NEWS & ANALYSIS

ARTICLES

The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects

by Russell V. Randle

Editors' Summary: The newest federal environmental statute, the Oil Pollution Act, became law in August 1990. The product of 15 years of congressional deliberation, the Act sets out an expansive new liability system for oil spills, as well as requirements for the oil industry and its suppliers, that will affect operations well into the 21st century.

In this Article, the author analyzes the Oil Pollution Act, exploring both the black-letter law of the statute and some of its likely effects.

The Oil Pollution Act of 1990 [1] became law on August 18, 1990, and so concluded the legislative response to the *Exxon Valdez* oil spill of March 1989. The *Valdez* spill, with its dramatic television footage of a huge and grotesque environmental disaster was the "Pearl Harbor" of the U.S. environmental movement. It galvanized public support behind legislation to assure that future oil spills are minimized, that effective responses are made to those that do occur, and that those responsible pay for the damages and are subject to severe penalties.

It is impossible to understand the Oil Pollution Act of 1990 without frequently referring to the *Valdez* spill and other oil tanker accidents that occurred in 1989 and 1990. [2] Congress plainly intended that these should not be repeated, as almost any page of the legislative debates makes clear.

It would be a mistake, however, to view the Oil Pollution Act as a response only to these incidents. Congress had been working for almost 15 years to consolidate and rationalize oil spill response mechanisms under various federal laws, including §311 of the Federal Water Pollution Control Act (the Clean Water Act), [3] the Deepwater Port Act of 1974, [4] the Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA), [5] the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA), [6] as well as to harmonize these oil spill mechanisms with state laws, international conventions, and other federal environmental law, especially the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund). [7] On several occasions, one House or the other passed a comprehensive oil spill bill, and in 1986 both Houses did, only to have the bills die in the conference committee because the conferees were unable to resolve political and philosophical differences over preemption of state law by federal standards and the relationship between the federal standards and international conventions. [8]

In 1980, Congress came close to passing comprehensive oil spill provisions as part of CERCLA, only to have those provisions omitted in the lame duck session that finally enacted CERCLA. The omission of those provisions was attacked on the floors of both the House and Senate as an important deficiency in CERCLA. [9] Instead of oil spill provisions, CERCLA contained a petroleum exclusion to make clear that oil spills were to be governed by a different statutory scheme. That result has complicated liability issues in Superfund cleanups, and is especially ironic, because the liability provisions in §107 of CERCLA are patterned on

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1. 33 U.S.C. §§2701-2761, 104 Stat. 484, ELR STAT. OIL POLL. 001-034.
2. These incidents include the *Mega Borg* fire and explosion in the Gulf of Mexico in the summer of 1990, the *American Trader* spill of about 400,000 gallons of oil near the southern California coast in February 1990, and a rash of incidents in late June 1989.
3. 33 U.S.C. §1321, ELR STAT. FWPCA 039. Section 311 was initially enacted in 1970 as the Water Quality Improvement Act of 1970, largely in response to the oil spill from an oil production platform off the coast of Santa Barbara, California, in January 1969. It was incorporated into the Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, and amended also to address hazardous substances. It was amended in 1978 to resolve a lawsuit concerning hazardous substance spill reporting and responses to it. It had not been materially amended until the Oil Spill Act was passed.
4. 33 U.S.C. §§1501-1524.
5. 43 U.S.C. §§1651-1655.
6. 43 U.S.C. §§1331-1374.
7. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA 007-075.
8. *See, e.g.*, S. 2799, passed by the Senate on September 28, 1986, and H.R. 2005, passed by the House on October 8, 1976.
9. *See, e.g.*, the correspondence from Senators. Robert Stafford (R-Vt.) and Jennings Randolph (D-W. Va.) to Representative James Florio (D-N.J.), LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL COMPENSATION AND LIABILITY ACT OF 1980, 97th Cong., 2d Sess. (1983), *reprinted at* Serial No. 97-14, at 774-75.

the oil spill liability provisions of §311 of the Clean Water Act.

To understand and interpret the new oil spill legislation, passed unanimously in both Houses, readers must examine Congress' unmistakable purpose of preventing future *Valdez*-style disasters, as well as CERCLA and cases interpreting it, for the meaning and function of much of the new statutory language.

The main elements of the Oil Pollution Act are the following:

> (1) a comprehensive federal liability scheme, addressing all discharges of oil to navigable waters, the exclusive economic zone,[10] and shorelines;
> (2) a single, unified federal fund, called the Oil Spill Liability Trust Fund, to pay for the cleanup and other costs of federal oil spill response authorized at $1 billion, far higher than any of the other funds previously authorized;
> (3) stronger federal authority to order removal action or to conduct the removal action itself;
> (4) drastically revised spill prevention control and countermeasure plan requirements for onshore facilities, offshore facilities, and vessels;
> (5) tougher criminal penalties;
> (6) higher civil penalties for spills of oil and for spills of hazardous substances;
> (7) tighter standards and reviews for licensing tank vessel personnel, and for equipment and operations of tank vessels, including the requirement of double hulls;
> (8) no preemption of state laws and an endorsement of the United States' participation in an international oil spill liability and compensation scheme; and
> (9) several provisions pertinent to Prince William Sound, to Alaska, and to other portions of the United States.

The Act comprises nine titles. Title I (Oil Pollution Liability and Compensation) contains the definitions used in the Act, establishes the liability scheme for oil spills, provides the mechanisms for recovery from the Oil Spill Liability Trust Fund and from responsible parties, and establishes financial responsibility requirements. Title II (Conforming Amendments) makes conforming changes in the Intervention on the High Seas Act,[11] the Clean Water Act, the Deepwater Port Act, and OCSLA. Title III (International Oil Pollution Prevention and Removal) expresses the sense of Congress regarding future participation in international oil spill prevention and removal regimes and directs the Secretary of State to review international agreements and treaties and to negotiate agreements with Canada regarding oil spills on the Great Lakes, Lake Champlain, and Puget Sound.

Title IV (Prevention and Removal) has three subtitles. Subtitle A (Prevention) provides for the review of information contained in the National Driver Register[12] for issuing licenses, certificates of registry, and merchant mariner's documents; provides for the suspension and revocation of those documents for alcohol and drug abuse incidents; and establishes prevention measures, which include manning standards for foreign and domestic tank vessels, the requirement for a study on tanker navigation safety standards, and the establishment of double hull requirements for tank vessels. Subtitle B (Removal) provides federal removal authority and requirements for the national planning and response system. Subtitle C (Penalties and Miscellaneous) strengthens the civil and criminal penalties available to the government under the Act.

Title V (Prince William Sound Provisions) contains several provisions designed specifically to avoid future spills in Prince William Sound. Title VI contains miscellaneous provisions. Title VII provides for an oil pollution research and development program. Title VIII contains provisions dealing with the Trans-Alaska Pipeline System and oil spills in the Arctic Ocean. Title IX transfers funds from the several preexisting federal oil spill funds into the single fund established by this Act.

Liability Provisions

Title I of the Oil Pollution Act contains the liability provisions. The provisions are modeled closely on those of CERCLA and of §311 of the Clean Water Act, and show the influence of nearly a decade of CERCLA litigation. Compared with §311, however, the Oil Pollution Act makes it easier for the government to establish liability against a party responsible for causing or contributing to an oil discharge or to a substantial threat of an oil discharge.

Standard of Liability and Responsible Parties

Section 1002(a) of the Act provides:

> Notwithstanding any other provision or rule of law, each responsible party for a vessel or a facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for removal costs and damages under the Act.

The Act defines "responsible parties" in §1001(32). For vessels, the responsible parties are the persons owning the vessel, operating it, or chartering it by demise.[13] For onshore facilities, the responsible parties are the owners and operators.[14] For offshore facilities, the definition is complicated by the requirements for offshore leasing under OCSLA or state law, but includes persons leasing the area in which the facility is located, the permittee of the area in which the facility is located, or the holder of a right of use or easement for the area in which the facility is located.[15] The licensees of deepwater ports and persons owning or operating a pipeline are also responsible persons.[16]

The definitions of "vessels" and "onshore and offshore facilities" closely follow the definitions in §311 of the Clean Water Act and §101 of CERCLA. Simply stated, a facility is defined as anything that stands still, or anything that moves, except a vessel, which is separately defined. For

10. *See infra* note 17 and accompanying text.

11. 33 U.S.C. §1486.

12. *See* 23 U.S.C. §401 note.

13. §1001(32)(A), ELR STAT. OIL POLL. 004.

14. §1001(32)(B), ELR STAT. OIL POLL. 004.

15. §1001(32)(C), ELR STAT. OIL POLL. 004.

16. §1001(32)(D), (E), ELR STAT. OIL POLL. 004.

practical purposes, almost any location from which oil is discharged and from which oil may reach surface waters in the United States or the exclusive economic zone[17] is included in these definitions.

The conferees eliminated provisions in the House's version of the bill that would have made the owner of the cargo secondarily liable for the removal costs incurred as a result of the spill. This liability was capped at 50 percent of these costs, and the other responsible parties had to pay their shares before this secondary liability provision became effective. The House's provision, if adopted, would have created a new class of liable parties under the Oil Pollution Act, similar to "generator" liability under CERCLA. Its elimination shows that Congress did not want the Oil Pollution Act to follow that controversial aspect of CERCLA.[18] Rather, the conferees followed the Senate's version of the bill, stating in §1001(17) that "liable" and "liability" shall be construed as the standard of liability that obtains under §311 of the Clean Water Act.[19] The courts have repeatedly determined that this standard—which is the CERCLA standard—provides for strict, joint, and several liability.[20]

The conferees made an additional change to try to assure that the Oil Pollution Act meshed with CERCLA. They modified the Clean Water Act's broad definition of "oil" to exclude fractions of oil that are specifically designated as hazardous substances under §101(14) of CERCLA.[21] That section incorporates the following toxic, hazardous, or priority pollutants, wastes, or substances under other environmental statutes:

- hazardous air pollutants under §112 of the Clean Air Act;[22]
- toxic or priority pollutants under §307 or hazardous substances under §311 of the Clean Water Act;
- imminently hazardous chemical substances under §7 of the Toxic Substances Control Act;[23]
- hazardous wastes under the Resource Conservation and Recovery Act (RCRA);[24] and
- hazardous substances designated under §102 of CERCLA.[25]

This language may be ambiguous, however, because crude oil naturally contains such substances as benzene that are listed hazardous substances. This overlap has created interpretive problems under the comparable language in CERCLA.[26] Where the government has proceeded under CERCLA, the petroleum exclusion has not been a successful defense except where the material has been crude oil or a newly refined fraction, such as gasoline. Congress appears to have changed this provision and to have deleted the secondary liability for cargo owners in an effort to assure that CERCLA or the Oil Pollution Act, not both, are applied to spills. Congress wants oil spills—including crude oil and refined product—to be addressed under the Oil Pollution Act and hazardous substance releases under CERCLA. (For spills of contaminated oils, for example, used oils, the government may have a choice.) Because the procedures and funding mechanisms under CERCLA and the Oil Pollution Act have important differences, the division is sensible. Whether the courts will extend this distinction to private party cases brought under both statutes is unclear.

Defenses and Exclusions to Liability

The defenses and exclusions to liability provided by the Oil Pollution Act are more limited than those under §311 of the Clean Water Act and under §107(b) of CERCLA. Section 1003(a) of the Oil Pollution Act exonerates the responsible party from liability imposed by §1002 if that party proves by a preponderance of the evidence that the incident resulted *solely* from (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 party in a contractual relationship with the responsible party; or (4) some combination of (1), (2), or (3).

The statute's definition of "act of God"[27] is identical to CERCLA's.[28] An act of God for these purposes "means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character the effects of which could not have been prevented or avoided by the exercise of due care and foresight." Thus, bad weather, such as seasonal hurricanes, or earthquakes in areas where earthquakes are common, probably will not constitute an act of God defense. "Act of war" is not defined under this statute, nor under CERCLA or the Clean Water Act. Congress likely had in mind the sinking of a vessel by a hostile foreign power.

The statutory language setting forth the act of a third-party defense is also virtually the same as that of CERCLA and §311 of the Clean Water Act. The responsible party must establish by a preponderance of the evidence that it (1) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances, and (2) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.[29]

The Oil Pollution Act, however, omits an important Clean Water Act defense. Under §311(f)(1)(C) of the Clean Water Act, "negligence on the part of the United States Government" is a complete defense if the discharge resulted solely

17. The exclusive economic zone is the zone contiguous to the territorial sea, extending 200 miles from shore. Proclamation No. 5030 (Mar. 10, 1983), *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS A18-29.

18. Nonetheless, state laws may in some cases permit claims against cargo owners.

19. The House version of what became §1002(a) had explicitly provided that such liability would be strict, joint, and several among the responsible parties. The difference between this version and the Senate version is probably not significant.

20. Total Petroleum, Inc. v. United States, 12 Cl. Ct. 178, 180, 17 ELR 21001 (1987); United States v. M/V Big Sam, 681 F.2d 432, 12 ELR 20994 (5th Cir.), *reh'g denied,* 693 F.2d 451 (5th Cir. 1982), *cert. denied,* 462 U.S. 1132, 13 ELR 20226 (1983); Burgess v. M/V Tamano, 564 F.2d 164 (1st Cir.), *cert. denied,* 435 U.S. 941 (1977).

21. §1001(23), ELR STAT. OIL POLL. 004.

22. 42 U.S.C. §7412, ELR STAT. CAA 014.

23. 15 U.S.C. §2606, ELR STAT. TSCA 017.

24. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA 001-050.

25. 42 U.S.C. §9601(14), ELR STAT. CERCLA 007.

26. Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 19 ELR 21313 (9th Cir. 1989); United States v. Wade, 577 F. Supp. 1321, 14 ELR 20096 (E.D. Pa. 1983).

27. §1001(1), ELR STAT. OIL POLL. 004.

28. CERCLA, §101(1), 42 U.S.C. §9601(1), ELR STAT. CERCLA 007.

29. §1003(a)(3), ELR STAT. OIL POLL. 005.

from that cause. That defense had considerable importance where the U.S. Coast Guard was responsible for maintaining aids to navigation, and where other agencies were responsible for publishing navigational charts, maintaining channel depths, and forecasting the weather.

The Oil Pollution Act excludes from its liability provisions three kinds of discharges: (1) discharges allowed by a permit issued under federal, state, or local law; (2) from a public vessel; or (3) from an onshore facility that is subject to TAPAA.[30] The exclusion for discharges permitted by federal, state, or local permits is similar in concept to the "federally permitted release" definition found in §101(10) of CERCLA and to similar language found in §311(a)(2) of the Clean Water Act defining "discharge;" however, the scope of the Oil Pollution Act's exclusion is different. The exclusion for federally permitted discharges was added in 1978 to §311 of the Clean Water Act to settle litigation challenging the Environmental Protection Agency's (EPA's) hazardous substance release reporting definitions. Section 311 excludes not only discharges in compliance with a permit, but also discharges that might be characterized as bypasses or upsets, or that might be violations of the permit conditions. It states:

> discharges resulting from circumstances identified and reviewed and made a part of the public record with respect to a permit issued or modified under section 402 [the National Pollutant Discharge Elimination System (NPDES) permit provision], and subject to a condition in such permit; and
>
> continuous or anticipated intermittent discharges from a point source, identified in a permit application under section 402 of this Act, which are caused by events occurring within the scope of relevant operating or treatment systems.

Virtually identical language appears in §101(10)(B) and (C) of CERCLA.

These CERCLA and Clean Water Act exclusions left the regulation of point source discharges under the Clean Water Act to permits issued under the NPDES and to the federal or state authorities issuing such permits. Thus, bypasses and upsets, or other NPDES violations resulting in the discharge of such regulated pollutants as oil and grease, were to be reported pursuant to the appropriate NPDES regulations and permit provisions, not under §311 reporting requirements. Additionally, the cleanup and remedial provisions of §311 and CERCLA could not be invoked against private parties to address such discharges, even though enforcement action could be taken under §309 of the Clean Water Act for discharges that violated NPDES requirements.

The Oil Pollution Act does not include these provisions for such circumstances as bypasses or upsets, or for violations by discharges or parameters addressed in permit conditions. Instead, the new statute simply excludes discharges "permitted by a permit issued under Federal, State, or local law." Thus, if an NPDES point source suffers a bypass, upset, or violation that results in the discharge of oil that exceeds permit conditions,[31] the discharger will probably be responsible for removal costs under the Oil Pollution Act. In one respect, however, the statutory language is broader than the §311 and CERCLA exclusions because it mentions "local" permits. Since no discharge to navigable waters may take place from a point source without an NPDES permit, the only potential discharges addressed by local permits would appear to be discharges to publicly owned treatment works pursuant to a pretreatment permit.

In Clean Water Act cases under §309, the Department of Justice has sought and obtained environmental assessment, remediation, and environmental restoration from alleged violators.[32] Its authority to do so for oil discharges is enhanced by this change. However, its authority to do so for hazardous substances and conventional pollutant discharges is undercut by the absence of an equivalent change in CERCLA and other Clean Water Act provisions.

Like §311 of the Clean Water Act, the Oil Pollution Act does not cover discharges from public vessels, except where the vessel is engaged in commerce. Discharges from onshore facilities subject to TAPAA are also excluded from coverage, leaving to TAPAA the regulation and enforcement of requirements against such installations.

Recoverable Removal Costs and Damages

Section 1002(b) defines the removal costs and damages that can be recovered from responsible parties. With one change, "remove" and "removal" are defined under §1001(30) the same as they are under §311(a)(8) of the Clean Water Act. The change is to include containment of oil or hazardous substances, as well as the actual cleanup. "Remove" and "removal" are defined differently in CERCLA than they are in Clean Water Act and the Oil Pollution Act.

"Removal costs" is also separately defined by the Oil Pollution Act[33] to make clear that costs incurred to respond to substantial threats of discharge of oil are also recoverable, as are the costs to prevent, minimize, or mitigate oil pollution from such a discharge. Curiously, the definitions of "remove" and "removal" include removal of hazardous substances, but "removal costs" is defined to address only oil discharges. Congress meant to address only oil discharges in the liability provisions, leaving to CERCLA the recovery of such costs for hazardous substances.

Recoverable removal costs for the federal and state governments, and for Indian tribes, are those incurred under §311(c), (d), (e), or (*l*) of the Clean Water Act, the Intervention on the High Seas Act,[34] or state law. The Clean Water Act provisions authorize the federal government to take removal actions for oil or hazardous substances discharged or threatened to be discharged to navigable waters or shorelines, to respond to marine disasters creating a substantial threat of a pollution hazard, and to initiate legal action to abate such threats.

Recoverable removal costs for any other person, presumably including individuals, other governmental entities (e.g.,

30. §1002(e), ELR STAT. OIL POLL. 005.

31. Some NPDES permits contain bypass or upset provisions so that these would not constitute NPDES violations. Good legal practice is to incorporate such provisions explicitly into permits where possible. The new Oil Pollution Act makes it even more important for dischargers to obtain such provisions if they believe bypasses or upsets are likely to occur.

32. *See, e.g.*, 55 Fed. Reg. 32320 (Aug. 8, 1990) (proposed settlement of Clean Water Act case including cleanup provisions for contaminated sediments at USX's Gary, Indiana, steel mill).

33. §1001(31), ELR STAT. OIL POLL. 004.

34. 33 U.S.C. §§1471-1487.

municipalities), corporations, etc., are "any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan."[35] This language follows the language in §107(a)(4)(B) of CERCLA, which has been construed to allow private-party actions for response costs under CERCLA.[36] This right of action fills a gap in §311, which, providing no equivalent right of recovery, leaves private claimants for removal costs to their rights under common law and admiralty law.

The damages provisions make clear that such private actions are intended to be included, as are actions by state and local governments. Recoverable damages are grouped in six categories, several of which appear to overlap:

(1) natural resource damages;
(2) damages to real and personal property, including loss of use of such property;
(3) loss of subsistence use of natural resources;
(4) loss of tax and other revenues;
(5) loss of profits or earning capacity; and
(6) increased costs of public services.

Three of these classes of damages from oil discharges—natural resource damages, loss of tax revenue, and increased cost of public services—are recoverable only by governmental entities. Natural resource damages are recoverable by four classes of natural resource trustee: federal, state, foreign government, or Indian tribes. Loss of tax and other forms of governmental revenue are recoverable by the United States, the states, and political subdivisions of states. The increased cost of public services (including such items as fire protection) caused by an oil discharge, are recoverable by the same claimants. Presumably, by excluding political subdivisions from the claimants that can recover natural resource damages, Congress meant to limit natural resource claims to properly designated trustees.[37]

The other three classes of damages for oil discharges overlap, and are recoverable by private claimants as well as by governments. The owner or lessor of personal or real property may recover damages for injury to such property or economic loss from its destruction. Any claimant may recover for loss of subsistence use of natural resources, regardless of the ownership or management of such resources. Likewise, any claimant may recover for damages equal to the loss of profits or impairment of earning capacity caused by the injury, loss, or destruction of real or personal property or natural resources. Until now, claimants for these kinds of damages had to rely on common law and admiralty for recovery.

The claims for damages, as opposed to removal costs, are likely to be subject to a jury trial. The United States contends that claims for response costs under CERCLA are equitable in nature and thus not subject to a claim for jury trial under the Seventh Amendment. That argument has prevailed where the issue has arisen under CERCLA.[38] Presumably, the United States will take the same position concerning removal costs, and the courts likely will follow it.

With respect to damages claims, however, there is divided case authority under CERCLA holding that claims for natural resource damages are subject to a jury trial.[39] Because the claims for monetary losses, loss of income, and other elements of damage are so similar to traditional common law claims, the Seventh Amendment arguments for jury trial are strong.

Designed to provide strong incentive for the prompt payment of meritorious claims, §1005 of the Oil Pollution Act governs interest on claims. Responsible parties (or their guarantors) are liable to claimants for interest from the 30th day after the claim is presented to the day it is paid. The rate is pegged to a rate published by the Federal Reserve; that is, the average of the highest rate for short-term (i.e., 180 day or less) commercial and finance company paper for the days the claim is pending. Periods of time may be excluded from the interest calculation where the payment is delayed for reasons beyond the control of the responsible party, or where the responsible party has made an offer that is greater than or equal to the amount the claimant ultimately receives.

Liability Limitations

Section 1004 of the Oil Pollution Act, like §107(c) of CERCLA and §311(f) of the Clean Water Act, contains liability limitations.[40] The liability limits apply to all removal costs and damages under §1002. This may be of limited use to responsible parties, however, because the Oil Pollution Act does not preempt state law remedies.

The tonnage liability limits of §1004(a) for tankers are eight times higher than those of §311. The liability limits for vessels are divided between limits for tank vessels and for all other vessels. Limits are also set for onshore and offshore facilities and deepwater ports, and a method is provided for determining the limit for mobile offshore drilling units. The limits are to be adjusted for inflation every three years, based on the consumer price index.[41]

The limits for tank vessels are set at the greater of (1) $1,200 per gross ton or (2) $10 million if the vessel exceeds 3,000 gross tons. If the vessel is less than 3,000 gross tons, the limit is $2 million. For nontank vessels, liability is limited to $600 per gross ton or $500,000, whichever is greater. The lower limits are based on the lesser threat these other vessels pose to the environment.

Liability for offshore facilities is limited to the total of "all removal costs plus $75,000,000." Notwithstanding these liability limits and the defenses available under the statute, the owner or operator of an offshore Outer Conti-

35. §1002(b)(1)(B), ELR STAT. OIL POLL. 005.

36. Walls v. Waste Resources Corp., 761 F.2d 311, 15 ELR 20438 (6th Cir. 1985).

37. The situation under CERCLA may be different, since at least two courts have allowed cities to plead natural resource damage claims. *See* City of New York v. Exxon, 633 F. Supp. 609, 618, 16 ELR 20850, 20854 (S.D.N.Y. 1986); Town of Boonton v. Drew Chem. Corp., 621 F. Supp. 663, 16 ELR 20328 (D.N.J. 1985).

38. *See, e.g.,* United States v. Wade, 653 F. Supp. 11, 14 ELR 20437 (E.D. Pa. 1984).

39. In re Acushnet River and New Bedford Harbor Proceedings re Alleged PCB Pollution, 712 F. Supp. 994, 19 ELR 21198 (D. Mass. 1989). *But see* United States v. Wade, 653 F. Supp. 11, 14 ELR 20437 (E.D. Pa. 1984).

40. Both Houses narrowly defeated efforts to delete liability limitations from the bill. The liability limits in §1004(a) were taken from the House bill, and were somewhat higher than those provided by the Senate version. Liability for the cargo owners was dropped from the House bill, however.

41. §1004(d)(4), ELR STAT. OIL POLL. 005.

nental Shelf (OCS) facility or a vessel carrying oil as cargo from such a facility shall be liable for all costs incurred by the federal, state, or local government as a result of a discharge or substantial threat of a discharge.[42]

For onshore facilities and deepwater ports, liability is limited to $350 million. The liability for classes or categories of onshore facilities can be adjusted downward by regulation based on size, throughput, storage capacity, proximity to sensitive areas, type of oil handled, history of discharges, and other factors deemed relevant to risk.[43] The limit may be set as low as $8 million.

The provision for onshore facilities increases the limitation by seven times over §311(f)(2) of the Clean Water Act, but changes the bases for reducing such limits. Previously, the statute limited such changes to installations storing less than 1,000 barrels of oil; now, no capacity limit exists. The Secretary or Administrator may make multiple classifications of onshore facilities, each with its own liability limitation, provided that the regulation considers such factors as prior history, environmentally sensitive areas, throughput, and size of the facility.

These liability limits do not apply if the incident was proximately caused by (1) gross negligence or willful misconduct or (2) a violation of an applicable federal safety, construction, or operating regulation. Liability is thus unlimited for such discharges. Moreover, where such gross negligence, willful misconduct, or a violation occurs, the limited defenses provided in §1003(a)—act of God, act of war, or act of an unrelated third party—are also lost to the responsible party. These provisions closely follow both §311 of the Clean Water Act and §107(c)(2) of CERCLA.

In addition, these liability limits do not apply if the responsible person fails or refuses to (1) report the incident as required by law; (2) cooperate with a responsible official in connection with removal activities; or (3) comply, without sufficient cause, with an administrative or judicial order issued under §311(c) or (e) or the Intervention on the High Seas Act. As discussed in connection with removal authority, the Act follows CERCLA §106 concerning administrative orders and sanctions for failing to obey them. The waiver of the liability limit assures that enforcement of the removal orders is not undercut by the limit.

Claims Against, and Financial Responsibility of, Guarantors and Responsible Parties

The Oil Pollution Act departs from both CERCLA and the Clean Water Act in the procedures it establishes for claims against responsible parties. These procedures make very clear that the Oil Spill Liability Trust Fund is the fund of last resort to pay claims under the Act. Instead, the responsible parties and their guarantors are the primary insurers against claims for removal costs and oil discharge damages.

Section 1014 has no counterpart in CERCLA, the Clean Water Act, or other major federal environmental statutes. This provision requires that where possible and appropriate, the federal government designate the source or sources of the discharge or threat of discharge. The responsible party (or parties) and the guarantor, if known, are to be immediately notified of that designation.

The designated party or guarantor has five days after receiving notification to deny such a designation.[44] If no such denial is made, the designated party is to advertise the designation within 15 days of its receipt and to explain the procedures for submitting claims to the designated party. Otherwise, the federal government will advertise this information at the designated party's expense. Such advertising is to continue for at least 30 days.

If the federal government is unable to designate a responsible party, or if both the responsible party and the guarantor designated deny the designation, or if the vessel causing the discharge is a public vessel, the federal government must advertise the procedures for submitting claims related to such discharge to the Fund.

The responsible parties' role as primary insurers against oil spill damages and removal costs is also shown by several other provisions. Consistent with both CERCLA and §311 of the Clean Water Act, §1010 does not bar indemnification, hold harmless, and insurance agreements, but rather makes clear that they do not operate to transfer liability from responsible parties.

Section 1016 requires that responsible parties for any vessel over 300 gross tons, using any place subject to the jurisdiction of the United States, establish and maintain evidence of financial responsibility up to the maximum liability limitation applicable to the vessel. Likewise, vessels using the exclusive economic zone to lighter or transship oil destined for a place subject to the jurisdiction of the United States must also demonstrate such financial responsibility. Offshore facilities must also obtain evidence of financial responsibility.

The financial responsibility provisions are similar to those in §311, but the liability limits and thus financial responsibility to be shown have been dramatically increased. Similar to the enforcement provisions for financial responsibility under §311, vessels that violate the financial responsibility provision may be denied access to U.S. ports and waters, seized, detained, forfeited, and sold.

A major part of the financial responsibility provisions is the designation of a guarantor in the United States subject to U.S. jurisdiction. The Oil Pollution Act makes clear that claimants may proceed directly against the guarantor, and the guarantor may assert the responsible party's defenses against the claimant, as well as the defense that the discharge was caused by the responsible party's willful misconduct. In defending against claims submitted to it, the guarantor may not invoke other defenses it may have in an action against the responsible party.

The practice under §1016 is consistent with the procedural requirements of §311 of the Clean Water Act. Indeed, this provision expressly provides for the continuation of current financial responsibility regulations under other law, until new regulations are promulgated. Nonetheless, until regulations are issued, the current financial responsibility demonstration will often be inadequate to assure that sufficient resources are available for the cleanup and for compensation of damages under the new law.

Section 1015 subrogates those paying removal costs and damages to all the rights, claims, and causes of action the

42. §1004(c)(3), ELR STAT. OIL POLL. 005.

43. §1004(d)(1), ELR STAT. OIL POLL. 005.

44. Presumably, the designation will not come as a surprise to the responsible party if the reporting requirements of §311 have been complied with.

claimant had under any law for such money. The party paying such claims, or a responsible party that has denied liability, may begin a contribution action against other liable or potentially liable parties pursuant to §1009. The contribution claims brought pursuant to §1009 may be based on the Oil Pollution Act, but may include any other law, including state law. Contribution claims must be filed within three years of (1) payment of a claim or (2) entry of a judgment or judicially approved settlement against the responsible party. [45]

The inclusion of a contribution provision is consistent with CERCLA. Likewise, case law under §311 provides for contribution against other liable parties. [46] Unlike CERCLA, however, which directs the courts to use equitable factors to allocate responsibility and to apply federal law, §1009 provides no guidance about the factors to be applied in apportioning liability and allows both state and federal law to be applied. Additionally, CERCLA provides that where a party resolves its liability to the state or federal government in a judicially approved settlement or an administrative settlement, the contribution actions against the settling party are cut off. [47] There is no equivalent provision in the Oil Pollution Act. Consequently, though multi-party cases are less frequent in the oil spill context than under CERCLA, settlements of multi-party cases under the Oil Pollution Act may be more difficult because of unanswered legal questions about contribution.

Under §1002(d) where a responsible party contends that the discharge resulted solely from the act or omission of an unrelated third party, the responsible party must pay the claims and is then subrogated to the rights of the claimants and the Fund to bring a contribution action against the liable party. This provision follows §311(g) of the Clean Water Act.

Litigation, Jurisdiction, and Statutes of Limitation

Regulations issued under the Oil Pollution Act are reviewed only in the U.S. Court of Appeals for the District of Columbia, [48] and challenges to these regulations must be filed within 90 days of their promulgation. Because these regulations may not be challenged in a subsequent civil or criminal enforcement action, high priority is placed on promptly resolving such challenges.

Claims for removal costs and damages may be filed in U.S. district court or in state courts of competent jurisdiction. Claimants may choose from many possible venues for actions filed in district court: any district (1) in which the discharge occurred, or where damage or injury was suffered, or (2) in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process.

Damage claims must be filed within three years of when damages from the discharge are reasonably discoverable with the exercise of due care, or for natural resources, within three years after completion of the natural resource damage assessment. Claims for removal costs must be filed within three years after completion of the removal action.

These limitation periods are consistent with the periods provided under §113(g) of CERCLA for removal actions, although the CERCLA provision is more intricate. Experience under CERCLA suggests that there is no agreed-upon cutoff date for completion of a removal action, so the limitations issue may be more ambiguous than the language of the Oil Pollution Act suggests.

The Clean Water Act does not provide a statute of limitations. The case law for recovery of removal costs under §311 suggests that cost-recovery actions may be initiated as late as six years after the incident, on the theory that the government's claim is one sounding in contract, for which there is a six-year statute of limitations under 28 U.S.C. §2415. [49] Thus, under the new statute, the leisurely processing of cases that sometimes occurred under §311 will bar the government's claims under the new statute of limitations.

The Oil Pollution Act makes clear in two places that its provisions, unlike CERCLA's, are not retroactive. A savings provision in §1017 states that nothing in this title shall apply to incidents that occurred prior to enactment, leaving such claims to be tried under the law as it stood at the time of the incident. This same principle is stated in positive terms in §1020, which applies the Act to incidents occurring after the date of enactment. Section 6001 has similar language. Thus, the Act applies only to oil discharges occurring after August 18, 1990.

Natural Resource Damages

The Oil Pollution Act, like §311(f) of the Clean Water Act and §107(f) of CERCLA, provides for the assessment and recovery of natural resource damages. Section 1006 establishes elaborate requirements for the assessment and recovery of natural resource damages under §1002(a), and for the trustees who assert claims on behalf of the United States, states, Indian tribes, and foreign governments. These entities may each recover natural resource damages for resources belonging to, managed by, controlled by, or appertaining to such entity. "Natural resources" is not defined under §311; the Oil Pollution Act's definition closely follows CERCLA's. [50]

The Act requires designation of the trustees and notification of the federal government of which trustees are authorized for the states, Indian tribes, and foreign governments. Trustees are to assess natural resource damages and to devise and implement plans for the restoration, rehabilitation, replacement, or acquisition of natural resources equivalent to those destroyed or damaged in an oil spill. The federal trustees are authorized, if reimbursed, to assist states and Indian tribes in such assessments and plans. Plans must be subjected to notice and comment rulemaking.

Both the Oil Pollution Act and CERCLA appear to assume that some resources clearly belong to a state, some to the United States, and some to Indian tribes. As lengthy disputes

45. §1017(f)(3), (4), ELR STAT. OIL POLL. 010.

46. United States v. Bear Marine Servs., 509 F. Supp. 710, 11 ELR 20659 (E.D. La. 1980).

47. §113(f)(2), ELR STAT. CERCLA 039.

48. Placing exclusive venue for review of regulations in the D.C. Circuit was not done under the Clean Water Act, though it is the rule under the Clean Air Act, RCRA, and CERCLA.

49. United States v. Dae Rim Fishery Co., 794 F.2d 1392, 16 ELR 20793 (9th Cir. 1986).

50. *Compare* Oil Pollution Act §1001(20), ELR STAT. OIL POLL. 004, *with* CERCLA §101(16), ELR STAT. CERCLA 007.

over western water rights indicate, however, that assumption is mistaken. Confusion over which resources are the duty of which trustee to defend may impair the resolution of natural resource damage claims under this Act, as it has under CERCLA.

Congress was very conscious of natural resource damages as a result of the *Valdez* spill. It intended that the new statute, in determining damages, reflect the public's dismay at the low values assigned to the deaths of creatures such as the sea otters killed in the *Valdez* spill. The legislative history of §1006(d), which sets forth the measure of damages, intended the Oil Pollution Act to follow the D.C. Circuit's construction of the similar language in CERCLA.[51] The replacement cost of the resource, not its market value, was to be the primary yardstick for assessing natural resource damages under the Oil Pollution Act.

The measure of damages provided in §1006(d) includes (1) the cost of restoring, replacing, rehabilitating, or acquiring the equivalent of, the damaged natural resources; (2) the diminution in value of those natural resources pending restoration; and (3) the reasonable cost of assessing those damages. The plan devised and approved by the trustee is to be the basis for determining the cost of restoration and other efforts under (1). Thus, the plan may function similarly to CERCLA's remedial investigation and feasibility study, but instead of determining remedy, here the emphasis will be on restoration.

The Conference Report and the debates make clear that restoration of damaged resources is the preferred alternative. The acquisition of equivalent resources "should be chosen only when the other alternatives are not possible, or when the cost of those alternatives would, in the judgment of the trustee, be grossly disproportionate to the value of the resources involved."[52] Equivalent resources, according to the Conference Report, are those that "the trustee determines are comparable to the injured resources. Equivalent resources should be acquired to enhance the recovery, productivity, and survival of the ecosystem affected by a discharge, preferably in proximity to the affected area."[53]

New natural resource damage regulations are to be promulgated by August 1992, and a citizen suit provision is included to assure that judicial action can be brought to compel the timely promulgation of these regulations. The regulations, if followed by the trustee in making the natural resource damage assessments, will create a rebuttable presumption in favor of those assessments.

As in CERCLA and §311 of the Clean Water Act, the money recovered for natural resource damages is to be used only to pay for restoration work, for the cost of the assessment, and for the diminution in value. The money is to be kept in a special interest-bearing account to assure its availability to the trustee.

Section 1011 requires the federal government to consult with affected natural resource trustees about removal actions, and with the governors of affected states when removal actions are completed. These consultations are to assure that the effects on natural resources of removal actions are properly balanced with the needs for removal.[54]

The Oil Spill Liability Trust Fund

The Oil Pollution Act consolidates overlapping federal oil spill liability funds and strengthens the resulting fund so that adequate federal resources will be available to respond to spills as large as the *Valdez* spill and for damages. At the time of the *Valdez* spill, the Clean Water Act revolving fund for oil spills had less than $7 million. The *Valdez* cleanup costs have exceeded $1 billion and are likely to exceed $2 billion.

Financing the Oil Spill Liability Trust Fund

Congress first passed oil spill liability trust fund provisions in 1986, which were codified in §§4611 and 9509 of the Internal Revenue Code. Congress amended these provisions in 1989 as part of the Budget Reconciliation Act, and taxes began to be collected under them in 1990.

Under §4611, a tax of five cents per barrel is levied on crude oil received at U.S. refineries or on petroleum products imported to, consumed in, or warehoused in the United States.[55] Earlier versions of §4611 had made the effective date of the tax contingent on passage of "qualifying legislation." The amended version made the tax effective after December 31, 1989, and until December 31, 1994.[56] Collections of the tax are to be suspended after the unobligated balance of the Fund reaches $1 billion, as long as the unobligated balance stays above that level.[57]

In addition to tax revenues received under §4611, the funds in the Deepwater Port Liability Fund and Offshore Oil Pollution Compensation Fund as of January 1, 1990, were transferred into the Oil Spill Liability Trust Fund.[58] Recoveries of removal costs, damages, and penalties under the Oil Pollution Act and §311 of the Clean Water Act are now credited to the new Oil Spill Liability Trust Fund.[59] The Fund is given borrowing authority of up to $500 million from the Treasury, to be repaid with interest from the revenues collected for the Fund through taxes and other means.[60]

51. Ohio v. Department of Interior, 880 F.2d 432, 19 ELR 21099 (D.C. Cir. 1989). Judge Wald, writing for the court, reversed those regulations because the measure of damages was inadequate under CERCLA, in large part because the diminution in value of natural resources was too heavily restricted to market values.

52. H.R. CONF. REP. No. 653, 101st Cong., 2d Sess. 108 (1990).

53. *Id.*

54. The House bill had provided a stringent series of civil penalties for causing natural resource damages, but these were deleted by the Conference Committee with little comment. The committee may have believed that they would overlap with the stringent new civil and criminal penalties already provided in the bill.

55. I.R.C. §4611(a)-(c).

56. *Id.* §4611(f)(1).

57. *Id.* §4611(f)(2).

58. The transfer was made by §9509(b)(3) and (4) of the Internal Revenue Code, also amended by the Budget Reconciliation Act of 1989, Pub. L. No. 101-239, §§7811(m)(3), 7505(d)(2). The Deepwater Port Liability Fund was established by §18(f) of the Deepwater Port Act of 1974, 33 U.S.C. §1517(f); the Offshore Oil Pollution Compensation Fund was established by §302 of OCSLA.
Liabilities and funds in the Clean Water Act Fund under §311(k) were also transferred to the new Fund by virtue of §2002 of the Act. Title II of the Oil Pollution Act also amended the Intervention on the High Seas Act, 33 U.S.C. §1486, the Deepwater Port Act, OCSLA, and §311 of the Clean Water Act to conform to the new Fund requirements.

59. I.R.C. §9509(b)(2), (5).

60. *Id.* §9509(d).

Uses of the Oil Spill Liability Trust Fund

Section 1012 enumerates the permissible uses of the Fund and lays out procedural requirements for the proper obligation of funds and processing of claims against it. Section 1012 must be read in conjunction with both §6002 of the Act (which requires that, with some exceptions, money in the Fund not be spent unless it is appropriated by Congress) and §9509 of the Internal Revenue Code (which also imposes restrictions on the use and management of money in the Fund and on claims procedures).

Section 1012(a) lists five permissible uses for Fund money:

> (1) The payment of removal costs, including federal and state expenses of monitoring removal efforts (presumably private removal efforts). These removal costs must be consistent with the National Contingency Plan (NCP).
>
> (2) The costs incurred by natural resource trustees for natural resource damage assessments and for the implementation of restoration plans.
>
> (3) The removal costs and natural resource damages incurred as a result of discharge of oil from a foreign offshore unit. [61]
>
> (4) The payment of uncompensated removal costs and damages as defined by the Act.
>
> (5) The payment of federal administrative, operational, and personnel costs of $25 million per year for Coast Guard enforcement of the Act; $30 million per year for establishment and operation of the National Response System under the Act, including the cost of buying and prepositioning equipment; and $27,250,000 for research and development efforts under Title VII of the Act.

For the Fund to pay for items (1) to (4), a determination must be made that the expenses were incurred consistent with the NCP. In this respect, the Oil Spill Liability Trust Fund differs from the Hazardous Substance Superfund under §111 of CERCLA, which contains no consistency requirement. Additionally, CERCLA's liability provisions allow recovery of federal or state response costs that are "not inconsistent with" the NCP, language that has been interpreted to shift the burden of proof to the person contesting such consistency. [62] The Conference Report is silent about whether this difference between the Oil Pollution Act and CERCLA is intended to impose a higher standard on federal and state removal cost claims than CERCLA imposes.

Section 1012(a)(1) makes the "monitoring" removal costs recoverable as removal costs. These monitoring costs may prove similar in practice to "oversight costs" under §104(a) of CERCLA, where a responsible party agrees to undertake the remedial investigation and feasibility study on condition that it reimburse the government for the cost of hiring an oversight contractor.

61. This provision would address spills from offshore oil platforms similar to the 1980 blowout at the Ixtoc I platform in Mexican waters, which resulted in the contamination of beaches in Texas.

62. United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 17 ELR 20843 (D.S.C. 1985); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 14 ELR 20212 (W.D. Mo. 1984), *aff'd*, 810 F.2d 726, 17 ELR 20603 (8th Cir. 1986).

Claims Procedures Under the Trust Fund

Sections 1012 and 1013 lay out some of the procedures for asserting claims for damages and removal costs under the Fund.

The Fund functions as an insurer of last resort for third parties damaged by oil spills. Under §1013, claimants must first seek compensation from the responsible party or parties. [63] Only after the responsible party has denied liability, or the claim has been pending without resolution before the responsible party for more than 90 days without resolution, may such claims be presented to the Fund. Alternatively, litigation may be commenced, but no claim can be approved by the Fund while litigation is pending to recover the same costs.

The Fund's role as a clearinghouse for claims, similar to the uninsured motorists fund some states have, is emphasized by §1012(d). It allows uncompensated damages and removal costs to be presented to the Fund "where full and adequate compensation is unavailable," presumably because of liability limitations or the insolvency of the responsible party. If the Fund pays a claim for removal costs and damages, the United States is subrogated under §1012(f) to all the rights the claimant has against the responsible party.

Several additional conditions apply to the payment of claims by the Fund. First, the removal costs and damages claimed must not have resulted from the gross negligence or willful misconduct of the claimant. Second, funds to implement plans to restore, rehabilitate, or replace natural resources must be incurred pursuant to a plan approved under §1006. The only exception is in emergencies to prevent irreversible losses, or to prevent or reduce continuing dangers to natural resources.

It seems likely that significant restrictions, based on the consistency language of the statute, will be placed on recovery of claims for private removal costs from the Fund. This has certainly been the experience under CERCLA. These restrictions, if imposed, would likely appear in the revised NCP.

Section 9509 of the Internal Revenue Code imposes additional limitations on payment of claims from the Fund, limitations that may become important if another spill like the *Valdez* occurs or if Congress limits appropriations under §6002 of the Act for budgeting reasons. Claims filed against the Fund can be paid only from the Fund, not from any other federal source. [64] Additionally, if the Fund has insufficient money to pay all claims, the order of filing determines which are paid. [65] *Thus, valid claims are paid in full in the order they are filed;* there is no pro rata reduction of all

63. Under §1013(b)(1), ELR STAT. OIL POLL. 008, claims may be presented first to the Fund in four cases: (1) where the President has advertised that the responsible parties have denied liability, or the source is a public vessel, or the source is unknown; (2) by the governor of a state for state removal costs; (3) by a U.S. claimant where the source of the discharge is a foreign offshore unit; or (4) by a responsible party under §1008 (i.e., one entitled to a defense to liability under §1003 or to a liability limitation under §1004). Where a liability limit is involved, only the excess paid beyond the liability limit is recoverable.

64. I.R.C. §9509(1), (2). Though the Fund has borrowing authority, it apparently cannot be compelled to borrow to pay claims.

65. *Id.* §9509(e)(3).

valid claims. This provision makes prompt filing of claims imperative.

States may obtain up to $250,000 from the Fund in emergencies without first presenting the claim to the responsible party. States are encouraged by §1012(d) to execute cooperative agreements with the federal government to facilitate such advance payments; otherwise, a request from the governor will be necessary.

Section 1012(h) provides for separate periods of limitations, which are not entirely consistent with those provided for litigation under §1017(f). For removal costs, litigation must be commenced within three years after the completion of the removal action. However, in presenting claims for removal costs to the Fund, the limitation is six years after the completion of the removal action. Presumably, this difference encourages the presentation of claims first to responsible parties, and to litigate such claims first rather than present them to the Fund. Nonetheless, if the Fund pays a claim that is more than three years old, its subrogation rights will be worth very little. The limitation period for damages claims is three years after the loss was discovered; for natural resource damages, the limitation period is three years after completion of the natural resources damage assessment. These periods are consistent with the limitations for litigation under the Act.

Federal Removal Authority, Civil Penalties, and Treble Damages

Two major criticisms of the handling of the *Exxon Valdez* disaster, and of other oil spill cleanup efforts, have been the unclear federal removal authority under the Clean Water Act and the slowness and weakness of federal response to inadequate private removal efforts. Penalties for violations of federal orders under §311 have also been unclear. The new statute increases federal authority and clarifies that substantial penalties can be imposed for the violation of orders to conduct removal actions.

Under §311(c), before its amendment by the Oil Pollution Act, the President was authorized to respond to discharges and threats of discharge of oil and hazardous substances; it also set out requirements for the NCP. Section 311(d) authorized the removal and destruction of vessels discharging oil or hazardous substances or posing a substantial threat of discharge. Section 311(e) authorized suit by the United States for injunctive relief to abate an imminent and substantial threat to the public health or welfare because of an actual or threatened discharge of oil or hazardous substances.

Section 4201 of the Oil Pollution Act replaces §311(c) and (d) of the Clean Water Act with a provision that combines language from both the House and Senate bills. Unlike the earlier version of §311(c)(1), which *authorized* the President to act, the new version *requires* his action to ensure "effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of discharge." Such action may include federal removal action, directing or monitoring state, local, or private removal actions, and the removal, and destruction, if necessary, of the vessel causing the discharge or threat of discharge. The new §311(c)(1) corresponds to the old §311(c)(1) and (d), but makes removal action mandatory. The new language might be the basis for citizen suits seeking an injunction mandamus to compel federal removal action.

The new §311(c)(2) makes the mandatory nature of removal action clear. The President "shall direct all federal, state and private actions to remove the discharge or to mitigate or prevent the threat of discharge" where the discharge or threat of it is a substantial threat to public health or welfare. To make such action more feasible, the government may take these actions without regard to any provision of law governing contracting procedures or employment of personnel by the federal government.

Section 311(c)(4) includes a new immunity provision for persons taking removal actions consistent with the NCP or under federal orders. The Conference Committee emphasized that this immunity is broader than that in the House bill. The House bill would have extended such immunity from damages only to those acting under federal order.

The new immunity does not extend to responsible parties, CERCLA response actions, personal injury or wrongful death, or gross negligence or willful misconduct. Similar to §119 of CERCLA, this provision immunizes response action contractors from strict liability under federal law for actions taken to clean up National Priority List sites.

New enforcement powers assure that federal orders to conduct removal actions are carried out, and that refusals to do so are severely punished. Section 4301 of the Oil Pollution Act amends §311(b) by adding elaborate administrative and civil penalty provisions.

Under the amended §311(b), any responsible party, who "without sufficient cause, fails to properly carry out removal of the discharge" under a federal order shall be subject to a civil penalty of up to $25,000 per day of violation or an amount up to three times the costs incurred by the Oil Spill Liability Trust Fund as a result of such failure. This language is very similar to that of §§106(b)(1) and 107(c)(3) of CERCLA. Presumably, EPA's administrative order guidance will be adapted to the new provision and CERCLA precedents used to interpret the new language.

Contingency Planning and SPCC Plans

Another criticism of the *Exxon Valdez* and other cleanups has been the uncoordinated, unrealistic, and overlapping nature of many oil spill contingency plans. According to the National Response Team Report about the *Valdez* disaster in March 1989, many problems that plagued the cleanup should have been apparent from drills, but if they were, no corrective actions were taken.

The new statute drastically revises contingency planning and readiness requirements from the national level to the individual vessel and facility level. Although §4202 of the new statute keeps §311(j)(1), it adds an extremely elaborate system of contingency planning, consisting of a national response unit (NRU), Coast Guard strike teams, Coast Guard district response groups, area committees, area contingency plans, and individual vessel and facility response plans. New §311(d) of the Clean Water Act contains the former §311(c)(2), concerning the NCP and adds several requirements, including the establishment of a fish and wildlife response plan, a worst-case discharge response plan, and a revised schedule identifying dispersants, other chemicals, and other spill-mitigating devices and substances. This latter requirement may prove critical to efforts

to use biological methods to respond to spills, as was done in the *Mega Borg* situation. [66] Unless such biological methods are approved under the NCP, efforts to use them may continue to face obstacles.

The NCP is to be amended to incorporate the necessary statutory changes by August 1991. If EPA's lengthy delays in promulgating amendments to the NCP under CERCLA are any indication, the Coast Guard or EPA, whichever is responsible for amending the NCP for oil, will have considerable difficulty in timely revising the plan. Unfortunately for those who must comply with it, the latter compliance deadlines are not delayed under the statute if the NCP is not revised on time.

The heart of the contingency planning requirements below the national level is §311(j) of the Clean Water Act, as newly revised by the Oil Pollution Act. Under the prior version of the Clean Water Act, §311(j)(1) provided in general terms for the development of local and regional oil and hazardous substance removal contingency plans. Additionally, §311(j)(1) provided for vessel and facility inspections and contingency planning requirements. Violations of these requirements could be punished by a fine of up to $5,000 per violation under §311(j)(2).

Under the amended §311(j)(2), the Coast Guard must establish the NRU in Elizabeth City, North Carolina (the site of a major Coast Guard air station). The NRU is to maintain a comprehensive, computerized inventory of oil spill removal resources, equipment, and personnel available worldwide and within areas designated for area contingency plans. The list is available to the public, so that the location of emergency equipment is known in time to be of help, as it was not in the *Valdez* situation.

The NRU will also coordinate both private and public personnel and equipment in responding to discharges or threats of them, and serve as a clearinghouse and repository for information and area contingency plans. The Conference Committee noted that both the House and Senate bills contemplated the active involvement of private response resources and personnel, and it cited the Petroleum Industry Response Organization—now known as the Marine Spill Response Organization (MSRO)—set up by a consortium of oil companies to respond to oil spills, as an example of organizations with which the NRU should work. Despite the heavy federal emphasis in the removal provisions, the private sector is still the primary cleanup resource. The conferees expect the federal government to avoid duplicating private personnel and equipment. Private concerns will have powerful financial incentives to avoid duplication by contracting with cooperative ventures such as MSRO.

In addition to the Coast Guard strike teams (formerly strike forces), §311(j)(3) establishes Coast Guard district response groups for each of the 10 Coast Guard districts in the United States. These response groups consist of Coast Guard personnel and equipment within each port in the district, any additional prepositioned equipment, and a district advisory staff. These groups are to review area contingency plans and to provide assistance in removal efforts when required by the federal on-scene coordinator.

Under §311(j)(4), the President shall designate areas for preparation of area contingency plans (ACPs). The President is to make such designations in February 1991, and to ensure that in such designations all navigable waters, adjoining shorelines, and the waters of the exclusive economic zone are subject to an ACP. The area committee has until February 1992 to prepare and submit the ACP for approval, and by August 1992, the Coast Guard shall review the ACPs and correct deficiencies.

Area committees, consisting of qualified federal, state, and local officials appointed to the task and working under the federal on-scene coordinator shall prepare the ACPs. In an effort to redress the failings at places like Prince William Sound, area plans must meet the following standards:

> (1) be adequate to remove a worst-case discharge;
> (2) describe areas of special environmental or economic importance (presumably, including important fishing grounds, fish hatcheries, and major beaches) especially vulnerable to damage from a discharge;
> (3) describe in detail the responsibilities of the governmental agencies and the vessel or facility owner or operator in responding to a discharge;
> (4) list available equipment and personnel, including firefighting equipment and dispersants;
> (5) have expedited procedures for approval of the use of dispersants (at Valdez, three critical days were lost at the beginning of the spill because of the confusion over how to obtain such approvals);
> (6) describe how the plan relates to the NCP, to other ACPs, and to facility and vessel plans (the *Valdez* plans overlapped, creating much confusion); and
> (7) be updated periodically.

The most wide-ranging requirement in the new statute is for vessel and facility response plans under new §311(j)(5). Although there have been requirements for spill prevention, control, and countermeasure (SPCC) plans at facilities since 1973, [67] the new requirements are far more elaborate and make compliance potentially far more expensive. New penalty provisions also make noncompliance more costly.

By August 1992, the Coast Guard or EPA must promulgate regulations governing tank vessel and facility response plans. By February 1993, these plans are to be prepared and submitted for approval. Facilities or vessels that do not submit a plan may not continue to handle, store, or transport oil after February 1993. Unless the plan is approved by February 1995, the vessel or facility may not handle, store, or transport oil.

The determination of tank vessels and offshore facilities subject to these requirements is clear. Onshore facilities must prepare plans:

> (1) if they handle, transport, or store oil or hazardous substances; and
> (2) if the onshore facility, "because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone." [68]

66. *See supra* note 2.

67. 40 C.F.R. pt. 112 (1989) (promulgated by 38 Fed. Reg. 34165 (Dec. 11, 1973)).

68. CWA, §311(j)(5)(B), ELR STAT. FWPCA 039.

Under this definition, almost any onshore facility that could discharge oil to a storm drain or storm sewer may need to prepare a response plan. The broad Clean Water Act definition of navigable waters includes intermittent streams and dry washes in the western part of the country that contain water only a few times a year.

For vessels and facilities, including hazardous substance storage facilities, that meet this requirement, the statute requires that the response plan meet the following criteria:

> (1) be consistent with the NCP and ACP;
> (2) identify the individual at the facility with full authority to implement the plan and require immediate communication between that individual and appropriate federal and state officials and cleanup contractors;
> (3) identify and assure by contract (or other means acceptable under the regulation) the availability of private personnel and equipment necessary to remove the worst-case discharge, and to mitigate and prevent discharges (or substantial threats of discharge, including fires); and
> (4) describe the training, equipment testing, periodic unannounced drills, and response actions to be carried out to prevent or mitigate discharges or substantial threats of discharge.

Facilities must update these plans periodically to reflect changes in operations and lessons learned from drills and tests.

The Conference Report suggests that the Coast Guard or EPA should strongly consider the practicality of these requirements in reviewing SPCC plans. The statute requires that equipment and contract personnel be available to the "maximum extent practicable," language the Conference Committee interprets to require consideration of technological limits on oil spill removal, and the practical and technical limits of the response capabilities of individual owners and operators. Use of cooperative organizations for spill response may be the most practical alternative for many operations.

The statutory language indicates that all onshore facilities will be required to prepare and submit response plans. The Conference Report, however, takes a less inclusive approach. It suggests that the Coast Guard (or EPA) can exempt classes of facilities at least from governmental review if not from submission so that the approval system is not overloaded. This flexibility will be essential to timely compliance with the statute. Unless most small onshore facilities are exempted, it is unlikely that the Coast Guard or EPA will have the resources to review and approve all the plans within the two-year deadline the statute imposes.

During the pendency of an application, an onshore facility may operate, provided it assures by contract that it has adequate cleanup resources for a worst-case spill, and provided it operates in accordance with the plan, including its training, testing, and drill requirements. This interim status will last no longer than two years; [69] after that time, facilities must shut down rather than operate without an approved plan.

69. This "interim status" differs from "interim status" under the 1976 version of RCRA, where there was no time limit on how long a facility could remain in interim status.

The response plan requirements overlap substantially with similar contingency plan and reporting requirements under the Emergency Planning and Community Right-to-Know Act (SARA Title III), [70] RCRA, and CERCLA. The Conference Report makes clear that the new contingency plan requirements do not supersede or supplant requirements under these other statutes, but rather that overlapping statutory requirements should be carefully harmonized with them to avoid confusion in an emergency.

Penalties

Before passage of the Oil Pollution Act, the penalties available to the federal government under §311 to punish unpermitted discharges of oil and hazardous substances had not been significantly amended since the early 1970s. Given the damages inflicted by the *Valdez* spill, the available penalties looked too weak, especially in comparison with other portions of the Clean Water Act and other environmental statutes.

Administrative Penalties

The new administrative penalty mechanism in §311(b)(6) is nearly identical to that in §309(g) of the Clean Water Act, which allows EPA to seek administrative penalties of up to $10,000 per violation. For Class I penalties, the maximum penalty is $25,000, and proceedings are informal. For Class II penalties, the alleged violator has the right to a hearing before an administrative law judge, and the maximum penalty is $125,000. The public may participate in a Class II penalty proceeding, as it can under §309(g).

Administrative penalties may be assessed against the owner, operator, or person in charge of any facility or vessel from which oil or a hazardous substance is discharged. Additionally, administrative penalties may be assessed for violations of SPCC regulations under §311(j).

Civil Penalties

Section 311(b)(7) includes a new civil penalty provision that makes any owner, operator, or person in charge of a facility from which oil or hazardous substances are discharged in violation of the Clean Water Act subject to a civil penalty. The penalty is either: (1) $25,000 per day of such discharge; or (2) $1,000 per barrel of oil discharged, or per unit of the reportable quantity of the hazardous substance discharged.

Under the latter formulation, if 1,000 barrels of oil are spilled, a penalty of up to $1 million could be assessed. Likewise, for a hazardous substance for which the reportable quantity is 100 pounds, a spill of 10,000 pounds would subject the spiller to a civil penalty of up to $100,000. This volumetric ranking for penalties drastically increases the potential exposure of those causing or suffering spills. Increased exposure places a premium on the proper handling of oil and hazardous substances. It may also lead to problems of calculation similar to those courts are now confronting in sentencing drug offenders, where the weight of the controlled substance involved is often heavily disputed.

70. 42 U.S.C. §§11001-11050, ELR STAT. EPCRA 001-012.

Where a discharge occurs because of gross negligence or willful misconduct, the penalty amount is increased to $3,000 per barrel of oil or unit of reportable quantity spilled. While there is a *lower* limit of $100,000 on such penalties, the upper limit is open-ended, being based on $3,000 times the number of barrels or units of reportable quantity. A person's exposure in such case could move rapidly into the million-dollar range for a spill of less than 350 barrels of oil, or a lesser quantity of many hazardous substances.

For a failure to properly conduct a removal action ordered under the Oil Pollution Act or Clean Water Act, or for a failure to comply with such an order, the court may assess a civil penalty of up to $25,000 per day. Alternatively, treble damages may be collected. For a failure to comply with SPCC and other regulations under §311(j), the court may now assess a civil penalty of up to $25,000 per day.

These civil penalties conform §311 to other civil and administrative penalties available under §309 of the Clean Water Act for other violations of the Act. The case law and procedural rules developed under §309 of the Clean Water Act will largely govern proceedings under the new provisions.

A civil penalty of up to $25,000 per day is also provided for violations of the financial responsibility regulations under the Oil Pollution Act. These penalties may be assessed by the administrative agency, and unlike the other administrative penalties, they have no upper limit. Additionally, for violations of the financial responsibility regulations, the government is authorized to seek an injunction to terminate the violator's operations.

Criminal Penalties

Severe criminal penalties are available to punish §311 violators. This change was accomplished simply by amending §309(c) to make criminal penalties of the Clean Water Act apply to discharges in violation of §311(b)(3). For negligent violations, penalties are a $25,000 fine and one year of imprisonment. For knowing violations, the fine is $50,000 and a term of imprisonment not to exceed three years. For "knowing endangerment," a violation that places another person in imminent danger of death or serious bodily injury, the fine is $250,000 for an individual, $1 million for an organization, and a term of imprisonment of not more than 15 years. Each day of a discharge is a separate offense; penalties double for repeat offenses.

These criminal penalties may create difficult issues for prosecutors under the self-incrimination provisions of the Fifth Amendment. Under §311(b)(5), self-reporting of releases is mandatory, and such notification may not be used in any prosecution against the person reporting the spill except in a prosecution for false statement or perjury. This provision has been amended to apply only to natural persons, and to strike the statutory requirement that information obtained by exploitation of the notice not be used in a prosecution against a person making the notification. Because corporations, however, have no Fifth Amendment right against self-incrimination, this provision appears to extend its protection no further than already required by the Fifth Amendment. Depending on the particular facts, and the subsequent developments of case law under the Fifth Amendment, this statutory language may not go as far as the Fifth Amendment requires, especially with respect to information developed by exploring the notification.

Until the 1990 amendments, the only criminal charge that could be brought for discharges to navigable waters was for discharging without a permit. The amendments give prosecutors much more to work with, and raise the stakes in criminal proceedings. The combination of mandatory self-reporting for persons causing a spill and the possibility that such reports may lead to criminal prosecutions is likely to result in new case law about the scope of the Fifth Amendment privilege against compelled testimony and about the scope of the statutory counterpart in §311(b)(5). Moreover, the prospect of criminal prosecution for negligent discharges of oil will place a premium on diligent training and operations in the oil industry.

Vessel Personnel, Equipment, and Construction Standards

The impact of the *Exxon Valdez* disaster is reflected throughout the Oil Pollution Act, but nowhere more clearly than in its amendments to the navigation laws. Unlike Title I of the Act (which is a free-standing statute modeled largely on CERCLA and §311 of the Clean Water Act) and unlike the removal provisions, contingency planning, and penalty provisions (which amend §311 of the Clean Water Act), the vessel manning, equipment, and construction standards are imposed through amendments to numerous provisions of the navigation laws in Title 46 of the United States Code.

Personnel Provisions

The personnel provisions largely reflect the public's perceptions that alcohol problems, coupled with chronic understaffing on tankers, contributed to the *Exxon Valdez* disaster. Consequently, §§4101 through 4104 change the requirements for issuing and revoking licenses and certificates for merchant mariners in order to make information about an applicant's alcohol and drug problems available to the licensing authorities. Thus, §4101 amends 46 U.S.C. §§7101 and 7302 to require that an applicant for a license, if applicable, make available any information about drunk driving from the National Drivers Registry and about prior criminal records; the applicant must also submit to drug and alcohol testing. Section 4102 amends several provisions to provide for a five-year term (instead of an indefinite term) for licenses and certificates. These changes will require periodic license renewals, retesting of licenses for drug and alcohol abuse, and rechecking for criminal records and drunk driving convictions.

Section 4103 makes it easier for the Secretary of Transportation (i.e., the Coast Guard) to suspend, revoke, and terminate licenses and certificates for drug and alcohol abuse, negligence, misconduct, or incompetence. These include violations of safety and operating standards. Section 4105 allows the licensing authorities access to the National Driver Register for the purpose of reviewing applicants' driving records.

Section 4104 amends 46 U.S.C. §8101 to provide a means whereby a vessel's two most senior licensed officers may relieve the captain if he is operating the vessel under the influence of drugs or alcohol. This relief requires prompt

reporting to the Coast Guard of the incident and an appropriate entry in the ship's log.

In addition to these changes to address personnel integrity and competence, the statute requires that standards be set for vessel manning, for both U.S. and foreign flag vessels. Section 4114 addresses U.S. flag vessels. It requires that rules be promulgated that define the conditions under which, and waters in which, vessels may operate with the autopilot engaged or engine room unattended. One of the issues in the *Valdez* case was the use of the autopilot on the bridge, and its attendance by a crew member who was apparently not properly licensed for his duty.

Additionally, §4114 amends 46 U.S.C. §8104 by adding a new subsection (r), which provides:

> On a tanker, a licensed individual or seaman may not be permitted to work more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period, except in an emergency or drill. In this subsection, "work" includes any administrative duties associated with the vessel, whether performed on board the vessel or onshore.

Another claim advanced in the debates over the Oil Pollution Act was that tanker companies had steadily reduced the number of crew on tankers, and had encouraged or required crew members to work too many hours of overtime, leading to an exhausted crew and avoidable mistakes.

With respect to the overall number of the crew on a tanker, §4114 amends 46 U.S.C. §8101, the vessel complement provision of the navigation title, which requires that the Coast Guard set the complement of a vessel at a level necessary for safe operation. A special requirement for tanker complements now requires that in setting the tank vessel complement, the Coast Guard "shall consider the navigation, cargo handling, and maintenance functions of that vessel for protection of life, property, and the environment." Additionally, a new training requirement is imposed in 46 U.S.C. §9101 for instruction in vessel maintenance functions.

These changes will likely result in better trained, better rested, and unimpaired crews operating U.S. tank vessels. These changes will also impose costs on the maritime industry, which Congress views as acceptable but which will further increase the disparity in operating costs between U.S. and foreign flag vessels.

Although U.S. flag vessels handle the shipment of Alaskan oil and the coastal trade in petroleum products as a result of the Jones Act,[71] most crude oil and most refined petroleum products imported into the United States are carried in foreign flag vessels. Section 4106 amends 46 U.S.C. §9101 to require the Coast Guard to evaluate the vessel manning, training, qualification, and watchkeeping requirements of foreign countries that license tankers operating in U.S. waters or at a port or place subject to U.S. jurisdiction. These evaluations are to take place periodically, or whenever a vessel casualty involving a vessel flagged by that foreign country occurs. The purpose of the evaluations is to determine if the foreign country's standards for licensing and certifying personnel are at least the equivalent of U.S. standards, and that those standards are being enforced.

If it is determined that the standards are not equivalent to U.S. standards or are not being enforced, vessels flagged by that foreign country will be prohibited from entering U.S. waters. Conditional entry of such vessels may be permitted after that time, provided the vessel is shown to be safe and not a threat to the environment, or provided such entry is necessary for the safety of the vessel or individuals on the vessel.

Section 4106 amends 46 U.S.C. §6101(a) to require that both U.S. and foreign flag tank vessels report marine casualties causing significant harm to the environment. This applies to foreign vessels suffering a casualty in U.S. waters or in the exclusive economic zone.

Vessel Equipment and Construction Standards

One of the most debated aspects of the Oil Pollution Act was the need for and effectiveness of tanker double hulls in preventing or reducing oil spills from groundings, collisions, and other vessel casualties. The proponents of double hulls contended that if the *Exxon Valdez* had had a double hull instead of protectively located ballast tanks, far less oil would have been released. Opponents contended that a double hull would have increased the chances that the *Valdez* would have sunk, losing all of its cargo instead of the 20 percent it did.

In addition to arguments about the efficacy of the double hulls in vessel accidents, the dispute concerned whether and how these vessel standards would mesh with international tanker safety and design standards. Prior efforts to mandate double hulls under the Port and Tanker Safety Act of 1978[72] resulted in negotiation by the United States of a variety of new tanker safety standards under international conventions, including the protective placement of segregated ballast tanks, but not double hull requirements in those agreements.

Efforts in the Senate to mandate a double hull requirement for all tankers lost quite narrowly. The House version contained a double hull provision to be phased in over 15 years. Both versions required that newly constructed tankers have double hulls.

The final legislation contains a complicated compromise provision in §4115: all newly constructed tank vessels must have double hulls; existing single hull tankers must be phased out beginning in 1995; and by 2010, all vessels over 5,000 gross tons with single hulls will be prohibited from operating until they are converted to double hulls.

Newly built tank vessels of less than 5,000 gross tons are not required to have double hulls if they have a double containment system that the Secretary determines is equally safe. By 2015, all vessels under 5,000 gross tons must be equipped with a double hull or equally effective double containment system.

The most significant exception to the double hull requirement is for vessels unloading oil in bulk at a deepwater port or in an approved lightering zone, which must be more than 60 miles from shore. The existing requirements governing lightering operations (i.e., the offshore unloading of crude oil from a large ocean-going tanker to a series of smaller, coastwise tankers) were tightened so that the delivering and receiving vessels must demonstrate financial

71. 46 U.S.C. §883.

72. 33 U.S.C. §§1221-1232.

responsibility, have a proper SPCC plan and equipment under §311(j) of the Clean Water Act, and after 2015, operate in compliance with the construction standards. As a practical matter, the receiving vessel will have to comply earlier with construction standards under other provisions in order to deliver the oil to onshore ports.

In addition to these tanker construction standards, §§4109 and 4110 impose two other equipment standards on vessels. Under §4109, the Coast Guard will issue standards for the minimum plating thickness of tank vessels; vessels more than 30 years old are to be subject to periodic gauging of plate thickness. Under §4110, by August 1991, regulations must establish minimum standards for overfill warning, oil tank level, and oil pressure monitoring devices, and both U.S. flag vessels and foreign vessels calling to U.S. ports or working in the exclusive economic zone shall install these devices. The application of the standards to foreign vessels is limited under the statute by the requirement that the provisions be consistent with general principles of international law. In practice, these standards are not likely to require extremely costly devices for use on foreign vessels unless international standards also require them.

In addition to these equipment standards, §4116 imposes several operating requirements concerning the use of pilots in Prince William Sound and Puget Sound, the use of two escort vessels in Puget Sound, and that in certain waters (to be defined by regulation) two persons (i.e., the captain and a pilot) are required to be on the bridge to navigate the vessel. Section 4118 requires additional regulations to assure that vessels are properly equipped with radio equipment to receive marine safety warnings and to communicate with the Coast Guard.

Sections 4111 to 4113, and 4117 require studies to be conducted on existing tanker navigation safety standards, modifying dredges for use in the removal of discharges, the use of liners to prevent leaking at onshore facilities, and the feasibility of a maritime oil pollution prevention program.

State and International Standards

The Oil Pollution Act is remarkable for what it does not say about state and international standards. The primary political issues with respect to state law and international standards were whether federal standards would preempt inconsistent state law and whether the United States would enter into an international convention that would supersede both federal law and inconsistent state law.

The House bill had provided statutory authority to implement two 1984 international agreements—the International Convention on Civil Liability for Oil Pollution Damage, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage—and implementation of these agreements was subject to the Senate's ratifying the conventions. The Senate, however, was opposed to the House provisions because the conventions would have preempted state law and would have required less stringent measures to prevent spills than would have been the case under the Oil Pollution Act. The Senate was adamant on these points and the resulting compromise in §3001 merely expressed the sense of Congress that participation in an international regime for oil spill prevention, cleanup, and compensation would serve the best interests of the United States.

Since 1975, the preemption issue had been the other primary obstacle to passing comprehensive oil spill legislation. Predictably, the Senate was against the preemption of state law and the House was for it. The proponents of preemption argued that uniformity in federal law in the transportation sector was extremely important, especially in maritime and international matters such as these. No useful purpose was served by such duplicative state laws, they argued, and their existence would confuse and slow cleanup and compensation. [73]

Opponents of preemption argued that the 24 states that have oil pollution liability and compensation laws had not hindered cleanup or compensation. Moreover, victims of oil spills needed some way to get beyond the limits in federal law to be compensated for their damages. [74]

In the 101st Congress, the Senate again refused to preempt state law. In a floor vote, the House reversed its position from prior years, and agreed not to preempt state law, although the committee versions of the bill would have provided for preemption of state law.

California has already enacted more stringent laws; other states, as they seek to raise money to address oil spill cleanup problems in state waters, are likely to do so too.

The savings provision in §6001 of the new act makes clear that remedies under admiralty and maritime law, and the admiralty jurisdiction of the U.S. district courts, remain unchanged. Thus, another body of law—admiralty—is also available to remedy damage claims resulting from oil spill damages.

Regional and Miscellaneous Provisions

The Oil Pollution Act contains many provisions addressing regional problems. The most important of these are in Titles V and VIII, concerning Prince William Sound and amendments to TAPAA. Additionally, there are two unrelated provisions barring oil and gas drilling off the Outer Banks of North Carolina for a period of time, [75] and the unitization of certain offshore drilling off Louisiana's shores. [76] Title VII of the statute establishes an oil pollution research and development program.

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73. Proponents of preemption cited *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 8 ELR 20255 (1978), in which the Court held that the State of Washington could not impose more stringent navigation requirements (state-licensed pilots, size restrictions, tug escorts) than were permitted under the federal Port and Waterway Safety Act of 1972 and regulations issued under it. The Court held that requirements for state-licensed pilots were partially preempted, that design and equipment standards were entirely preempted, but that in the absence of federal regulations, tug escort provisions were not preempted. Some of the state provisions defended there are now written into the Oil Pollution Act's provisions for Puget Sound.

74. The opponents of preemption cited *Askew v. American Waterway Operators, Inc.*, 411 U.S. 325, 3 ELR 20632 (1973), in which the Court held that the Federal Water Quality Act of 1970 did not preempt Florida's Oil Spill Prevention and Pollution Control Act. The Florida statute imposed financial responsibility requirements on terminals and vessels, and required that containment gear and other equipment be maintained by ships and terminals.

75. §6003, ELR STAT. OIL POLL. 027.

76. §6004, ELR STAT. OIL POLL. 027.

Alaskan Provisions

Title V of the statute contains seven sections pertaining to tanker operations in Prince William Sound. These provisions:

(1) establish and fund the Prince William Sound Oil Spill Recovery Institute to carry out research and programs relating to the *Exxon Valdez* spill;[77]

(2) establish environmental monitoring and oversight programs for oil terminal and tanker operations in Prince William Sound;[78]

(3) provide for the installation and operation of an automated navigational light on Bligh Reef in the Sound, where the *Exxon Valdez* ran aground;[79]

(4) require the Coast Guard to upgrade the existing vessel traffic service system at the Port of Valdez;[80]

(5) impose additional spill response plan requirements on vessels and terminals operating in the Sound, beyond the requirements of §311(j) of the Clean Water Act;[81]

(6) prohibit the *Exxon Valdez* and other vessels that have spilled more than one million gallons of oil into the marine environment after March 22, 1989, from operating in the Sound.[82]

Title VIII amends TAPAA to bring its liability and other provisions into conformity with the Oil Pollution Act. The Trans-Alaska Pipeline System (TAPS) is exempted from the Oil Pollution Act's liability scheme. Instead, an amendment to §204(a)(2) of TAPAA raises the amount of damages from $50 million to $350 million, for which holders of the pipeline right-of-way may be held strictly liable. Additional amendments make clear that the TAPAA liability standards apply until TAPS oil is loaded aboard a vessel, while any subsequent discharge from the vessel is governed by the Oil Pollution Act.

The TAPS Liability Fund under §204(c) is repealed, and once enough money is reserved to pay existing claims, the remaining money is to be paid into the Oil Spill Liability Trust Fund. Section 8103 requires a comprehensive review of TAPS for compliance with applicable laws.

Section 8202 makes substantial civil penalty changes in TAPAA. It adds a new §207 to TAPAA, which allows the Department of the Interior to assess civil penalties for oil discharges in transit to TAPS or through it. Not only are the persons responsible for the pipeline responsible for penalties arising from such spills, but so are the owners of the oil spilled. This liability is joint, several, and strict. The penalty amount, like that under the amended §311 of the Clean Water Act, is $1,000 per barrel of oil discharged. Limited defenses like those found in §311 are prescribed: if the discharge resulted solely from an act of God, an act of war, or an act of a third party beyond the control of liable persons. Civil penalties may not be assessed under both this statute and the Clean Water Act for the same discharge.

Offshore Drilling Provisions

There are a number of provisions concerning offshore drilling. Section 8201 clarifies the Department of the Interior's authority to immediately assess civil penalties under §24(c) of OCSLA for any violation presenting a serious threat to health, safety, or the environment. The penalty amount is increased to $20,000, to be adjusted for inflation every three years.

Section 6003 adds provisions concerning oil and gas drilling off the Outer Banks of North Carolina. The presence of this provision in the statute results primarily because Rep. Walter Jones, Chairman of the House Merchant Marine and Fisheries Committee, represents the North Carolina district containing the Outer Banks.

This provision embodies portions of H.R. 3861, the Outer Banks Protection Act, in order to address proposals made by Mobil Oil and others to drill an exploratory well 40 miles off of Cape Hatteras, North Carolina. The Secretary of the Interior is prohibited from conducting a lease sale, issuing any new leases, approving any new exploration plan or development or production plan, approving any application for a permit to drill, or permitting any drilling for oil or gas under OCSLA off North Carolina.

The prohibitions remain in force until the later of September 1991 or 45 days of continuous session of Congress after submission of a written report from the Secretary about such drilling proposals. The Secretary, in the Secretary's report, must certify that the environmental information available (including certain information specified under §6003(d)) is sufficient to carry out his responsibilities under OCSLA. The Secretary must explain any differences between his report and the findings and recommendations of the Environmental Sciences Review Board, an independent task force established under §6003(e).

The Environmental Sciences Review Board is established to assess the adequacy of available oceanographic, ecological, and socioeconomic information for the Secretary to carry out his duties under OCSLA. If the Board finds that the information is insufficient, it recommends what additional information is needed. The Board is likely to represent a strong North Carolina perspective, since its three members—all scientists—are chosen in part by the governor of North Carolina.

President Bush singled out this provision as an unfortunate addition to the statute when he signed the bill on August 18, 1990, about two weeks after the Iraqi invasion of Kuwait.

Section 6004 affects offshore drilling off Louisiana. Added on the Senate floor by the Louisiana members, the provision governs drilling and production already underway rather than banning new exploration. It amends §5 of OCSLA to prevent, through cooperative development of an area, harmful effects from uncoordinated (and excessively fast) development of a common hydrocarbon-bearing area that straddles the boundary between state and federal control. The division between state and federal responsibility created a situation where there were strong short-term incentives to develop and produce the field in a way that did not maximize the recovery of oil and gas.

77. §5001, ELR STAT. OIL POLL. 023.

78. §5002, ELR STAT. OIL POLL. 023.

79. §5003, ELR STAT. OIL POLL. 026.

80. §5004, ELR STAT. OIL POLL. 026.

81. §5005, ELR STAT. OIL POLL. 026.

82. §5007, ELR STAT. OIL POLL. 026. These provisions are to be funded pursuant to the authorization in §5006, ELR STAT. OIL POLL. 026.

Research and Development Provisions

Title VII of the Act establishes a comprehensive interagency oil pollution research and development program. Section 7001(a) establishes an interagency coordinating committee to coordinate the federal research and development program for oil pollution prevention, mitigation, cleanup, and effects. The committee comprises members from the Departments of the Interior, Energy, Commerce, Defense, and Transportation, as well as EPA, the National Air and Space Administration, and the Federal Emergency Management Agency.

The interagency committee is to devise a comprehensive plan by February 1991 to determine each agency's role, to assess the current state of knowledge as well as significant research gaps (especially in cleanup technology), and to establish research priorities. The resulting program is to (1) help develop and evaluate innovative oil pollution prevention and cleanup technology, including biological methods of cleanup; (2) improve monitoring, evaluation, and modeling of the short- and long-term effects of oil spills; and (3) improve and demonstrate better oil spill response methods, including demonstration programs in the Ports of Los Angeles, New York, and New Orleans.

The bill also authorizes other research efforts. Annual funding of up to $27,250,000 is authorized from the Oil Spill Liability Trust Fund, although such sums must be appropriated through the normal appropriations process.

Conclusion

The Oil Pollution Act of 1990 is a comprehensive and thorough effort to resolve the difficult political issues that had hobbled effective oil spill prevention and cleanup efforts under the previous uncoordinated legal regime. Its ambitious goals will require a substantial increase in resources expended by the federal government and the regulated community. It remains to be seen whether these efforts will actually improve water quality and reduce the amount of oil spilled, but the Oil Pollution Act provides a solid legal foundation from which to accomplish those goals.