229] The costs of assessing the harm to those resources is also added to this total to ensure that natural resource damage cases do not fail merely because assessment monies are unavailable.[230] New regulations implementing this standard are to be promulgated by the National Oceanic and Atmospheric Administration, in consultation with the heads of affected federal agencies.[231] As under previous law,[232] calculations of harm by trustees using these new regulations are afforded a rebuttable presumption of correctness in any administrative or judicial proceeding brought under the OPA.[233]

Sums recovered by trustees under this section are to be retained by the trustee to pay costs incurred in performance of the trustee's duties under the OPA.[234] Any amounts in excess of this are to be deposited in the Federal Fund.[235] The OPA also provides a limited citizens' suit provision which allows suits to be brought against federal

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U.S.C.A. § 2712(j) (West Supp. 1991). Federal trustees may also conduct damage assessments for other trustees on a reimbursable basis. OPA § 1006(c)(1)(B), 33 U.S.C.A. § 2706(c)(1)(B) (West Supp. 1991).

[227] 40 C.F.R. pt. 11 (1990). These regulations apply to harm caused by oil spills under the Clean Water Act and releases of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act.

[228] 880 F.2d 432 (D.C. Cir. 1989).

[229] OPA § 1006(d)(1), 33 U.S.C.A. § 2706(d)(1) (West Supp. 1991).

[230] *Id.*

[231] This change reflects congressional dissatisfaction with the Department of the Interior, which promulgated the first set of damage assessment regulations.

[232] 43 C.F.R. § 11.10 (1990).

[233] OPA § 1006(e)(2), 33 U.S.C.A. § 2706(e)(2) (West Supp. 1991).

[234] A similar scheme is outlined in section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(f) (1988). However, recoveries made under that authority have been deposited in the United States Treasury and not used to restore or replace harmed natural resources. By specifically authorizing the retention of the recovered sums by the trustee and exempting these sums from appropriation, the use of these monies to restore natural resources is guaranteed.

[235] OPA § 1006(f), 33 U.S.C.A. § 2706(f) (West Supp. 1991).

officials for failure to carry out nondiscretionary duties.[236] The Congressional Conference Report for the OPA states that the citizens' suit provision is not intended to "expand or diminish rights existing under current law."[237] Since general authority to compel federal officials to take nondiscretionary duties already exists under section 1361 of title 28, United States Code, it appears that the provision is superfluous. In any case, it appears that citizens can seek to require the promulgation of damage assessment regulations under section 1006(g) of the OPA. However, its effect on forcing a trustee to bring a lawsuit for harm to a resource is unclear.[238]

11. Jurisdiction and Venue

Review of regulations promulgated under the OPA may be filed in the District of Columbia Circuit Court of Appeals within ninety days of the date of promulgation.[239] No collateral challenges to these regulations are allowed. All other controversies under the OPA may be adjudicated in an appropriate United States district court.[240] The OPA also establishes statutes of limitation for filing actions for removal costs and damages under the Act, as well as for contribution and subrogation actions.[241] In addition, state courts of competent jurisdiction to hear cases over removal cost and damage claims (as defined in the OPA), may consider claims under the OPA or state law.[242]

12. Preemption of State Laws

The jurisdiction under the OPA of state courts to hear claims for

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[236] OPA § 1006(g), 33 U.S.C.A. § 2706(g) (West Supp. 1991).

[237] H.R. REP. NO. 653, *supra* note 57, at 109-110.

[238] Some courts have held that pursuit of a legal action is a discretionary duty, not subject to citizen suit actions. City of Seabrook v. Costle, 659 F.2d 1371 (5th Cir. 1981); Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977); Committee for the Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006 (4th Cir. 1976). *But see* South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118 (D.S.C. 1978); Illinois *ex rel.* Scott v. Hoffman, 425 F. Supp. 71 (S.D. Ill. 1977); Wisconsin's Envtl. Decade, Inc. v. Wisconsin Power & Light Co., 395 F. Supp. 313 (W.D. Wis. 1975).

[239] OPA § 1017(a), 33 U.S.C.A. § 2717(a) (West Supp. 1991).

[240] OPA § 1017(b), 33 U.S.C.A. § 2717(b) (West Supp. 1991).

[241] OPA § 1017(f), 33 U.S.C.A. § 2717(f) (West Supp. 1991). See discussion, *supra* note 169, regarding conflict of this section with statute of limitations for filing claims for removal costs against the Federal Fund.

[242] OPA § 1017(c), 33 U.S.C.A. § 2717(c) (West Supp. 1991).

removal costs and damages is not surprising, as the OPA explicitly does not preempt state law in the area of oil spill liability and compensation. This issue has been one which divided the Houses of Congress and is generally the one identified as stalling passage of a comprehensive oil spill liability regime for over fifteen years.[243] State liability laws were preempted in each of the House of Representative's oil spill bills introduced since the mid-1970s.[244] Preemption of state law was thought to assure certainty and uniformity of oil spill laws, thereby guaranteeing that oil would continue to be transported while those harmed by a spill would be compensated. However, this view was not shared by the Senate. The Senate argued that the existing regime should be allowed to continue — each state should be allowed to establish its own liability and compensation laws, particularly, imposition of unlimited liability.

The House predecessor bill to the OPA, H.R. 1465, stopped short of total preemption of state law in an attempt by the House authors to compromise early with the Senate on this issue. The version of H.R. 1465 considered on the House floor provided that actions arising out of discharges of oil from a vessel or facility had to be brought under the federal regime, including recovery of removal costs and damages. It specifically exempted actions for wrongful death and personal injury, which could be brought under state law. The House bill did not preclude a state from continuing or establishing an oil spill compensation fund or from requiring any person to contribute to that fund. However, if the state fund was capitalized by a tax or fee imposed on the same persons who were contributing to the Federal Fund, the state fund was barred from compensating any claimant for damages under the OPA. H.R. 1465 also did not preempt a state from exacting fines or penalties for an oil spill.[245]

The House had passed oil spill bills preempting states from imposing their own liability regime with little opposition since 1977.[246] However, here again, the significance of the Exxon Valdez can clearly be seen. Members of the House previously in support of preemption changed their position, while others who had not been active in the

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[243] Jones, *supra* note 8, at 10,333.

[244] H.R. 14862, 94th Cong., 2d Sess. (1976).

[245] H.R. 1465, 101st Cong., 1st Sess. §§ 1018, 1019, 135 CONG. REC. H8128 (daily ed. Nov. 8, 1989).

[246] H.R. 6803, 95th Cong., 1st Sess. (1977) (passed by a vote of 332-59 on September 12, 1977).

legislation took a strong interest in the bill.[247]

During the House debate on this issue, several lines of argument were drawn. Proponents of preemption argued that a nationally uniform comprehensive oil spill liability regime was needed to ensure protection of United States waters and shores while allowing for economical and environmentally-safe transportation of oil. Oil transporters would not be faced with differing requirements each time they crossed state boundaries; in turn, they would be subject to the highest standard of liability under federal law. In addition, a billion-dollar Federal Fund would be available to ensure that all those who suffered from an oil spill would be fully compensated. Opponents of preemption argued that states are in the best position to protect their own shores and waters from an oil spill. They also pointed out that most other environmental laws allowed for more restrictive state regulation, and that states may wish to pursue other categories of removal costs and damages other than those provided under federal law.

After this divisive debate pitting environmentalists and states righters against supporters of the oil and maritime industry and federal activists, H.R. 1465 passed the House with almost all preemption language deleted.[248] Section 1018 of the OPA[249] makes clear that states may impose additional requirements regarding oil spill liability, removal activities, penalties and fines, and state oil spill trust funds. In addition, the federal Limited Liability Act is also made inapplicable to the states. Neither the OPA nor the Limited Liability Act preempts the authority of any state from imposing additional liability or requirements regarding the discharge of oil or removal activities connected with a spill.

Although it is fairly easy to understand that state liability and compensation laws are not preempted by the OPA, in other areas related to oil spill incidents, the line is harder to draw. Some House Conferees were particularly concerned that the OPA not be interpreted to expand the authority of states over areas traditionally reserved to the federal government. While attempts were made during negotiations to

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[247] For example, one of the sponsors of an early House oil spill bill which contained complete preemption language, H.R. 6803, 95th Cong., 1st Sess. (1977), later led the fight for no preemption during debate on H.R. 1465. *See* 135 CONG. REC. H8128-8156 (daily ed. Nov. 8, 1989).

[248] 135 CONG. REC. H8128-8156 (daily ed. Nov. 8, 1989).

[249] 33 U.S.C.A. § 2718 (West Supp. 1991).

include language that specified what areas were preempted and what areas were not, the Senate was leery of doing so. The only concession the Senate would make on this point was to include language in the Congressional Conference Report stating that the OPA does not disturb the Supreme Court decision in *Ray v. Atlantic Richfield Company*.[250] In *Ray*, the State of Washington had enacted a tanker law that regulated the design, size, and movement of oil tankers in Puget Sound, an area already subject to federal law. Consequently, the Court held that federal law preempted Washington's tanker law.[251]

The House Conferees were particularly concerned that states might perceive section 1018 as a license to expand their authority with regard to vessel construction, manning, licensing, or other matter related to oil spill prevention and response, as discussed in *Ray*. That concern now appears to be well founded. In the climate that has existed around the country in the wake of the Exxon Valdez incident, states have rushed to enact strong oil spill laws which edge into this traditional federal arena.[252]

IV. 1984 OIL SPILL PROTOCOLS

A. Background

During the drafting of the OPA, an issue that received considerable debate was that of international agreements dealing with oil spill liability. The final section of this paper examines this issue and Congress' failure to ratify existing agreements which the United States had been instrumental in negotiating. In 1969 and 1971, two international instruments covering pollution damage from oil spills were negotiated: the 1969 Convention on Civil Liability for Oil Pollution Damage (Civil Liability Convention)[253] and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention).[254] The Civil Liability Conven-

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[250] 435 U.S. 151 (1978). *See* H.R. REP. NO. 653, *supra* note 57, at 122.

[251] *Ray*, 435 U.S. 151, 158 (1978).

[252] For example, the State of California recently enacted the Lempert-Keene Oil Spill Prevention and Response Act, CAL. GOV'T CODE § 8670.1-.70 (West Supp. 1991). That Act covers many of the areas covered by the OPA, including liability, damages, financial responsibility, and contingency planning.

[253] Nov. 29, 1969, 973 U.N.T.S. 3.

[254] Dec. 18, 1971, 1110 U.N.T.S. 57. *See also* Director, International Oil Pollution Fund,

tion establishes strict liability for a shipowner for oil pollution damage, supported by a requirement for insurance to cover the potential oil pollution liability of a shipowner. It also establishes limits of liability for shipowners for oil pollution damage.[255] The Fund Convention creates an International Oil Pollution Compensation Fund (International Fund) to provide supplementary compensation to oil spill victims beyond the limits of liability established under the Civil Liability Convention.[256] The Civil Liability Convention entered into force in 1975 and the Fund Convention entered into force in 1978. As of February 20, 1990, the Civil Liability Convention had been ratified by sixty-six countries and the Fund Convention by forty-three countries.[257]

In 1984, a Diplomatic Conference was held by the International Maritime Organization to revise the Civil Liability Convention and the Fund Convention. The most important purpose of the Conference was to increase the amounts of compensation available under the two conventions.[258] The Conference adopted an amendment, or protocol, to each Convention.[259] The 1984 Protocol to the Civil Liability Convention[260] will enter into force when it is ratified by 10 countries, including six countries with total tanker fleets of not less than one million units of gross tanker tonnage each. The 1984 Protocol to the Fund Convention[261] will enter into force when ratified by eight countries and when at least 600 million tons of contributing oil is received in a given year in those countries.[262] The 1984 Protocol to the Civil Liability Convention has been ratified by Australia, the Federal Republic of Germany, France, Peru, St. Vincent and Grenadines, and South Africa. The Protocol to the Fund Convention has been ratified by the Federal Republic of Germany and France.[263] There is little chance that the Protocols will enter into force unless the United

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International Regime of Compensation for Oil Spills Established by the 1984 Oil Spill Protocols 1 (1990) [hereinafter International Regime].

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] Protocol to Amend the Convention on Civil Liability for Oil Pollution Damage of 1969, May 25, 1984, 23 I.L.N. 177 [hereinafter Protocol on Civil Liability].

[261] Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, May 25, 1984.

[262] International Regime, *supra* note 254, at 2.

[263] *Id.*

States ratifies them, an event, as will be seen, that appears unlikely.[264]

B. Explanation of 1984 Oil Spill Protocols

1. Protocol to the Civil Liability Convention

The Protocol to the Civil Liability Convention covers pollution damage from spills of "persistent"[265] oil from ships constructed or adapted for the carriage of oil in bulk as cargo. The Protocol applies exclusively to pollution damage caused in the territory of a country party to the Protocol, including its territorial sea and exclusive economic zone. The Protocol also applies to preventative measures, wherever taken, to prevent or minimize pollution damage in the areas covered by the Protocol.[266]

Under the Protocol, the shipowner is strictly liable for pollution damage as a result of an oil spill incident caused by his or her ship. There is a defense to liability available to a shipowner who proves that the pollution damage resulted from an act of war or an exceptional natural phenomenon; that the pollution damage was wholly caused by the act of a third party with the intent to cause damage; or that the damage was wholly caused by the negligence of proper authorities to maintain navigational aids.[267]

No claim for pollution damage may be made against the shipowner except under the Protocol to the Civil Liability Convention.[268] The Protocol also prohibits claims against the agents of the owner or the members of the crew; against the pilot or any other person who performs services for the ship; against any charterer, including a bareboat charterer,[269] and any manager or operator of the ship; against any person performing salvage operations with the consent of

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[264] *Id.*

[265] The Civil Liability Convention and its 1984 Protocol apply to so called "persistent" oils, that is, heavier oils such as heavy crude oil, fuel oil, heavy diesel, and lubricating oil, and not to lighter oils such as gasoline, jet fuel, and kerosine. Protocol on Civil Liability, *supra* note 260, at art. I, ¶ 5.

[266] International Regime, *supra* note 254, at 1.

[267] *Id.*

[268] Protocol on Civil Liability, *supra* note 260, at art. IV.

[269] *Id.*

the owner or appropriate public authority; against any person taking preventive measures; and against all servants or agents of persons exempt from paying claims under the Convention. This prohibition of claims against these persons applies unless the damage resulted from their personal act or omission, committed with the intent to cause the oil pollution incident, or recklessly and with knowledge that the oil pollution damage would result.[270] Nothing in the Protocol affects the right of recourse of the shipowner against any of these persons, or against any other third party.[271]

For each spill incident, the shipowner is entitled to a limit of liability which does not exceed 59.7 Special Drawing Rights, a figure which translates into approximately $78 million.[272] However, the shipowner is not entitled to limited liability in cases in which the pollution damage resulted from the personal acts or omissions of the shipowner committed with the intent to cause the damage, or recklessly with knowledge that the damage would result.[273] The Protocol contains an expedited procedure to amend the limits of liability for shipowners contained in the Civil Liability Convention.[274]

The owner of a ship registered in a country that is a party to the Protocol and that carries more than 2,000 tons of oil as cargo is required to maintain evidence of financial responsibility sufficient to cover its liability up to the limit established by the Protocol.[275] Actions for compensation against the shipowner and the shipowner's insurer may only be brought in the courts of the country where the pollution damage occurred. Any judgment rendered in a country party to the Protocol is enforceable in any other country party to the Protocol.[276]

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[270] *Id.*

[271] *Id.* at para. 5.

[272] *Id.* at art. V, para. 1. The limits of liability for a shipowner are: (1) for a ship less than 5,000 gross tons, three million Special Drawing Rights (approximately $3.9 million U.S.); (2) for a ship of at least 5,000 but less than 140,000 gross tons, three million Special Drawing Rights plus 420 Special Drawing Rights (approximately $550 U.S.) for each additional ton; and (3) for a ship of 140,000 gross tons or more, 59.7 million Special Drawing Rights (approximately $78 million U.S.).

[273] Protocol on Civil Liability, *supra* note 260, at art. V, para. 2.

[274] International Regime, *supra* note 254, at 2.

[275] *Id.* at 1.

[276] *Id.* at 2.

2. Protocol to the Fund Convention

The 1984 Protocol to the Fund Convention establishes an International Fund to provide compensation for pollution damage if: (1) the owner of the ship causing the oil pollution has a defense to liability under the Civil Liability Convention; (2) the shipowner is financially incapable of meeting its obligations under the Civil Liability Convention, and the shipowner's financial security is insufficient to satisfy the claims for compensation for the damage; or (3) the damage exceeds the shipowner's limits of liability under the Civil Liability Convention.[277] The maximum amount of compensation available from the International Fund for each oil pollution incident is 200 million Special Drawing Rights, approximately $260 million, including amounts payable by the shipowner under the Protocol to the Civil Liability Convention.[278]

The International Fund is supported by contributions from any person in a member country who has received over 150,000 tons of crude oil or heavy oil that was carried by sea in a calendar year. Individual contributors are required to pay contributions to the International Fund based upon the amount of oil received. The governments of member countries have no responsibility for these contributions, unless they accept this responsibility.[279]

C. Conference Debate on the 1984 Oil Spill Protocols

Title III of the House predecessor bill to the OPA contained implementing legislation for the 1984 Protocols.[280] The Senate predecessor bill to the OPA did not.[281] The House-Senate Conference Committee to resolve the differences between the oil spill bills twice debated the merits of including implementing legislation for the 1984 Protocols in the OPA. Although there were some opponents to the 1984 Protocols on the Conference Committee from the House of Representatives, most of the opposition to the Protocols came from the Senate

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[277] *Id.*
[278] *Id.*
[279] International Regime, *supra* note 254, at 3.
[280] H.R. 1465, 101st Cong., 1st Sess., tit. III, 135 CONG. REC. H8247 (daily ed. Nov. 9, 1989).
[281] S. 686, 101st Cong., 1st Sess., 135 CONG. REC. S10,406 (daily ed. Aug. 15, 1989).

conferees.[282] The opposition arguments and concerns can be grouped into four major categories:

(1) The role of the Senate should not be bypassed.

• The Protocols should not be implemented by legislation until the Senate first ratifies the Protocols.[283]

(2) Compensation Limits of the Protocols would be restrictive.

• The Protocols provide protection to oil spill victims only under a limited set of circumstances.[284]

• The Protocols preempt state unlimited liability laws.[285]

• The Protocols limit compensation to oil spill victims to the amounts available from the International Fund and the Federal Fund.[286] Because the amounts paid from the International Fund consist of contributions from the Federal Fund, United States taxpayers actually bear these costs, not the spiller.[287] Shipowners spilling oil may make claims against the International Fund for oil spill expenses they incur above their limits of liability, which also limits compensation from the International Fund.[288]

(3) Other shortcomings of the Protocols should be recognized.

• The standard contained in the Protocols for breaching a shipowner's limit of liability is lower than the standard contained in the oil spill bills passed by the House of Representatives and the Senate, and would preempt higher federal and state standards that make it easier to breach limits of liability.[289]

• The third party defense to liability available to shipowners under the Protocols is inconsistent with the third party defenses contained in the oil spill bills passed by the House of Representatives and the Senate, or with the defenses under the laws of most states.[290]

• The defense to liability available to shipowners under the Protocols for oil pollution damage resulting from the negligence of the

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[282] Minutes of the House-Senate Conference on H.R. 1465, the Oil Pollution Act of 1990, 32 (Apr. 25, 1990) [hereinafter April 25 Conference].

[283] *Id.* at 26-27.

[284] *Id.* at 39.

[285] *Id.* at 40.

[286] *Id.* at 25.

[287] Letter from Senator George J. Mitchell to Congressman Dante B. Fascell, Chairman, Foreign Affairs Committee, U.S. House of Representatives (Apr. 23, 1990) [hereinafter Mitchell Letter]. Senator Mitchell argues that any tax on oil consumed in the United States is ultimately paid by the American people. April 25 Conference, *supra* note 282, at 23.

[288] April 25 Conference, *supra* note 282, at 25.

[289] Mitchell Letter, *supra* note 287, at 4.

[290] *Id.* at 5.

claimant preempts federal and state law prohibiting defenses of this type, and would require federal and state governments and other claimants to seek reimbursement and compensation from the International Fund and the Federal Fund.[291]

• The Protocols require "channeling" of claims for oil pollution damage to the shipowner, and prohibit actions against other potentially liable persons.[292]

• The Protocols define pollution damage in a way that limits liability for natural resource damages.[293]

• The Protocols require state court actions to be removed to federal court.[294]

(4) Renegotiation of the Protocols should be pursued.

• The United States should renegotiate the Protocols to accommodate the arguments against their ratification.[295]

On the other hand, the supporters of implementing the Protocols in the OPA were from the House of Representatives,[296] and they made the following arguments and counterarguments in favor of the Protocols:

(1) Role of the Senate would not be bypassed.

• There is no requirement that the Senate ratify an international agreement before legislation is enacted to implement the agreement.[297]

(2) International nature of oil pollution requires entry into an international agreement.

• The most effective oil spill liability and compensation system depends on international participation, and should represent a united international, federal, and state effort.[298]

(3) Limitations on federal and state law would be minimal.

• The effect of the Protocols on state law is limited to one type of state statute imposing unlimited liability on persons responsible for oil spills.[299]

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[291] *Id.*

[292] *Id.* at 6.

[293] April 25 Conference, *supra* note 282, at 23.

[294] Mitchell Letter, *supra* note 287, at 9.

[295] Minutes of the House-Senate Conference on Title III of H.R. 1465, the Oil Pollution Act 19 (June 28, 1990) [hereinafter June 28 Conference].

[296] *Id.* at 13.

[297] *Id.* at 8.

[298] April 25 Conference, *supra* note 282, at 18.

[299] Memorandum from Henry Cohen, Legislative Attorney, American Law Division, Congressional Research Service, Library of Congress, to the Comm. on Merchant Marine and Fisheries, U.S. House of Representatives, on the Extent to Which Title III of the Oil Pollution

• State unlimited liability laws will not, in reality, provide unlimited compensation to victims of oil spills.[300]

• The greatest weakness in an oil spill system that depends exclusively on state and federal law is its lack of enforceability against other sovereigns.[301]

(4) Compensation of oil spill victims would be maximized under the Protocols.

• The most important goal of an oil spill compensation system is to deliver prompt and complete compensation to victims of oil spills, and the amounts available from the International Fund are necessary to provide full and *prompt* compensation to oil spill victims.[302]

• The Protocols contain over $260 million to compensate oil spill victims and clean up the environment, with the potential of nearly $400 million once the United States ratifies the Protocols and begins contributing to the International Fund.[303]

(5) Accomplishing the goals of the oil spill system are more likely to be achieved under the Protocols.

• Under the Protocols, states are free to accomplish all of the goals of oil spill compensation, cleanup, prevention, and punishment. Some revision of state law may be required, but that is a small price to pay

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Act of 1989 Would Preempt State Law (Apr. 18, 1990).

[300] June 28 Conference, *supra* note 295, at 10.

> "Mr. Studds: Let me emphasize this last point because it's important. Some have suggested that only the unlimited liability provisions of state laws can guarantee full compensation in the event of another Exxon Valdez. This argument is flawed by the fact that most tanker operators are not Exxon and would not have the resources needed to provide full compensation in a case where damages exceed the billion dollars or so that could be recovered from [the] fund."

Id. at 5.

[301] *Id.* at 10.

[302] April 25 Conference, *supra* note 282, at 18; Memorandum from Merchant Marine and Fisheries Minority Staff to Republican Oil Spill Conference Staff on Answers to Frequently Asked Questions on International Oil Spill Protocols 2-3 (Apr. 20, 1990) [hereinafter Staff Memo]. "The International Protocols will ensure that United States' citizens are fully and promptly compensated for their losses. Since the International Oil Pollution Compensation Fund was established in 1979, it has established a reputation for quick settlement of claims. The average time period for payment of claims is six months. For the average citizen, this process is preferable to a complicated, lengthy litigation process. An instructive example for those who argue that litigation is superior to administrative settlement of claims through the International Fund is the Amoco Cadiz incident. In the Amoco Cadiz oil spill, which occurred in France in 1978 before the entry into force of the Fund Convention, not a single cent has been paid to *any* claimant. Complicated litigation is still pending in courts in the United States, with no resolution in sight." *Id.*

[303] April 25 Conference, *supra* note 282, at 18.

for the benefits of an international solution to the problem of oil spills.[304]

• The best way to punish persons responsible for oil spills is directly through civil or criminal penalties. Penalties are not affected by the Protocols, and states are free to impose civil or criminal penalties against persons responsible for oil spills.[305]

• The best way to prevent or deter oil spills is directly through vessel operational requirements monitored by federal and state officials. The Protocols do not affect the increased vessel requirements for prevention imposed by the oil spill bills passed by the House of Representatives and the Senate.[306]

(6) Misunderstandings surrounding the Protocols should be corrected.

• Many legal scholars have stated that the Protocols standard for breaking limits of liability is the same as the gross negligence standard provided in the oil spill bills passed by the House of Representatives and the Senate, thus defusing the argument that the Protocols would make it harder to breach limits of liability.[307]

• Natural resource damages are not limited by the Protocols, because damages above those paid from the International Fund may be compensated from the Federal Fund and from state oil spill funds.[308]

(7) Clarification of the Protocols is possible.

• Most of the objections raised to the Protocols can be overcome in the implementing legislation to harmonize the international, federal, and state oil spill systems.[309]

(8) Renegotiation of the Protocols is not an option.

• Because of its failure to ratify the Protocols, the United States has lost stature with the international community. For this reason, renegotiation of the Protocols to benefit the United States is not an option.[310]

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[304] *Id.* at 17-18.
[305] Staff Memo, *supra* note 302, at 1.
[306] *Id.* at 5.
[307] *Id.* at 4.
[308] Reasons to Support the International Oil Spill Protocols (May 9, 1990).
[309] April 25 Conference, *supra* note 282, at 19-20.
[310] June 28 Conference, *supra* note 295, at 7.

D. Final Conference Action

On June 28, 1990, the House and Senate Conferees met to decide whether to implement the Protocols. At this meeting, Congressman Gerry Studds of Massachusetts offered a compromise proposal to respond to the arguments in opposition to the Protocols. The compromise proposal clarified the relationship of the Protocols to federal and state law, and provided for the repeal of the implementing legislation for the 1984 Protocols within five years if certain amendments to the Protocols were not adopted internationally.[311]

The proposal responded to the major arguments cited in opposition to the 1984 Oil Spill Protocols. The proposal: (1) clarified that the adoption of implementing legislation for the Protocols does not constitute a ratification or endorsement of the Protocols; (2) clarified that liability limits may be breached under the Protocols if an oil spill is caused by the gross negligence or willful misconduct of the responsible party; (3) clarified that the Protocols do not preempt a claim under any other law for removal costs or damages that are not covered by the Protocols; (4) clarified that the Protocols do not preempt claims under federal or state law from the Federal Fund, including the measure of damages for natural resource damages, the total of removal costs or damages, or the period during which claims may be brought for oil spill damages; (5) clarified that the Protocols do not preempt a claim against a person who is not the owner of a ship or the shipowner's agent; and (6) clarified that the Protocols do not preempt the right of federal or state governments to impose civil or criminal penalties for an oil spill.[312]

Finally, the compromise proposal expressed the sense of Congress that the President should take steps to denounce the Protocols within five years of ratification unless the President finds that United States participation in the international oil spill system under the Protocols has not undermined federal and state efforts to prevent and provide compensation for oil spills, and that the Protocols have been revised to make them comparable to certain provisions of the OPA. The last provision of the compromise proposal repealed legislation implementing

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[311] Memorandum from Congressman Gerry Studds to House and Senate Conferees on Title III of Comprehensive Oil Pollution Legislation (H.R. 1465/S. 686) 2 (June 25, 1990).

[312] *Id.* at 2-3.

the Protocols after five years, and prohibited the President from making payments to the International Fund after that date unless the foregoing conditions were satisfied.[313]

During the debate on the proposal, members of the Conference Committee from the House of Representatives emphasized that state unlimited liability laws cannot guarantee adequate compensation for victims of an oil spill. They explained that most oil tanker operators do not have the assets of a company like Exxon and would not have the resources needed to compensate oil spill claimants following an oil spill where damages exceed the billion dollars available from the Federal Fund. The supporters of the compromise pointed out that the oil transportation industry may simply organize around state unlimited liability statutes to protect the assets of their companies from bankruptcy. They observed that state unlimited liability laws encourage oil to be transported by one-ship, undercapitalized companies.[314]

Another argument stated in favor of the proposal concerned the need for international enforceability of judgments of United States courts. Without this enforcement authority, billion dollar judgments from state or federal courts against persons responsible for oil spills are worthless to oil spill victims.[315] Finally, the supporters of the proposal argued that the Senate position in favor of renegotiation of the 1984 Protocols was unrealistic. It was under the Senate's direction that the United States had successfully negotiated the 1984 Protocols in the first place. The United States was now no longer in a position to dictate to other countries on this issue, because of its failure to ratify the 1984 Protocols.[316]

Not surprisingly, the House Conferees voted to accept the compromise proposal, and offered it to the Senate Conferees for their consideration.[317] During their debate on the proposal, the Senate conferees argued against accepting the proposal on several grounds. First, they contended that the proposal would preempt important objectives in federal and state oil spill liability matters; second, it would create confusion with respect to American law concerning oil spills;

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[313] *Id.*

[314] June 28 Conference, *supra* note 295, at 5, 9, 10.

[315] *Id.* at 10.

[316] *Id.* at 7; *see also* Letter from Senators Robert T. Stafford, Jennings Randolph, and John H. Chafee to Rear Admiral Bobby F. Hollingsworth, Chief, Office of Marine Environment and Systems, U.S. Coast Guard (Apr. 20, 1984).

[317] June 28 Conference, *supra* note 295, at 13.

third, it would compromise the constitutional role of the Senate; and fourth, it would shift exposure for unlimited liability from persons responsible for oil spills to the American taxpayer.[318] Consequently, the Senate rejected the compromise.[319]

The persistent House of Representatives, however, had yet another proposal in the wings.[320] The House Conferees agreed to recede to the Senate on the Protocols issue in exchange for the Senate's agreeing to another, milder proposal.[321] The result is OPA section 3001, which expresses the sense of Congress "that it is in the best interests of the United States to participate in an international oil pollution . . . regime that is at least as effective as Federal and State laws in preventing [oil spills] and in guaranteeing full and prompt compensation for damages resulting from such incidents."[322]

E. Outlook for International Solutions

Because of the international nature of the oil transportation industry, the problem of oil pollution must be addressed internationally. The oil pollution compensation, cleanup, prevention, and punishment system for the United States will not be complete until it includes international participation.

Recently, the Diplomatic Conference for the Oil Pollution Preparedness and Response Convention was concluded in London, England. While most delegations agreed with the United States that the Oil Pollution Preparedness and Response Convention was too important to allow the failure of the United States to ratify the Protocols to stand in the way of the Convention, many delegations and individuals privately emphasized that the United States has lost stature internationally because of its failure to ratify the 1984 Protocols.[323]

With this reality, the Europeans, with the United Kingdom in the lead, are searching for a solution to the international oil spill problem, and are considering a number of possibilities. It remains to be seen whether the Europeans will propose to renegotiate the 1984 Protocols,

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[318] *Id.* at 14.
[319] *Id.* at 21.
[320] This second proposal was offered by Congressman Jones.
[321] June 28 conference, *supra* note 295, at 22-23, 24.
[322] OPA § 3001.
[323] Telephone interview with Daniel F. Sheehan, Technical Advisor, Office of Marine Safety, Security, and Environmental Protection, U.S. Coast Guard (Dec. 12, 1990).

or whether they develop another scheme to address international oil pollution. Unfortunately, the United States' failure to ratify the Protocols will probably prevent the United States from being a leader in the upcoming negotiations.[324]

V. CONCLUSION

As can be seen by the foregoing lengthy discussion, the Oil Pollution Act has made substantial changes in federal oil spill law. The OPA generally reflects an anti-oil industry bias, by raising penalties, limiting defenses to liability, providing more and quicker compensation for those hurt by a spill, and imposing sometimes onerous new prevention and planning requirements on the oil transportation industry. It has been over a year since the OPA was signed into law, and the reactions to the new requirements of the OPA are varied. Representatives of the oil transportation industry threaten to stop moving oil through United States ports unless they receive some relief from exposure to unlimited liability. Members of environmental groups think that the OPA did not go far enough to deter oil transporters from spilling oil and to punish responsible persons. The Coast Guard and other federal agencies charged with implementing and administering the OPA are struggling with the enormous task of writing regulations to give effect to Congress' intent in enacting the OPA. Finally, the members of Congress and their staff who developed the Act are watching all these developments with interest, but without an incentive to reconsider any significant issue decided as part of the OPA.

Despite the various arguments against certain provisions of the OPA, there is little interest in Congress in revisiting the OPA's major provisions. The decisions made on the most important issues of the OPA, including the preemption of state law, implementation of International Oil Spill Protocols, and double hulls for oil tank vessels, were extremely difficult to resolve in the Conference on the OPA. There were close to eighty members of Congress who were conferees on the OPA with divergent views on the issues under consideration. It is our opinion that no significant changes will be made to the OPA unless a crisis or catastrophe of the proportions of an Exxon Valdez oil spill causes Congress to reopen issues decided as part of the OPA. None of us has a crystal ball, but we predict that the current "wait-and-see"

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[324] *Id.*

attitude of Congress toward the OPA will prevail until events allow us to determine the actual effects of the OPA.