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Liability for Oil Tanker Spills

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COMMENT

LIABILITY FOR OIL TANKER SPILLS

by Amy McKaig

I. INTRODUCTION

THE *Amoco Cadiz*,[1] the *Exxon Valdez*[2] and the near disaster of the *Mega Borg*[3] remind us of the dangers inherent in the transportation of crude oil.[4] Even domestic oil often is found in remote areas and must be shipped in order to be processed and used.[5] Although large-scale oil spills such as the eleven million gallon *Exxon Valdez* and the near spill of the thirty-three million gallons of the *Mega Borg* grab headlines, a vast amount of oil is spilled a little bit at a time. For example, between January and August of 1990, one million gallons of oil from small spills were released into the waters of New Jersey alone.[6]

Given no drastic change in the United States' economy or populace, the large scale shipping of crude oil and its attendant risks will continue at its current level.[7] So, without a way to avoid the danger, our focus turns to the

1. On March 16, 1978, the *M/V Amoco Cadiz* grounded off the Brittany coast of France. The resulting spill of 68 million gallons impacted approximately 130 miles of French coastline. The slick was 18 miles wide and 80 miles long. Bartlett, *In re Oil Spill by the Amoco Cadiz-Choice of Law and a Pierced Corporate Veil Defeat the 1969 Civil Liability Convention*, 10 THE MAR. LAW. 1 (1985); Edelman, *The Oil Pollution Act of 1990*, N.Y.L.J., September 7, 1990, at 31, col. 1.

2. On March 24, 1989, the *Exxon Valdez* crashed into Bligh Reef in Prince William Sound, Alaska. The spill of eleven million gallons of crude oil coated more than 1,000 miles of Alaskan coastline. The spill was the worst in United States history. Feder, *Exxon Valdez's Sea of Litigation*, N.Y. Times, November 19, 1989, at F1, col. 3. Rosen, *Alaskans Cold to Judge's Proposal for Spill Payment*, THE REUTER BUS. REP., September 17, 1990, at 1.

3. In June 1990 an explosion aboard the *Mega Borg* supertanker caused a fire that burned for more than a week in Galveston Bay. Approximately four million gallons of oil escaped, causing a slick 30 miles long and 10 miles across in some spots. Fortunately, most of the oil burned off. The potential harm was incredible since the *Mega Borg* was carrying a total of 38 million gallons at the time of the explosion. Solomon & Machalara, *Troubled Waters: Oil Tankers' Safety is Assailed as Mishaps Average Four a Week*, Wall St. J., June 10, 1990, at A1, col. 1.

4. "*Exxon Valdez*. Kill Van Kull [shipping channel]. *Mega Borg*. The names of oil spills are beginning to carry the kind of emotional charge usually stored in the names of infamous military defeats: Dunkirk, Pearl Harbor, Tet. One mention and most listeners feel a rush of anger, humiliation, and disappointment. The oil industry in the past 15 months is awash with such defeats." Nulty, *What We Should Do to Stop Spills*, FORTUNE, July 16, 1990, at 46.

5. Halkias, *Major Oil Companies Hesitate to follow Shell Part Decision*, Dallas Morning News, June 17, 1990 at 28A, col. 1; Nulty, *supra* note 4, at 46.

6. 136 CONG. REC. S11,544 (daily ed. Aug. 2, 1990) (statement of Sen. Lautenberg).

7. Stigler, *What an Oil Spill is Worth*, Wall St. J., April 17, 1990, at A12, col. 2.

question of whether the current environmental laws adequately deal with oil spills and their resulting liability. The United States Congress recently addressed that question by passing the Oil Pollution Act of 1990[8] (Act) dealing with the overall problems of oil spills.

Generally, this Comment will: (1) examine the historical background of the Act; (2) discuss the problems that existed under the old system; (3) outline the provisions of the Act; and (4) discuss whether or not the Act solves the past problems, introduces new ones or both. All discussions in this Comment are limited to spills in United States territorial waters.

II. HISTORICAL BACKGROUND

The history behind the Act will be discussed in two sections — one covering the historical development of the law, and the other discussing the civil liabilities of oil spills. The second section will be divided further into four categories: direct cleanup costs of a spill, damages to natural resources, recovery of private citizen's damages, and a miscellaneous category including a discussion of the various criminal penalties imposed on the party responsible for the spill.

A. Historical Development

Prior to 1967, liability for maritime accidents in United States waters was grounded mainly in common law theories of tort-based negligence.[9] The Limitation of Liability Act of 1851,[10] however, applied to all maritime tort actions when the tort occurred without the shipowner's privity or knowledge.[11] This Act limited an owner's liability to the value of the vessel and freight aboard.[12] Since these amounts often were minimal,[13] an owner's liability might be very small.[14] Although the Limitation of Liability Act is quite old, courts have relied upon it in deciding cases as recently as 1989.[15]

Before any legislation dealing specifically with oil spill liability existed, courts used both the Refuse Act of 1899[16] and the Intervention on the High

8. Oil Pollution Act of 1990, Pub. L. No. 101-380, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 484 (enacted August 18, 1990) [hereinafter Oil Pollution Act].

9. Note, *Strict Liability Under Section 311 of the Clean Water Act: Cleaning Up Respondeat Superior and Negligence*, 10 COLUM. J. ENVTL. L. 149, 159 (1985).

10. 46 U.S.C. §§ 181-189 (1988).

11. *Id.* § 183(a).

12. *Id.* § 183(a).

13. *See* Note, *supra* note 9.

14. *See id.*

15. Esta Later Charters, Inc. v. Ignacio, 875 F.2d 234, 239 (9th Cir. 1989) (mere technicality of procedural timing prevented its application in a personal injury case resulting from a ship explosion). The judge commented "Misshapen from the start, the subject of later incrustations, arthritic with age, the limitation Act has 'provided the setting for judicial lawmaking seldom equalled.' " *Id.* at 239 (quoting Eyer, *Shipowners' Limitation of Liability—New Directions for an Old Doctrine*, 16 STAN. L. REV. 370, 374 (1964)).

16. 33 U.S.C. § 407 (1988).

Seas Act[17] in providing remedies to oil spill victims.[18] These acts are generally considered outmoded and arguably have been preempted by more recent statutes.[19]

Congress enacted the Oil Pollution Act of 1924[20] in an attempt to recover the United States government's reasonable cleanup costs when a spill resulted from the discharger's willful misconduct or gross negligence.[21] The Oil Pollution Act of 1924 enjoyed only limited success; Congress repealed the legislation in 1970.[22]

In 1967, the *Torrey Canyon* spill in the English Channel shook the globe.[23] The largest oil spill to date,[24] *Torrey Canyon* focused public attention on the enormous risks oil spills posed to the environment[25] and consequently provided the catalyst for the development of oil spill legislation and agreements world-wide.[26]

Unfortunately, rather than a coherent system, the resulting United States legislation constitutes a mixed bag of statutes and case law.[27] In 1985, the president of the Maritime Law Association of the United States reported to Congress that "the present patchwork of federal and state laws is unwieldy, inconsistent, inefficient and unnecessarily expensive."[28] The following discussion presents the various liabilities surrounding oil tanker spills.

B. Direct Cleanup Costs

Although both statutes and case law use the phrase "direct cleanup costs"

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17. 33 U.S.C. § 1471 (1988).

18. Bagwell, *Liability under United States Law for Spills of Oil or Chemicals from Vessels*, LLOYD'S MAR. & COM. L.Q. 496, 517-18 (1987).

19. *Id.*

20. Oil Pollution Act of 1924, Pub. L. No. 68-238, ch. 316, §§ 2-9, 43 Stat. 604-06 (1924), *as amended by* Clean Water Restoration Act of 1966, Pub. L. No. 89-753, § 211(a), 1966 U.S. CODE CONG. & ADMIN. NEWS (80 Stat.) 1246, 1252-53, *repealed by* Water and Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, Title I, § 108, 1970 U.S. CODE CONG. & ADMIN. NEWS (84 Stat.) 91,113.

21. Clean Water Restoration Act of 1966, Pub. L. No. 89-753, § 211(a) (80 Stat.) 1246, 1252-53.

22. Repealed by Water and Environmental Quality Improvement Act of 1970, Pub. L. No. 91-224, Title I, § 108, U.S. CODE CONG. & ADMIN. NEWS (84 Stat.) 91,113.

23. The *Torrey Canyon* ran aground on March 18, 1967, 15 miles off the coast of England, on her maiden voyage. The result of the approximately 120,000 tons of crude oil spilled was widespread pollution of the coasts of both France and England. The fishing industries of both countries suffered enormous damages. Although the British government estimated it spent at least two million pounds in dealing with the oil, the British and French governments accepted three million pounds as full and final settlement of all claims, including private claims which they had paid. H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 27-1, at 693-94 (3d ed. 1979); Buglass, *The Big Oil Spill: Potential Liabilities v. Available Insurance*, DYNAMIC ASPECTS OF MARINE AND OFFSHORE LIABILITIES, at III-2 (1978).

24. H. BAER, *supra* note 23, at 694.

25. *Id.*

26. Buglass, *supra* note 23, at III-2.

27. Bagwell, *supra* note 18, at 496.

28. Letter from Graydon S. Staring, President, The Maritime Law Association of the United States, to Hon. Gerry E. Stubbs, Chairman, Subcommittee on Coast Guard and Navigation, Committee on Merchant Marine and Fisheries, U.S. House of Representatives, 31 May 31, 1985, *cited in* Bagwell, *supra* note 18, at 496.

quite often[29] its exact definition is unclear. Generally, the phrase refers to the actual cost of containing and removing the spilled oil.[30] Such costs may include the use of containment booms, oil scrapers, fire control equipment, oil eating microbes, and the personnel to handle these operations.[31] So far, the phrase does not include any damage to natural resources such as fish, wildlife, and public shorelands.[32]

1. Direct Cleanup Costs—Federal Statutes

The United States statutory system provides a patchwork of laws applicable to marine pollution.[33] Several federal statutes deal specifically with oil spills,[34] while others are more general in scope.[35] One act focuses exclusively on the Alaskan pipeline.[36]

Congress first enacted the Federal Water Pollution Control Act[37] (FWPCA) in 1948.[38] The Federal Water Quality Improvement Act legislation of 1970 greatly amended the FWPCA.[39] In 1977, Congress amended FWPCA yet again, and the legislation became known as the Clean Water Act (CWA).[40]

Simply stated, the CWA prohibits the discharge of oil or hazardous substances in or on navigable waters.[41] The amount of oil the CWA covers is "such quantities as may be harmful."[42] The meaning of harmful rests on the sheen test, defined as a "film or sheen upon or discoloration of the surface of the water."[43] The presence of a sheen establishes a rebuttable presumption of a harmful quantity of oil.[44] Courts have strictly interpreted this test, finding harmful as small an amount as thirty gallons.[45]

The CWA essentially provides for cleanup of discharged oil,[46] and authorizes the federal government to remove the oil once it has been discharged.[47] Prior to the 1977 amendments, the federal government's direct cleanup costs

29. *See* 33 U.S.C. § 1321 (1988); 42 U.S.C. § 9601 (1988); 43 U.S.C. § 1813 (1988).
30. Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 673 (1st. Cir. 1980).
31. Ohio v. United States Dept. of the Interior, 880 F.2d 432, 439 (D.C. Cir. 1989).
32. Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 673 (1st. Cir. 1980).
33. Bagwell, *supra* note 18, at 496.
34. 33 U.S.C. § 1321 (1988); 43 U.S.C. § 1813 (1988).
35. 42 U.S.C. §§ 9601-57 (1988).
36. 43 U.S.C. §§ 1651-53 (1988). Note that once a statute is discussed, later discussion in another liabilities category presumes the same provisions for liability limits, available defenses, and claims.
37. 33 U.S.C. §§ 1251-1376 (1988). The primary provisions are in § 1321.
38. Act of 30 June 1948 (62 Stat.), 1155. *See* Bagwell, *supra* note 18, at 496.
39. Buglass, *supra* note 23, at III-6. Congress further amended the FWPCA in 1972. *Id.*
40. Bagwell, *supra* note 18, at 496.
41. *Id.* at 497.
42. 33 U.S.C. § 1321(b)(3) (1988).
43. Discharge of Oil, 40 C.F.R. § 110.3 (1977). The governing regulation also includes prohibitions of discharges that either violate applicable water quality standards, or those that result in a sludge under the water's surface or on the adjacent shoreline. *Id.*
44. United States v. Chevron Oil Co., 583 F.2d 1357, 1363-64 (5th Cir. 1978).
45. United States v. Boyd, 491 F.2d 1163, 1166 (9th Cir. 1973).
46. Bagwell, *supra* note 18, at 500.
47. 33 U.S.C. § 1321(c)(1) (1988). The section also provides an exception if the President determines that the owner or operator of the vessel will properly remove the oil. *Id.*

constituted the only recoverable damages.[48]

Liability imposed by the CWA on the responsible owner or operator of a vessel for removal costs is limited in two ways.[49] First, several defenses allow total avoidance of liability for removal costs:[50] act of God; act of war; negligence by the United States Government; act or omission of a third party; or any combination of the foregoing.[51] Courts construe these defenses quite narrowly.[52]

The third party defense is not available if the spill results from the negligence of a compulsory pilot acting under the general supervision of the ship's master.[53] Similarly, the defense is not available to the owner of an oil barge if the crew of the tug having the barge in tow caused the spill, because a tug is an independent contractor and not a third party under the CWA.[54] The third party defense, however, may be available for the acts of vandals.[55]

The existence of a third party who solely caused a discharge does not remove liability from the owner or operator of a vessel.[56] Rather, the owner still must pay the costs incurred by the United States in removing the oil.[57] The owner is then entitled, by subrogation, to any recovery the United States may receive from the third party.[58] In addition, the CWA does not affect any direct recovery available to the owner from the sole-cause third party.[59]

The second limitation on liability is a specific dollar amount.[60] For an inland oil barge, damages are limited to the greater of $125 per gross ton or $125,000.[61] Damages for all other vessels are limited to the greater of $150 per gross ton or $250,000.[62] When the discharge is "the result of willful negligence or willful misconduct within the privity and knowledge of the owner,"[63] however, the owner or operator of the vessel faces unlimited liability for removal costs under the CWA.[64] A finding of unlimited liability depends on the egregious nature of the mistakes involved and the degree of foreseeability that the harm would occur.[65] Where the owner makes several errors and could have easily foreseen the disaster, full liability exists;[66] where

48. 33 U.S.C. § 1321(f) (1988). *See infra* notes 169-75.
49. 33 U.S.C. § 1321(f)(1) (1988). *See* Bagwell, *supra* note 18, at 500-04.
50. 33 U.S.C. § 1321(f)(1) (1988).
51. *Id.*
52. Schoenbaum, *Liability for Spills and Discharges of Oil and Hazardous Substances From Vessels*, XX FORUM 152, 154 (1984).
53. Burgess v. M/V Tamano, 564 F.2d 964, 982 (1st Cir. 1977).
54. United States v. LeBoeuf Bros. Towing Co., 621 F.2d 787, 789 (5th Cir. 1980); United States v. Hollywood Marine, Inc., 625 F.2d 524, 524 (5th Cir. 1980).
55. Union Petroleum Corp. v. United States, 651 F.2d 734, 736 (Ct. Cl. 1981).
56. 33 U.S.C. § 1321(g) (1988).
57. *Id.*
58. *Id.*
59. 33 U.S.C. § 1321(h) (1988).
60. 33 U.S.C. § 1321(f)(1) (1988).
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. Schoenbaum, *supra* note 52, at 155.
66. *See* Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1162 (2d Cir. 1978) (limitation denied when grounding resulted from accumulation of acts).

the errors are few or unimportant and the harm is unanticipated, liability will be limited to the applicable dollar amounts.[67] These same dollar limits, including their nonapplicability for willful misconduct, apply to sole-cause third parties as well.[68]

Since the CWA does not explicitly preempt prior law, the Limitation of Liability Act of 1851[69] arguably limits the CWA.[70] Courts, however, have rejected this interpretation. Case law holds the CWA preempts other federal law dealing with recovery of oil spill cleanup costs.[71]

The 1977 amendments to the CWA created the National Contingency Plan (NCP) to aid in planning responses to oil spills.[72] The purpose of the NCP is to minimize cleanup costs.[73] The NCP provides for: assigning duties among federal agencies;[74] purchasing and storing equipment;[75] establishing a strike force and the requisite plans to deal with spill removal;[76] implementing an early warning system for spill reporting;[77] and creating a national center to direct the contingency plans' implementation.[78]

The other major anti-pollution act on the federal level is the Comprehensive Environmental Response, Compensation and Liability Act of 1980,[79] commonly referred to as CERCLA or the Superfund.[80] Congress created CERCLA to deal with hazardous substance cleanup at the federal level.[81] CERCLA does not apply to liability for oil tanker spills, however, as its definition of hazardous substances expressly excludes petroleum products.[82]

The Outer Continental Shelf Lands Act[83] of 1978 (OCSLA) excludes inland bays and waterways[84] and primarily impacts the Gulf of Mexico.[85] OCSLA provides for joint, several and strict liability[86] for the owner and operator of the vessel constituting the source of oil pollution.[87] The damages

67. *See* Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979) (ordinary negligence insufficient liability).
68. 33 U.S.C. § 1321(g) (1988).
69. 46 U.S.C. §§ 181-89 (1988).
70. Schoenbaum, *supra* note 52, at 155.
71. *See* Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609, 618 (4th Cir. 1979); *In re* Oswego Barge Corp., 664 F.2d 327, 340 (2d Cir. 1981).
72. 33 U.S.C. §§ 1321(c)(2), 9607(a) (1988).
73. 33 U.S.C. § 1321(c)(2) (1988).
74. *Id.* § 1321(c)(2)(A).
75. *Id.* § 1321(c)(2)(B).
76. *Id.* § 1321(c)(2)(C).
77. *Id.* § 1321(c)(2)(D).
78. *Id.* § 1321(c)(2)(E).
79. 42 U.S.C. §§ 9601-75 (1988).
80. Bagwell, *supra* note 18, at 505.
81. Note, *Developments in the Law—Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1464 (1986). The word comprehensive in the title of CERCLA is a bit of a misnomer, as CERCLA does not deal with compensating victims. *Id.*
82. 42 U.S.C. § 9601(14) (1988). The Superfund Amendments and Reauthorization Act (SARA) confirmed the exclusion. Pub. L. No. 99-499 (100 Stat.), 1613 (1986). Edelman, *supra* note 1, at 3, col 2.
83. 43 U.S.C. § 1331 (1988).
84. 43 U.S.C. § 1331(a) (1988).
85. Bagwell, *supra* note 18, at 513.
86. 43 U.S.C. § 1814(a) (1988).
87. *Id.*

cover direct cleanup costs.[88] Potential claimants under OCSLA include both federal[89] and state governments.[90] Complete defenses available under OCSLA include: act of war;[91] grave natural disaster;[92] act of God;[93] or a third party.[94]

Similar to the CWA, OCSLA limits the dollar liability of an owner and operator to the greater of $300 per gross ton or $250,000.[95] Again, as under the CWA, these limits do not apply in the case of willful misconduct or gross negligence.[96] The limits may also be disregarded if a violation of applicable federal regulations causes the discharge[97] or if the owner or operator refuses to aid the federal authorities in cleanup.[98]

Perhaps the most distinctive aspect of OCSLA is its creation of a fund financed by fees and lawsuit recoveries.[99] A claimant may choose to sue either the owner, operator, or guarantor of the responsible vessel, or against the OCSLA fund directly.[100] Such an election is irrevocable and provides the exclusive remedy under OCSLA.[101] Recovery under OCSLA bars recovery under any other provision of state or federal law.[102] The 1977 amendments to the CWA expanded its geographical limits to match OCSLA, and the liability limits are greater under the CWA than under OCSLA.[103] Consequently, claimants have used OSCLA infrequently.[104]

Congress passed the Deepwater Port Act[105] (DPA) in 1974 to regulate oil handling facilities beyond U.S. territorial waters.[106] The DPA provides for no-fault based joint and several liability[107] and a dollar limitation of liability to the lesser of $150 per gross ton or $20 million.[108] As its name implies, the DPA is limited to discharges from vessels receiving oil from deepwater ports.[109] As a result, the DPA has seen limited use, in part because of the small number of such ports.[110]

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88. 43 U.S.C. § 1813(a)(1) (1988).
89. *Id.* § 1813(b)(2)-(3),(5).
90. *Id.* § 1813(b)(3).
91. *Id.* § 1814(e)(1).
92. *Id.*
93. *Id.*
94. 43 U.S.C. § 1814(e)(2) (1988).
95. *Id.* § 1814(b)(1).
96. *Id.* § 1814(b). The conduct is required to be within the privity or knowledge of the owner or operator. *Id.*
97. *Id.*
98. 43 U.S.C. § 1814(b)(1) (1988).
99. *Id.* § 1812.
100. *Id.* § 1817(c).
101. *Id.*
102. 43 U.S.C. § 1820(a) (1988).
103. 33 U.S.C. § 1321(a) (1988).
104. Bagwell, *supra* note 18, at 513.
105. 33 U.S.C. § 1501 (1988).
106. *Id.* § 1502(10).
107. *Id.* § 1517(d).
108. *Id.* The limit does not apply when the cause is gross negligence or willful misconduct within the privity and knowledge of the owner or operator. *Id.*
109. 33 U.S.C. § 1517(a)(1) (1988).
110. *See* Get Oil Out! Inc. v. Exxon Corp., 586 F.2d 726, 732 (9th Cir. 1978).

The Trans-Alaska Pipeline Authorization Act[111] covers pipeline oil once it is loaded onto vessels at a pipeline terminal facility.[112] Coverage ceases when the vessel is offloaded at a United States port.[113] Given the usual range of Alaskan oil tankers, the Act mainly affects west coast states.[114]

The Trans-Alaska Pipeline Authorization Act also creates a Pipeline Liability Fund.[115] Owners and operators have strict liability, jointly and severally with the Pipeline Liability Fund, for all damages, including direct cleanup costs resulting from an oil discharge.[116] The available defenses are minimal, including acts of war or government negligence, but clearly excluding acts of God or other natural disasters.[117]

Limitation on liability provisions establish a $14 million ceiling for owners and operators.[118] The provisions also provide that the Pipeline Liability Fund will pay the remaining balance up to $100 million.[119] Suggesting an owner's liability is limited, however, would be premature because the Pipeline Liability Fund is authorized to recover from the responsible owner any funds it expends.[120]

2. *Direct Cleanup Costs—State Statutes*

When individual states began enacting their own oil spill legislation, some questioned whether the federal statutes precluded such legislation.[121] The CWA attempted to answer this question by including a provision disavowing any preemption of state-imposed liabilities or requirements.[122] The Supreme Court in *Askew v. American Waterways Operators, Inc.*[123] finally decided the issue, holding current federal regulations did not preempt a Florida statute providing for the state's recovery of cleanup costs.[124] Consequently, approximately twenty-four states have since enacted their own oil spill legisla-

111. 43 U.S.C. §§ 1651-55 (1988).

112. 43 U.S.C. § 1653(c)(1) (1988).

113. 43 U.S.C. § 1653(c)(7) (1988).

114. Bagwell, *supra* note 18, at 515.

115. 43 U.S.C. § 1653(c)(5) (1988). Five cents per barrel of oil transported through the Pipeline goes to the Fund until it reaches $100 million and is subsequently maintained at that figure. *Id.*

116. 43 U.S.C. § 1653(c)(1) (1988). Unlike OCSLA, more specific definitions of covered damages are not included.

117. 43 U.S.C. § 1653(c)(2) (1988).

118. 43 U.S.C. § 1653 (1988).

119. 43 U.S.C. § 1653(c)(3) (1988). Claims exceeding $100 million are proportionately reduced. *Id.*

120. 43 U.S.C. § 1653(c)(8) (1988).

121. Post, *A Solution to the Problem of Private Compensation in Oil Discharge Situations*, 28 U. MIAMI L. REV. 524, 543 (1974).

122. 33 U.S.C. § 1321(o) (1988).

123. 411 U.S. 325 (1975).

124. *Id.* at 329.

tion.[125] Nineteen states impose unlimited liability.[126] Florida's statute is illustrative of such state legislation and is examined in detail below.

The Florida legislature enacted Florida's Pollutant Spill Prevention and Control Act[127] (Florida Act) in 1970.[128] The Florida Act generally requires prompt containment and removal of spills and creates a fund to pay for such removal.[129] The Florida Act is broader than the CWA in its prohibition of any discharge, not merely those discharges deemed harmful.[130] The Florida Act calls for the dischargers to clean up their own spills, and if they do not, allows for Florida authorities to do so.[131] Dischargers who render assistance in cleanup are eligible for reimbursement of their costs.[132] Further, if the spill is in United States waters, rather than inland waterways, Florida may rely on federal funds before using its own.[133]

The Florida Act also creates the Florida Coastal Protection Trust Fund[134] (Florida Fund), funded with monies from excise taxes, registration fees, penalties, and judgments imposed on carriers of hazardous substances.[135] The Florida Fund pays for both enforcement costs[136] and the costs of immediate stoppage of a spill.[137] Discharger liability includes repayment to the Florida Fund for all cleanup costs up to the lesser of $100 per gross ton or $14 million.[138] As with the CWA, a willful discharger's liability is unlimited.[139] Defenses to liability under the Florida Act are limited to occasions when the discharge is caused solely by any one or a combination of: an act of war,[140] an act of government,[141] act of God,[142] or the act or omission of a third party.[143]

Inroads by state statutes into this area continue even today. In September 1990 California's governor signed a bill into law touted as the nation's most

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125. Edelman, *supra* note 1, at 23, col. 1. Recovery under state law takes three different avenues: (1) statutorily provided arbitral or administrative procedure; (2) bringing suit based on an explicit provision in a statute for a private right; or (3) bringing suit based on an implicit provision in a statute. Post, *supra* note 121, at 539.

126. Statement by Senate Majority Leader George Mitchell (D-Me.) Regarding Oil Pollution Act of 1990, Fed. News Service, August 2, 1990, at 2.

127. FLA. STAT. ANN. §§ 376.011-.17, 376.19-.21 (West 1988 & Supp. 1990).

128. *See generally* Barret & Warren, *History of Florida Oil Spill Legislation*, 5 FLA. ST. U.L. REV. 309 (1977) (outlining the impetus for and legislative history of the Florida oil spill legislation enacted in 1970).

129. FLA. STAT. ANN. § 376.021(4)(b) & (c) (West 1988).

130. FLA. STAT. ANN. § 376.041 (West 1988).

131. FLA. STAT. ANN. § 376.09(1) (West 1988).

132. FLA. STAT. ANN. § 376.09(6) (West 1988).

133. FLA. STAT. ANN. § 376.09(2) (West 1988).

134. FLA. STAT. ANN. § 376.11 (West Supp. 1990).

135. FLA. STAT. ANN. § 376.11(2) (West Supp. 1990).

136. FLA. STAT. ANN. § 376.11(4)(a) (West Supp. 1990).

137. FLA. STAT. ANN. § 376.11(4)(b) (West Supp. 1990).

138. FLA. STAT. ANN. § 376.12(1) (West 1988 & Supp. 1990).

139. *Id.* The exact language is "such discharge was the result of willful or gross negligence or willful misconduct within the privity or knowledge of the owner or operator or agent thereof." *Id.*

140. FLA. STAT. ANN. § 376.12(3)(a) (West 1988 & Supp. 1990).

141. FLA. STAT. ANN. § 376.12(3)(b) (West 1988 & Supp. 1990).

142. FLA. STAT. ANN. § 376.12(3)(c) (West 1988 & Supp. 1990).

143. FLA. STAT. ANN. § 376.12(3)(d) (West 1988 & Supp. 1990).

comprehensive oil spill prevention and cleanup plan to date.[144] Included in the statute are provisions for creating a $100 million emergency fund, originally funded by a twenty-five cent per barrel tax on oil, available for immediate direct cleanup activities.[145] Spillers are required to reimburse the emergency fund for the cleanup expenses.[146] The statute also creates the position of an oil spill czar. The czar must establish detailed spill prevention plans.[147]

3. Direct Cleanup Costs—International Conventions

Various nongovernmental international agreements cover liability for oil spills. The Tanker Owner's Voluntary Agreement Concerning Liability for Oil Pollution[148] (TOVALOP) is a voluntary tanker owner agreement originally adopted in 1969 to reimburse cleanup costs, whether governmental or private.[149] The vast majority of the world's tanker owners subscribe to TOVALOP.[150] Although TOVALOP has paid claims based on spills in United States waters,[151] the agreement is not considered part of United States law dealing with spills.[152]

The Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution[153] (CRISTAL) came into effect in 1971.[154] CRISTAL supplements TOVALOP, as cargo owners also subscribe to it.[155] CRISTAL is designed to be employed only when other remedies are exhausted,[156] thus limiting its application.[157]

The Civil Liability Convention on Oil Pollution Damage[158] (CLC) constitutes a set of protocols adopted by the majority of the large maritime nations,[159] with the exception of the United States.[160] Effective in 1975,[161] the CLC limited the liability of shipowners to approximately $8.9 million per incident.[162] Also, a separate fund convention is designed to help those oil

144. Gillam, *Governor Signs Offshore Spill Cleanup Plan*, L.A. Times, September 23, 1990, at A 17, col. 3.
145. *Id.*
146. *Id.*
147. *Id.*
148. Becker, *Acronyms and Compensation for Oil Pollution Damage From Tankers*, 18 TEX. INT'L L.J. 475, 476 (1983) (citing 2 S.H. LAY, R. CHURCHILL & M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA 641 (1973)).
149. Buglass, *supra* note 23, at III-2.
150. Becker, *supra* note 148, at 476.
151. *Id.* at 478.
152. *Id.*
153. *Id.* at 479.
154. *Id.* CRISTAL and TOVALOP were both revised in 1978. *Id.*
155. Buglass, *supra* note 23, at III-3.
156. *Id.* at III-4.
157. It has been suggested that the oil industry created CRISTAL merely to convince the public of the industry's large monetary willingness to help in the fight against pollution. *Id.* at III-4.
158. *Id.*
159. *Id.*
160. *Id.*
161. Becker, *supra* note 148, at 477.
162. Van Hanswyk, *The 1984 Protocols to the International Convention on Civil Liability*

spill victims not adequately covered by the CLC protocols.[163] The total compensation available from both sources was limited to $47 million.[164] Member nations made substantial amendments in 1984, extending the coverage to 200 miles off the coastline and increasing the liability and fund convention limits to $62 million and $208 million respectively.[165] However, the United States never adopted the CLC protocols, and thus the protocols do not impact spills in United States' waters.[166]

C. *Natural Resource Damages*

Like direct cleanup costs, most statutes poorly define natural resource damages. Natural resource damages generally include damages to public land, fish, wildlife, and marine life.[167] Natural resource damages, however, do not cover injuries to an individual's real or personal property, such as boats or piers, or the loss of their use.[168]

1. *Natural Resource Damages—Federal Statutes*

The CWA amendments in 1977 added recovery for the cost of restoring or replacing natural resources damaged by the discharge of oil,[169] without including how such damages are to be measured. *Puerto Rico v. SS Zoe Colocotroni*[170] attempts to create standards for the measurement of natural resource damages. The statute discussed by the court allowed for recovery of the total value of the environmental damage.[171] Analogizing to the CWA, the court held that the traditional diminution of value rule was not an appropriate measure, and instead awarded the amount necessary to restore the affected area to its pre-spill condition.[172] *Ohio v. United States Department of the Interior* also used the restoration cost standard.[173] The *Ohio* court held that the measurement of damages should include restoration costs, compensation for reliably calculated use values, and other factors.[174] The court stated that market value was not the exclusive factor in determining

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for Oil Pollution Damages and the International Fund for Compensation for Oil Pollution Damages: An Option for Needed Reform in United States Law, 22 INT'L LAW. 319, 322 (1988). The limits are not set in dollars, so the actual figures fluctuate with exchange rates. *Id.*

163. Edelman, *supra* note 1, at 22, col 6. The fund's monies are generated by contributions from persons receiving oil cargoes in member countries. *Id.*

164. *Id.*

165. Van Hanswyk, *supra* note 162, at 320.

166. *Id.*

167. Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 675-77 (1st Cir. 1980).

168. *Id.*

169. 33 U.S.C. § 1321(f)(4) (1988). "The costs of removal of oil . . . shall include any costs or expenses incurred by the Federal Government or any State government in the restoration or replacement of natural resources damaged or destroyed as a result of a discharge of oil . . . ." *Id.*

170. 628 F.2d 652, 675 (1st Cir. 1980).

171. P.R. LAWS ANN. Tit. 12, § 1131 (1977).

172. 628 F.2d at 675.

173. 880 F.2d 432 (D.C. Cir. 1989).

174. *Id.* at 462-80.

use value.[175]

Damages recoverable under OCSLA are quite broad, including injury to or destruction of natural resources,[176] loss of use of natural resources,[177] and loss of profits or impairments of earning capacity from injury to or destruction of natural resources.[178] The Trans-Alaska Pipeline Authorization Act's coverage of all damages resulting from an oil discharge[179] also extends to the recovery of damages to natural resources.[180]

2. *Natural Resource Damages—State Statutes*

The Florida Legislature created the Florida Act[181] primarily for two reasons: protection of work-related and recreational uses of shorefront property,[182] and preservation of the general beauty of the Florida coast line.[183] Florida's natural resources are thus protected and damages to them are recoverable. In addition, the Florida Fund pays for cleanup and rehabilitation of natural resources.[184]

3. *Natural Resource Damages - Common Law*

A state may recover natural resource damages even without applicable statutes; the state is construed as a representative of the people in the form of a public trustee.[185] Courts have also extended this right of recovery to state owned lands such as parks.[186] Additionally, courts recognize a compensatable right to pollution-free navigable waters.[187] Such a right is generally granted to a state on behalf of its citizens.[188] This right is based either on the technical theory that the state owns its waters[189] or on other more straightforward policy grounds.[190] One state court extended the doctrine to allow both the tanker company and the oil company to seek relief.[191]

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175. *Id.* The court felt it incorrect to reduce the value of a forest merely to the board feet of lumber it contained, or the wildlife to the market value of its hides. *Id.*

176. 43 U.S.C. § 1813(a)(2)(C) (1988).

177. *Id.* § 1813(a)(2)(D).

178. *Id.* § 1813(a)(2)(E).

179. 43 U.S.C. § 1653(c)(1) (1988). Unlike OCSLA, a more specific definition of covered damages is not included.

180. Alyeska Pipeline Serv. Co. v. United States, 649 F.2d 831, 834 (Ct. Cl. 1981); *In re* Glacier Bay, 746 F. Supp. 1379, 1385 (D. Alaska 1990).

181. FLA. STAT. ANN. §§ 376.011-.17, 376.19-.21 (West 1988 & Supp. 1990).

182. FLA. STAT. ANN. § 376.021(3)(b) (West 1988 & Supp. 1990).

183. *Id.*

184. FLA. STAT. ANN. § 376.11(4)(c).

185. Maine v. M/V Tamano, 357 F. Supp. 1097, 1100-01 (D. Me. 1973); *In re* Steuart Transp., 495 F. Supp. 38, 39 (E.D. Va. 1980).

186. *M/V Tamano*, 357 F. Supp. at 1100-01.

187. *M/V Tamano*, 357 F. Supp. at 1101; Maryland Dep't of Natural Resources v. Amerada Hess Corp., 350 F. Supp. 1060, 1066-67 (D. Md. 1972), *motion denied*, 356 F. Supp. 975 (D. Md. 1973).

188. *Id.*

189. *Maryland Dep't of Natural Resources*, 350 F. Supp. at 1066-67.

190. *M/V Tamano*, 357 F. Supp. 1097 (D. Me. 1973).

191. Maryland Dep't of Natural Resources v. Amerada Hess Corp., 350 F. Supp. 1060, 1066 (D. Md. 1972), *motion denied*, 356 F. Supp. 975 (D. Md. 1973).

4. Natural Resource Damages—International Conventions

In 1978 the subscribing tanker owners revised TOVALOP extensively to include strict liability to third parties for pollution damages as a result of a spill.[192]

D. Private Citizens' Damages

Private citizens clearly suffer damage when an oil spill occurs. For instance, property maintained on the water, such as a boat or pier, is often severely damaged. Real property on the shore is also affected by oil coming onto the shoreline. Other purely economic harms, such as lost tourism to a beachfront resort, must be considered as well.

1. Private Citizens' Damages—Federal Statutes

The CWA does not provide for private claims, such as those of fisherman or shore property owners.[193] Damages under OCSLA include injury to realty or personalty,[194] the loss of use of realty or personalty,[195] and the loss of profits or impairments of earning capacity from injury to or destruction of realty or personalty.[196] OCSLA also provides for an expanded list of possible plaintiffs with standing. For example, a private citizen may sue to recover loss of profits from damages to natural resources if twenty-five percent of his or her earnings are from activities using these resources.[197] The Trans-Alaska Pipeline Authorization Act provides a right of recovery of all damages from an oil discharge[198] for claimants who are United States or Canadian citizens.[199]

2. Private Citizens' Damages - State Statutes

Many state statutes provide for recovery by private citizens. A few examples are examined below. The Florida Legislature created the Florida Act[200] to protect owners and users of shorefront property as well as citizens of Florida.[201] Thus, the Florida Act creates a direct right for non-Florida citizens to recover damages. Individuals suffering damage as a result of a covered discharge can also recover from the Florida Fund.[202] Once a claim is paid, the Florida Fund is subrogated to any cause of action that individuals may have for the damages.[203]

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192. Becker, *supra* note 148, at 477.
193. Buglass, *supra* note 23, at III-6.
194. 43 U.S.C. § 1813(a)(2)(A) (1988).
195. *Id.* § 1813(a)(2)(B).
196. *Id.* § 1813(a)(2)(E).
197. *Id.* § 1813(b)(4).
198. 43 U.S.C. § 1653(c)(1) (1988). Unlike OCSLA, more specific definitions of covered damages are not included.
199. *Id.*
200. FLA. STAT. ANN. §§ 376.011-.17, 376.19-.21 (West 1988 & Supp. 1990).
201. FLA. STAT. ANN. § 376.021(3)(b) (West 1988).
202. FLA. STAT. ANN. § 376.12(2) (West 1988 & Supp. 1990).
203. *Id.*

The Maine Legislature originally adopted Maine's oil pollution statute (Maine Act) 1970.[204] Equally as elaborate as Florida's statute, the Maine Act similarly provides an administrative fund for private claimants.[205]

In contrast, Washington[206] and Massachusetts[207] state statutes create an explicit private right for damages as a result of oil spills,[208] but individuals must use the courts to obtain compensation.[209] Washington's statute provides the broader coverage of the two, including "damages to persons, or property, public or private".[210] Massachusetts' statute restricts recovery to actual physical damage to real or personal property.[211]

3. *Private Citizens' Damages—Common Law*

State and federal statutes allow the recovery of damages for much of the liability resulting from an oil spill.[212] The private citizen's recovery, however, is still subject to common law.[213] A plaintiff must prove direct damages to recover. The court in *Matter of Lloyd's Leasing Ltd.*[214] held that "direct physical impact damages,"[215] consisting of damages to the hulls of boats,[216] were required for recovery.[217] Other courts extend compensation for such damages.[218]

Damage to affected land also fits in the physical category to a certain degree. In one of the earliest cases, a federal court found compensable the plaintiff's claims for damages to his beach as a result of oil discharges.[219] Courts have also extended compensable losses to include temporary injuries such as loss of use and enjoyment of the property for rental purposes.[220] Some recovery of such damages, however, is limited. For example, one court held that damages from tracking oil onto adjacent, non-shore, prop-

204. Oil Discharge Prevention and Pollution Control Act of 1970, ME. REV. STAT. ANN. tit. 38, §§ 541-60 (1989 & Supp. 1990).

205. Post, *supra* note 121, at 540.

206. Washington Water Pollution Control Act, WASH. REV. CODE. ANN. §§ 90.48.315-.336 (Supp. 1990).

207. Massachusetts Clean Waters Act, MASS. GEN LAWS ANN. ch. 21, §§ 26-53 (1988 & Supp. 1990).

208. WASH. REV. CODE ANN. § 90.48.336 (Supp. 1990); MASS. GEN. LAWS ANN. ch. 21, § 42 (1988).

209. Post, *supra* note 121, at 541.

210. WASH. REV. CODE ANN. § 90.48.336 (Supp. 1990).

211. MASS. GEN. LAWS ANN. ch. 21, § 42 (1988).

212. *See supra* notes 29-191 and accompanying text.

213. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) (Federal Water Pollution Control Act creates no private right of action).

214. 697 F. Supp. 289 (S.D. Tex. 1988).

215. *Id.* at 290.

216. *Id.*

217. *Id.* The court relied on Louisiana *ex rel* Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir.) (en banc), *cert denied*, 477 U.S. 903 (1986).

218. Oppen v. Aetna Ins. Co., 485 F.2d 252, 257 (9th Cir. 1973) (damages to private pleasure boats recoverable); Atlantic Pipe Line Co. v. Dredge Philadelphia, 247 F. Supp. 857, 864 (E. D. Pa. 1965), *aff'd*, 366 F.2d 780 (3d Cir. 1966) (United States allowed recovery for damage to ships in naval basin).

219. Kirwin v. Mexican Petroleum Co., 267 F. Supp. 460, 462 (D.R.I. 1920).

220. *In re* New Jersey Barging Corp., 168 F. Supp. 925, 937 (S.D. N.Y. 1958).

erty were not foreseeable and thus not compensable.[221] Courts have allowed recovery in cases of private parties with income attributable to sea life, the paradigm class being fishermen.[222]

The harms discussed above generally fit into the category of direct harms, as some physical impact is required for compensation.[223] Another category of damages resulting from oil spills is ordinarily referred to as indirect harms. In the latter case, real damage may have occurred, but no physical object is directly affected.[224]

Loss of tourism is probably the largest single element of the indirect harm category. Determination of such losses, however, is problematic. Lost tourism and revenues to a beach front hotel's business are easily verified; less clear is the damage to the restaurant three blocks inland, or the gas station on the road into town.[225]

Some cases have wrestled with this uncertainty. In *Burgess v. M/V Tamano*,[226] plaintiffs included owners of motels, trailer parks, campgrounds, restaurants, and grocery stores. In dismissing their complaints, the court noted that recovery required a damage particular to the individual that was different than that of the public generally.[227] Recent case law in this area, however, is minimal.

E. Miscellaneous Penalties

1. Miscellaneous Penalties—Federal Statutes

The CWA possesses two components that extend beyond cleanup of a spill.[228] First, the CWA imposes on "any person in charge of a vessel"[229] a duty to report a discharge to the United States government as soon as he or she learns of it.[230] Failure to notify is a misdemeanor, with maximum punishment a $10,000 fine, up to one year in jail, or both.[231]

Second, a civil penalty is imposed for each discharge as a separate offense with a minimum penalty of $5,000.[232] In addition, an extra civil penalty of

221. *In re* Lloyd's Leasing Ltd, 697 F. Supp. 289, 291 (S.D. Tex. 1988).

222. Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974) (breach of duty to perform oil related operations so as to avoid diminution of aquatic life gives rise to loss for fisherman); Burgess v. M/V Tamano, 370 F. Supp. 247, 250 (D. Me. 1973) (commercial fisherman and clam diggers entitled to recovery).

223. *See supra* notes 215, 218.

224. Post, *supra* note 121, at 524.

225. *Id.* at 525.

226. 370 F. Supp. 247 (D. Me. 1973).

227. *Id.* at 251.

228. Bagwell, *supra* note 18, at 499.

229. 33 U.S.C. § 1321(b)5 (1988).

230. *Id.* Regulation names the appropriate agency to which the report is to be made. Control of Pollution By Oil and Hazardous Substances, Discharge Removal, 33 C.F.R. § 153.203 (1990).

231. 33 U.S.C. § 1321(b)5 (1988). Even if no officer or director of a corporation is aware of a spill, the corporation may still be found guilty of a failure to notify the agency. Apex Oil Co. v. United States, 530 F.2d 1291, 1294 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976); United States v. Kennecott Copper Corp., 523 F.2d 821, 824 (9th Cir. 1975); United States v. Hougland Barge Line, Inc., 387 F. Supp. 1110, 1116 (W.D. Pa. 1974).

232. 33 U.S.C. § 1321(b)(6)(A) (1988).

up to $50,000 may be imposed for particularly grave offenses, and in the case of willful misconduct, up to $250,000.[233] Also, the federal government has the power to issue regulations establishing spill prevention and removal methods.[234] Violators of these regulations are subjected to an additional $5,000 per day penalty.[235]

The Deepwater Port Act[236] provides for civil[237] and criminal[238] penalties for oil spills. Damages available under OCSLA include a unique provision for recovery by a governmental entity of loss of tax revenue for one year after injury to realty or personalty.[239]

2. *Miscellaneous Penalties—State Statutes*

Under the Florida Act,[240] the discharger faces civil penalties for any violation of the Florida Act of up to $50,000 per day that the discharge occurs.[241] In addition, the pilot or master of a vessel who does not notify the authorities of the discharge faces a third degree felony charge.[242]

III. PROBLEMS WITH THE STATE OF THE LAW

Clean up cost liability for an oil spill can be enormous.[243] For instance, liability limits do not apply when the spill can be traced to the fault of an identifiable party, which is usually the case.[244] Even if the spilling tanker was not at fault, adverse public relations may force the offender to initiate a clean up and attempt to recover its costs later.[245] Incredibly, in the aftermath of the *Valdez* spill, Exxon has already spent over $2 billion in cleanup costs, natural resource rehabilitation, and other expenses in Prince William Sound.[246] This amount is even more mind-boggling when one considers that the spill was the world's 21st-largest at the time[247] and that litigation costs have yet to be paid.[248] In addition to direct liability for cleanup costs, tanker owners also can face claims for natural resource damage, private citizen claims, and the ever present threat of judicially imposed punitive damages.[249]

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233. *Id.* § 1321(b)(6)(B).
234. *Id.* § 1321(j)(1).
235. *Id.* § 1321(j)(2).
236. 33 U.S.C. §§ 1501-1524 (1988).
237. *Id.* § 1517(a)(2).
238. *Id.* § 1517(b).
239. 43 U.S.C. § 1813(a)(2)(F) (1988).
240. FLA. STAT. ANN. §§ 376.011-.17, 376.19-.21 (West 1988 & Supp. 1990).
241. FLA. STAT. ANN. § 376.16(1) (West 1988).
242. FLA. STAT. ANN. § 376.12(7) (West 1988 & Supp. 1990). An additional third degree felony charge is imposed on a vessel that does not stay in the area for a reasonable time after the discharge. *Id.*
243. Nulty, *supra* note 4, at 48.
244. *See supra* notes 49-68 and accompanying text.
245. Feder, *supra* note 2 at F6, col.2.
246. Nulty, *supra* note 4 at 46.
247. *Id.*
248. *Id.*
249. *See supra* notes 29-242 and accompanying text.

In the aftermath of the *Mega Borg* scare during the summer of 1990, Shell decided to deliver oil to only one United States port on its own tankers.[250] The International Association of Tanker Owners argues that without ceilings on liability, only unscrupulous owners, or single ship companies willing to take the risks, will deliver oil to the United States.[251] The potential results are shocking because if fewer tanker companies transport oil to the United States, both increased transportation costs, and correspondingly greater consumer prices, have been predicted.[252] Also, with undercapitalized and slip-shod firms taking the place of the unwilling major tanker firms, spill risks increase and less compensation to victims can be expected.[253]

The efficiency of response to an oil spill also is questionable. Theoretically, the National Contingency Plan provides a cohesive response to oil spills,[254] thus reducing cleanup costs and any resulting liability, whether borne by the United States or the discharger.[255] In at least one case, however, experts agree that the effects of the *Exxon Valdez* spill worsened dramatically due to slow industrial and governmental response, poor coordination, and no apparent planning.[256]

Although cleanup costs remain high, the current system allows governments to recover their cleanup costs directly under a variety of statutory schemes or through litigation.[257] While such lawsuits are not cheap, governments can more easily pay for a cleanup and later seek recovery from those responsible.[258] The same is true for natural resource damage, as courts also seem well on their way to crafting realistic assessments of natural resource damages.[259]

The private citizen harmed by an oil spill is not as fortunate and may have few resources to rely on until a law suit can be resolved. In some states, statutes provide direct rights to individuals,[260] but no federal statutes are available in this area. Even when litigation is available, the responsible party could be judgment proof or unfindable. Finally, a delay in compensation alone could be devastating.[261]

A major problem in leaving private citizen damages to the courts is the unresolved policy questions regarding such damages. The most prevalent

250. Halkias, *supra* note 5, at 28A, col. 1.

251. Solomon & Lublin, *Tanker Fire Raises Serious Questions About Liabilities in Oil Spills off U.S.*, Wall St. J., June 12, 1990, at A12, col. 2.

252. Halkias, *supra* note 5, at 28A, col. 1.

253. *Id.*

254. 33 U.S.C. § 1321 (1988).

255. Schoenbaum, *supra* note 52, at 152-54.

256. Feder, *supra* note 2, at F6, col. 2.; S. REP. No. 94, 101st Cong., 2d Sess. 722 at 724-25 (1990).

257. *See supra* notes 33-166 and accompanying text.

258. *Id.*

259. *See* Ohio v. United States Dep't of the Interior, 880 F.2d 432, 462-80 (D.C. Cir. 1989); Puerto Rico v. SS Zoe Colocotroni, 628 F.2d 652, 675 (1st Cir. 1980).

260. *See supra* notes 200-11 and accompanying text.

261. After 12 years of litigation, the appellate court decided the *Amoco Cadiz* case in summer 1990 which resulted in a $160 million damage award against Amoco. Edelman, *supra* note 1, at 3, col 1.

concerns are how widely to compensate damage claims[262] and how to measure them.[263]

The first question is answerable in many instances. For example, loss of tourism is a fairly direct and acceptable damage suffered by private parties.[264] The problem of quantifying damages, however, remains. Merely looking at the change in hotel guest occupancy is not particularly accurate.[265] Such numbers are clearly affected by other things such as weather, the economy, and tourist preferences.[266]

Compensable damages are not as easily determined in other situations. Should a bartender in Anchorage be able to make claims for tips he might have received from fishermen thrown out of work by the *Exxon Valdez* spill?[267] What about a California driver suing for increased gas prices?[268] Such damages are clearly real, but should they be compensable?

Access to damage funds administered by the government and funded by industry taxes and fines should help all claimants, especially private citizens. The Maine Act establishes a recovery fund for claimants, providing quicker and cheaper access to compensation than through the courts.[269] Not all such funds produce such positive results. For example, the Pipeline Liability Fund's effectiveness is at best debatable. It cannot be tapped until the responsible owner's liability limits are reached.[270] In the case of a small spill, the Pipeline Liability Fund will likely be of little help to the claimant.[271] As of mid-1990, compensation for eligible spills in 1987 and 1989 had yet to be paid.[272] Apparently, contested claims[273] introduce an adversarial flavor which considerably slows the claims process.[274]

Under the current state of the law are unhappy tanker owners, relatively protected governments, and frustrated private citizens. The tanker owners, in the wake of an oil spill, face virtually unlimited liability for cleanup costs and natural resource rehabilitation.[275] Lengthy litigation with potential liability to private citizens is also inevitable after most spills.[276] No wonder tanker owners are threatening to leave the United States market. Obviously, governments want to discourage oil spills. They may have become complacent, however, due to their relatively secure position regarding cleanup costs

262. *See supra* notes 225-27 and accompanying text.
263. *Id.*
264. *Id.*
265. Stigler, *supra* note 7, at A12, col. 2.
266. *Id.*
267. Feder, *supra* note 2, at Fl, col. 2.
268. *Id.*
269. Post, *supra* note 121, at 540.
270. 43 U.S.C. § 1653(c)(3) (1988).
271. Keener, *Fishermen Have Waited Too Long for Spill Compensation*, Anchorage Daily News, July 11, 1990, at C6, col. 3.
272. *Id.*
273. *Id.* The Pipeline Fund is paying approximately $1 million per month for its defense attorneys to deal with claims arising from the 1987 spill in Glacier Bay. *Id.*
274. *Broken Promises-Alyeska Record Shows How Big Oil Neglected Alaska Environment*, Wall St. J., July 20, 1989, at A12, col. 4.
275. *See supra* notes 37-192 and accompanying text.
276. Stigler, *supra* note 7, at col. 2.

and their recovery.[277] Private citizens, on the other hand, face costly and lengthy litigation, uncertain damages and little, if any, access to oil spill administrative funds.[278] Under current federal and state laws dealing with oil spills, many salient issues and problems remain. Congress has reacted by passing new legislation.[279]

IV. OIL POLLUTION ACT OF 1990

The Oil Pollution Act of 1990[280] (Act) became law on August 18, 1990.[281] The Act, which applies prospectively,[282] is comprehensive legislation designed to prevent oil spills, improve emergency preparedness and response capability, and ensure that shippers and oil companies pay the full cost of spills that do occur.[283] Geographic coverage includes all navigable waters of the United States, up to 200 miles offshore.[284] The bill is long and complex, with many provisions. Specific elements of the Act are outlined below in the same four categories of liabilities used earlier in the Historical Background section.

A. Direct Cleanup Costs

The Act's provisions on removal of oil spills place the federal government more firmly in charge of all operations, regardless of the discharger's response.[285] The Executive Branch has the authority to arrange and direct all governmental and private actions aimed at removal.[286] Furthermore, the Act requires federal removal when cleanup activities are not proceeding properly or promptly.[287] The Act also grants the federal government power to prevent a spill.[288] This power extends to the removal and destruction of a vessel discharging or threatening to discharge.[289]

Additionally, private parties are encouraged to aid in the removal of spilled oil by an exemption from liability for their costs or any damages resulting from removal.[290] The exemption is total for federal employees acting within their official capacities.[291] However, for other persons, this exemption does not cover gross negligence or willful misconduct,[292] personal

277. Nulty, *supra* note 4, at 48.
278. *See supra* notes 193-239 and accompanying text.
279. Oil Pollution Act, *supra* note 8.
280. *Id.*
281. 55 Fed. Reg. iii (1990). The Act was 15 years in the making. Edelman, *supra* note 1, at 22, col. 6.
282. Oil Pollution Act, *supra* note 8, at § 1020.
283. 136 CONG. REC. S11,536 (daily ed. August 2, 1990) (statement of Sen. Mitchell).
284. Oil Pollution Act, *supra* note 8, at § 1002(a).
285. Oil Pollution Act, *supra* note 8, at § 4201(a).
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. Oil Pollution Act, *supra* note 8, at § 4201(a). Such costs and damages are instead charged to the responsible party. *Id.*
291. Oil Pollution Act, *supra* note 8, at § 1018(d).
292. *Id.* § 4201(a).

injury or wrongful death,[293] nor does it extend to responsible parties.[294]

Exposure to liability is still limited by a list of available defenses, as under the CWA. The wholly retained defenses are an act of God,[295] an act of war,[296] or any combination of the defenses.[297] Lost is the defense of negligence by the United States government. Perhaps as a substitute, the third party act or omission defense is now easier to establish.[298] Any persons failing to report the spill,[299] cooperate in removal activities,[300] or end the threat of a discharge cannot invoke the defenses.[301]

The Act raises specific dollar limits on liability to $1,200 per gross ton, with a maximum of $10 million.[302] An interesting addition allows the President to adjust these limits for inflation at least every three years.[303] Recommendations for additional limit adjustments may be made to Congress at other intervals.[304] As under the CWA, these limits do not apply in cases involving gross negligence or willful misconduct.[305] The limits also do not apply in the case of a violation of a federal safety standard,[306] a failure to report the spill,[307] or a failure to cooperate with removal activities.[308]

One of the most significant changes from the CWA is the Oil Spill Liability Trust Fund (Fund),[309] which is principally financed by a five cent per barrel tax on imported and domestic oil.[310] The Fund is designed to cover the removal costs of the federal government, state governments, and uncompensated private efforts.[311] The maximum payout per incident is $1 billion.[312]

The Act anticipates claims to the Fund as a secondary measure, with the

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293. *Id.*
294. *Id.*
295. Oil Pollution Act, *supra* note 8, at § 1003(a)(1).
296. *Id.* § 1003(a)(2).
297. *Id.* § 1003(a)(4).
298. Rather than proving a third party was the sole cause, the responsible party must establish, by a preponderance of the evidence, that the responsible party: "(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and (B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions". Oil Pollution Act, *supra* note 8, at § 1002(a)(3).
299. Oil Pollution Act, *supra* note 8, at § 1003(c)(1).
300. *Id.* § 1003(c)(2).
301. *Id.* § 1003(c)(3).
302. Oil Pollution Act, *supra* note 8, at § 1004(a)(1).
303. The changes are based on significant increases in the Consumer Price Index. *Id.* § 1004(d)(4).
304. *Id.* § 1004(d)(3).
305. *Id.* § 1004(c)(1).
306. Oil Pollution Act, *supra* note 8, at § 1004(c)(1)(B).
307. *Id.* § 1004(c)(2)(A).
308. *Id.* § 1004(c)(2)(B).
309. *Id.* § 1001(11). Establishment occurred in § 9509 of the Internal Revenue Code of 1986. 26 U.S.C.A. § 9509 (1989).
310. 26 U.S.C.A. § 9509 (1989). This tax has been collected since January 1990, a full eight months before Congress actually passed the Act. Penalties collected from violations of the CWA are also deposited in the Fund. Oil Pollution Act, *supra* note 8, at § 4304.
311. Oil Pollution Act, *supra* note 8, at § 1012(a)(4).
312. *Id.* § 9001(c).

responsible party as the first line of liability.[313] Several exceptions are provided to this hierarchy. One permits direct presentation of claims to the Fund if the responsible party refuses to be so designated,[314] or cannot be located.[315] If the dollar limits of liability are reached, claimants may request any excess amounts, up to the payout per incident limit, from the Fund.[316] States are allowed to make their claims for reimbursement of removal costs directly to the Fund.[317] An automatic draw is established for requests from governmental agencies so they may circumvent the possible adversarial claims procedure.[318] Yet another exception provides that claims presented to responsible parties that are not settled within 90 days may be presented to the Fund.[319] If full compensation is not available from the responsible party, a claim for the unreimbursed portion may be made to the Fund.[320] In all cases, use of the Fund is not available to claimants whose gross negligence or willful misconduct was responsible for the spill or its damages.[321]

A major goal of the Act is better planning for oil spill responses in an effort to reduce their impact and ensuing liabilities.[322] Thus, response planning for removals is to be expanded. Several additions are made to the National Contingency Plan[323] originally created under the CWA.[324]

One such addition is the establishment of Coast Guard strike teams.[325] These teams are composed of the people and equipment necessary to carry out the National Contingency Plan, and a detailed pollution prevention plan, including protection of fish and wildlife.[326] Second, an early detection and warning system and procedures for immediate response are added to the National Contingency Plan.[327] Third, the National Contingency Plan will now include research and development of procedures and techniques for the most effective identification of spills and removal strategies.[328] Fourth, every local area having its own Area Contingency Plan will have a designated Federal On-Scene Coordinator.[329] Finally, an additional procedure is required to coordinate the Federal On-Scene Coordinators, the Coast Guard

313. *Id.* § 1013(a). References to "the polluter must pay" permeate the House and Senate record on the days of passage. 136 CONG. REC. S11,536-48 (daily ed. August 2, 1990); 136 CONG. REC. H6,920-49 (daily ed. August 3, 1990).

314. Oil Pollution Act, *supra* note 8, at §§ 1013(b)(1)(A), 1014(c)(1).

315. *Id.* §§ 1013(b)(1)(A), 1014(c)(3).

316. *Id.* § 1013(b)(1)(B); § 1008(b).

317. *Id.* § 1013(b)(1)(C).

318. S. REP. NO. 94, 101st Cong., 2d Sess. 10, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 722, 731.

319. Oil Pollution Act, *supra* note 8, at § 1013(c)(2).

320. *Id.* § 1013(d).

321. *Id.* § 1012(b).

322. S. REP. NO. 94, 101st Cong., 2d Sess. 10, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 722, 731.

323. Oil Pollution Act, *supra* note 8, at § 4201(c).

324. 33 U.S.C. § 1321(c) (1988).

325. Oil Pollution Act, *supra* note 8, at § 4201(b).

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

strike teams, and others.[330] These revisions to the National Contingency Plan are to occur no later than one year from the date of the Act.[331]

Adding chaos to confusion, the National Response System is created under the Act as well.[332] It consists of six pieces: (1) the National Response Unit; (2) Coast Guard District Response Groups; (3) Area Committees and their Area Contingency Plans; (4) Tank Vessel and Facility Response Plans; (5) Equipment Requirements and Inspections; and (6) Area Drills.[333]

The Act requires the establishment of the National Response Unit in North Carolina[334] within one year.[335] It is charged with maintaining a computerized list of equipment and other resources available world-wide for dealing with a spill and providing that list to governmental agencies and the public.[336] The National Response Unit will administer the Coast Guard strike teams, and provide technical assistance for the preparation of Area Contingency Plans, and coordinate Federal On-Scene Coordinators.[337] In addition, the National Response Unit is responsible for maintaining and reviewing all Area Contingency Plans.[338]

The Act also calls for a Coast Guard District Response Group in each of the ten Coast Guard districts[339] within one year of enactment.[340] All the Coast Guard personnel and equipment in the district, any additional equipment called for in one of the contingency plans, and an advisory staff will compose these District Response Groups.[341] The responsibilities of the District Response Groups are very similar to that of the National Response Unit. They include providing technical assistance for the preparation of Area Contingency Plans, coordinating Federal On-Scene Coordinators, and reviewing Area Contingency Plans.[342] In addition, the District Response Groups are to maintain all Coast Guard response equipment in the district.[343]

The Act requires the designation of locations which need their own contingency plans[344] within six months.[345] Once designated, newly appointed Area Committees are charged with developing Area Contingency Plans.[346] These Area Contingency Plans are to cover all navigable waters and the adjoining shorelines.[347] The Area Committees are also expected to work

330. Oil Pollution Act, *supra* note 8, at § 4201(b).
331. *Id.* § 4201(c).
332. *Id.* § 4202(a)(1).
333. *Id.* § 4202(a)(6).
334. Oil Pollution Act, *supra* note 8, at § 4202(a)(6).
335. *Id.* § 4202(b)(2).
336. *Id.* § 4202(a)(6).
337. *Id.*
338. *Id.*
339. *Id.*
340. Oil Pollution Act, *supra* note 8, at § 4202(b)(3).
341. *Id.* § 4202(a)(6).
342. *Id.*
343. *Id.*
344. *Id.*
345. Oil Pollution Act, *supra* note 8, at § 4202(b)(1)(A).
346. *Id.* § 4202(a)(6).
347. *Id.* § 4202(b)(1)(A).

with state and local officials to coordinate planning of response procedures.[348]

A requirement for Area Contingency Plans is the ability to handle a worst-case discharge[349] from a vessel or other facility.[350] Each plan must include: a description of the area, including any special features; a specific listing of the responsibilities of governmental agencies and the discharging owner in the case of a discharge; a list of the equipment and personnel available for removal; and details as to how the plan is coordinated with other response plans.[351] Submission for Presidential approval[352] within eighteen months of passage of the Act[353] is required for all Area Contingency Plans.

All tankers, foreign and domestic, and other oil facilities are required to submit a plan to the President for dealing with a worst-case actual or threatened discharge[354] within two years after the date of enactment.[355] The plan must: be consistent with National Contingency and Area Contingency Plans; identify the tanker person-in-charge during a discharge; ensure that sufficient private equipment and personnel are available to handle a worst-case discharge; and include provisions for training, testing, and surprise drills of personnel and equipment.[356] Approval of such a plan will be a prerequisite to the transport and handling of oil.[357] Failure to comply with this requirement subjects the tanker operator to fines.[358] However, actions consistent with an approved plan in the case of a discharge does not provide a defense to liability under the Act.[359]

The periodic inspection of removal and containment equipment is required.[360] In addition, all vessels carrying oil as cargo are required to have removal equipment on board.[361]

The last piece of the National Response and Planning System is a provision for area drills.[362] The Act calls for periodic, unannounced drills in regions with Area Contingency Plans.[363] Participation is mandatory and includes governmental agencies, tanker crews, and private industry.[364]

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348. *Id.* § 4202(a)(6).
349. Worst-case discharge is defined as: "(A) in the case of a vessel, a discharge in adverse weather conditions of its entire cargo; and (B) in the case of an offshore facility or onshore facility, the largest foreseeable discharge in adverse weather conditions." Oil Pollution Act, *supra* note 8, at § 4201(b)(4).
350. *Id.* § 4202(a)(6).
351. *Id.*
352. *Id.*
353. *Id.* § 4202(b)(1)(B).
354. Oil Pollution Act, *supra* note 8, at § 4202(a)(6).
355. *Id.* § 4202(b)(4).
356. *Id.* § 4202(a)(6).
357. *Id.* A two year grace period is allowed after submission of the plan, and before its approval, if the tanker has certified that the necessary private personnel and equipment are available to handle a worst-case discharge. *Id.*
358. *Id.* *See infra* note 439.
359. *Id.*
360. Oil Pollution Act, *supra* note 8, at § 4202(a)(6).
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.*

In addition to plans aimed at decreasing the cost of a spill once it has occurred, the Act has many provisions aimed at the prevention of spills.[365] One such provision amends the Coast Guard's procedure for issuing mariner licenses. The new inclusion requires any individual who is applying for an officer's license or merchant mariner's documents to make information on driving violations available.[366] The criminal record of the individual is open for review as well.[367] The strongest provision requires a drug test before issuance of a license.[368] All of the above tests and reviews also apply to the renewal of licenses and documents.[369]

Extensions to the rules on suspension or revocation of mariner licenses are included in the Act. The amendments allow revocation of licenses or documents if the holder has: violated a marine safety statute; committed an act of incompetence, misconduct, or negligence; is convicted of an offense that would prevent the holder from obtaining a license; or has been convicted of driving violations, such as driving while intoxicated or reckless driving, within the past three years.[370] Provisions are also included which allow for drug and alcohol testing on periodic, random, reasonable cause, and post-accident bases.[371] Issuance of a new license or documents after revocation requires a showing that the basis for revocation no longer exists and that such an issuance is not in contravention of good discipline and safety at sea.[372]

More immediate action is available when the administrative procedures dealing with licensing would be too time consuming.[373] Amendments to existing law allow the next two most senior officers to remove the master or individual in charge when they reasonably believe he is under the influence of alcohol or a dangerous drug and thus unable to command.[374]

A highly touted prevention measure is the requirement for double hulls on vessels, foreign and domestic, carrying oil in United States waters.[375] An exception is provided for vessels smaller than 5,000 gross tons as long as they have an approved double containment system.[376] The requirement applies immediately to all new vessels.[377] Phase-in starts in 1995 with tankers forty years old.[378] By the year 2010, no tanker with a single hull will be allowed to operate.[379] A five year extension, until 2015, is given for tankers

365. Oil Pollution Act, *supra* note 8, at §§ 4101-4118.
366. *Id.* §§ 4101(a) & (b).
367. *Id.*
368. *Id.*
369. Oil Pollution Act, *supra* note 8, at §§ 4101, 4102.
370. *Id.* § 4103(b).
371. *Id.* § 4103(a)(1).
372. *Id.* § 4103(c).
373. *Id.*
374. *Id.*
375. Oil Pollution Act, *supra* note 8, at § 4115(a).
376. *Id.*
377. *Id.*
378. *Id.*
379. Oil Pollution Act, *supra* note 8, at § 4115(a).

with a double bottom or sides.[380] The Act holds out an extra carrot for compliance by providing, under the Federal Ship Financing Fund, guarantees for owners' loans necessary for conversion.[381] Interestingly, the Act provides that, if technology generates a safer alternative, the double-hull requirement can be over-ridden.[382]

Various standards dealing with the staffing requirements of a vessel are promulgated. Crews are restricted to a maximum of fifteen hours of work in any twenty-four hour period or thirty-six hours in any seventy two hour period.[383] Also, the Coast Guard is to create rules determining when and where vessels may operate on auto-pilot or with an unattended engine room.[384] In addition, a study is commissioned to investigate crew sizes, qualifications and training, plus new navigational aids.[385]

Foreign vessels don't escape the Act either. The Coast Guard is authorized to investigate crew standards of foreign vessels on a periodic basis and any time the vessel is involved in an accident.[386] If the determination is that the crew standards of the country of license are not at least as strict as those of the United States, all tankers with documentation issued from that country will be denied entry to the United States until the standards are upgraded.[387] Provisional entry, on a ship-by-ship basis, can be granted to vessels establishing adequate safety standards or in cases of emergency.[388]

Specific provisions are made for pilotage under the Act. Licensed pilots are required for passage on portions of the Great Lakes[389] and in Prince William Sound.[390] The Coast Guard is to designate the areas where tankers must be accompanied by at least two tugs.[391]

Various additional safety standards are adopted as well. These include establishing minimum hull thicknesses[392] and standards for tank level and pressure monitoring.[393] Participation in the Coast Guard's Vessel Tracking Service is now mandatory.[394] The Coast Guard will study the possibility of creating tanker-free zones, where tankers would be prohibited, or at least limited.[395]

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380. *Id.*
381. *Id.* § 4115(f)(2).
382. *Id.* § 4115(e).
383. Oil Pollution Act, *supra* note 8, at § 4114(b).
384. *Id.* § 4114(a).
385. *Id.* § 4111(b).
386. *Id.* § 4106(a).
387. *Id.*
388. *Id.*
389. Oil Pollution Act, *supra* note 8, at § 4108(a).
390. *Id.* § 4116(a).
391. *Id.* § 4116(c). Designated areas include Prince William Sound, Alaska, and Rosario Strait and Puget Sound, Washington. *Id.*
392. *Id.* § 4109.
393. Oil Pollution Act, *supra* note 8, at § 4110.
394. *Id.* § 4107. Participation was voluntary before passage of the Act. The National Transportation Safety Board determined that the absence of an effective Vessel Tracking Service system served as one of the major causes of the Exxon Valdez spill. Edelman, *supra* note 1, at 23, col. 1.
395. Oil Pollution Act, *supra* note 8, at § 4111(b)(7).

Some miscellaneous provisions of the Act attempt to connect it with other existing laws. For the most part, however, the Act emasculates other federal statutes aimed at oil spills. Any application of the Clean Water Act to liability of the responsible party, the third party, or recovery of removal costs is specifically superseded by the Act.[396] The Fund is available both to carry out what remains of the CWA and to act as a depository for any funds received under the CWA.[397]

The Deepwater Port Act is largely left intact. Any monies collected under the Deepwater Port Act, including those retained in its Deepwater Port Liability Fund, are, however, likewise to be deposited in the Fund.[398] All outstanding liabilities of the Deepwater Port Liability Fund are assumed by the Fund.[399]

Drastically affected is the Outer Continental Shelf Lands Act. All of its provisions dealing with oil spills are repealed.[400] The Fund takes over any monies left in the Offshore Oil Pollution Compensation Fund and assumes all of its liabilities.[401]

The Trans-Alaska Pipeline System provisions dealing with discharge of oil from vessels loaded at its terminals are also repealed.[402] Likewise, the portion of that legislation establishing the Trans-Alaska Pipeline Liability Fund is repealed.[403] Interestingly, rather than simply turning over the Pipeline Liability Fund's monies to the Fund, a reserve estimated to be sufficient to pay outstanding claims is kept, with the balance turned over to the Fund.[404] Effective retroactively, a broad definition of damages is added to the Trans-Alaska Pipeline Authorization Act,[405] apparently aimed at compensating local governments for losses due to cleanup of the *Exxon Valdez* spill.[406] Also added is an expeditious payment clause, requiring the Pipeline Liability Fund to pay claims not settled within 90 days of their presentation to the owner of the discharging vessel.[407]

The Act specifically supersedes the Limitation of Liability Act of 1851 as it relates to oil discharges or prevention of such discharges.[408]

Once again, Congress chose not to adopt any existing international protocols such as those of the CLC. The Act concedes that it is in the best interests of the United States to participate in an international system for liability and compensation due to oil pollution.[409] However, Congress felt that for

396. *Id.* § 2002(a).
397. *Id.* § 2002(b)(5).
398. *Id.* § 2003(b).
399. *Id.*
400. Oil Pollution Act, *supra* note 8, at § 2004. Congress repealed 43 U.S.C. §§ 1811-1824. *Id.*
401. *Id.*
402. Oil Pollution Act, *supra* note 8, at § 8102(a)(1).
403. *Id.*
404. *Id.* § 8102(a)(2)(A).
405. *Id.* § 8102(c).
406. 136 CONG. REC. H6,945 (daily ed. August 3, 1990) (statement of Cong. Young).
407. Oil Pollution Act, *supra* note 8, at § 8102(d).
408. *Id.* § 1018(c).
409. *Id.* § 3001.

the United States to participate, such a scheme must be at least as effective as current federal and state law.[410] A small bone was thrown in providing for Presidential encouragement of an international inventory of personnel and equipment available for spill removal.[411] The Act does call for a review of existing agreements with Canada dealing with oil discharges on the Great Lakes and Lake Champlain to determine if any amendments or revisions are needed.[412]

B. Natural Resource Damages

Under the Act the provisions for damages are quite specific. The responsible party is liable for the following categories of damages: natural resources;[413] subsistence use;[414] revenues;[415] and profits and earning capacity.[416]

Natural resource damages are only recoverable by governmental or Indian tribe trustees and not private citizens.[417] The damages include injury to, destruction of, loss of, or loss of use of natural resources.[418] The Act also defines the methodology for calculating natural resource damages. The measure is (A) "the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources; (B) the diminution in value of those natural resources pending restoration; plus (C) the reasonable cost of assessing those damages."[419] The trustees are to assess damages and develop and implement a plan for restoration of the natural resources.[420] The reasonable costs of assessing the injury, destruction, or loss of the natural resources are recoverable.[421] Revolving trust accounts, whose use is restricted to the trustees' costs incurred in carrying out their responsibilities under this Act will hold all recovered natural resource damages.[422]

Additional measures of damages related to natural resources are included in the provisions for subsistence use and revenues. Whether such resources are injured, destroyed or lost, recovery is available for subsistence use, regardless of who owns or manages the resources.[423] The revenue measurement of damages allows governmental entities to recover for their lost taxes, rents, fees, or royalties due to damages to natural resources.[424]

The profits and earning capacity provision allows recovery by any claim-

410. *Id.*
411. Oil Pollution Act, *supra* note 8, at § 3004.
412. *Id.* §§ 3002, 3003.
413. *Id.* § 1002(b)(2)(A).
414. *Id.* § 1002(b)(2)(C).
415. Oil Pollution Act, *supra* note 8, at § 1002(b)(2)(D).
416. *Id.* § 1002(b)(2)(E).
417. *Id.* § 1002(b)(2)(A).
418. *Id.* § 1002(b)(2)(A).
419. Oil Pollution Act, *supra* note 8, at § 1006(d)1.
420. *Id.* § 1006(c).
421. *Id.* § 1002(b)(2)(A). The standard to be used is defined in Ohio v. United States Dep't of the Interior, 880 F.2d 432, 462-80 (D.C. Cir. 1989). *See* discussion, *supra* notes 173-75.
422. Oil Pollution Act, *supra* note 8, at § 1006(f).
423. *Id.* § 1002(b)(2)(D).
424. *Id.*

ant for loss of profits or impaired earning capacity due to damages to natural resources.[425] This provision is a route for recovery by fishermen of their lost income due to damaged fishery resources.[426]

The Fund's potential uses include the payment of costs to assess natural resource damages and to create and implement plans to rectify those damages,[427] plus the payment of claims for uncompensated damages.[428] The payout per incident is limited to $500 million for natural resource damages.[429]

C. *Private Citizens' Damages*

Under the Act, the responsible party is liable for the following damages: injury to real or personal property,[430] lost revenues, lost profits and impairment of earning capacity.[431] The Fund may potentially pay for such damages, if they are not available directly from the responsible party.[432] Property damages include injury to, or economic losses resulting from, destruction of such property.[433] Generously, lessees, rather than merely property owners, can recover directly.[434]

The provisions for revenues, profits and earning capacity also deal with property damage. The revenue measurement allows governmental entities recovery for their lost taxes, rents, fees, or royalties due to damages to real or personal property.[435] The profits and earning capacity is a similar provision, allowing recovery by any claimant for loss of profits or impaired earning capacity due to damages to real or personal property.[436]

D. *Miscellaneous*

The Act depends on the CWA's prohibition of discharge, but increases the resultant penalties. The maximum penalty for a discharge is now $25,000 per day or $1,000 per barrel of oil.[437] If the spill was a result of gross negligence or willful misconduct the penalty is not less than $100,000 and not more than $3,000 per barrel of oil.[438] Penalties for failure to comply with Presidential regulations are raised to $25,000 per day.[439] Additional penalties are now imposed for failure to remove the discharge when so ordered.[440]

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425. Oil Pollution Act, *supra* note 8, at § 1002(b)(2)(E).
426. H.R. CONF. REP. NO. 653, 101st Cong., 2d Sess. 103, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 781.
427. Oil Pollution Act, *supra* note 8, at § 1012(a)(2).
428. *Id.* § 1012(a)(4).
429. *Id.* § 9001(c)(2).
430. *Id.* § 1002(b)(2)(B).
431. Oil Pollution Act, *supra* note 8, at § 1002(b)(2)(E).
432. *Id.* § 1012(a)(4).
433. *Id.* § 1002(b)(2)(B).
434. *Id.*
435. Oil Pollution Act, *supra* note 8, at § 1002(b)(2)(D).
436. *Id.* § 1002(b)(2)(E).
437. *Id.* § 4301(b).
438. *Id.*
439. *Id.* *See supra* notes 354-61 and accompanying discussion.
440. Oil Pollution Act, *supra* note 8, at § 4301(b).

These penalties are a maximum of $25,000 per day or three times the costs incurred as a result of the refusal.[441]

The duty to report a spill is likewise retained with increased penalties. The maximum penalty is raised to $250,000 for an individual or $500,000 for a corporation.[442] A penalty of imprisonment for up to five years may also be imposed.[443]

A number of other penalties under existing marine transportation safety laws are also increased.[444] Included are penalties for negligent operation of a vessel[445] and penalties under the Deepwater Port Act,[446] the Intervention on the High Seas Act,[447] and the Ports and Waterways Safety Act.[448]

The Act establishes an additional category of damages referred to as public services.[449] Public services damages are related to neither property or natural resources. Rather, that provision is designed to allow local or state governments to recover for the costs of providing increased or additional fire, police, and other health and safety services.[450] The time period covers both during and after removal activities.[451]

Finally, the Fund is available for payment of administrative, operational, and personnel costs for the enforcement of the Act.[452]

V. EFFECT OF THE ACT

Does the Act solve the problems that existed in the United States under previous law? Does it introduce any new problems? Given the Act's incipiency, educated guessing and general predictions are the best tools available to answer these questions.

Federal and state governments were in a fairly good position before the Act.[453] Recovery, under the Act, of lost taxes and extra services for governmental entities,[454] and providing states with an automatic draw from the Fund for cleanup costs[455] is merely icing on their cake.

Private citizens, on the other hand, were not as well situated.[456] The Act's inclusion of specific compensable damages for private citizens improves that situation. Private citizens now have a basis for direct presenta-

441. *Id.*
442. *Id.* § 4301(a)(2).
443. *Id.* § 4301(2).
444. Oil Pollution Act, *supra* note 8, at § 4302.
445. *Id.* § 4302(a).
446. *Id.* § 4302(m).
447. *Id.* § 4302(l).
448. Oil Pollution Act, *supra* note 8, at § 4302(j).
449. *Id.* § 1002(b)(2)(F).
450. *Id.*
451. H.R. CONF. REP. NO. 653, 101st Cong., 2d Sess. 103, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 781.
452. Oil Pollution Act, *supra* note 8, at § 1012(a)(5).
453. *See supra* notes 33-192 and accompanying text.
454. *See supra* notes 435, 449-51 and accompanying text.
455. *See supra* note 318.
456. *See supra* discussion notes 193-227.

tion of their claims to the responsible party.[457] Private citizens are provided with another route to compensation in the Fund. The provision for presentation to the Fund of claims not settled within ninety days[458] by the responsible party should speed up damages recovery. If no relief is available under those two avenues, at least the Act's damages provisions should reduce uncertainty in litigation.

If the existing problems with payment of claims under the Trans-Alaska Pipeline Liability Fund are repeated, the new provisions involving the Fund will be of little help. Ominously, the Senate presumed that the claims procedure will be adversarial.[459] To cut both administrative and claimant costs, such adversarial attitudes must be kept to a minimum. A provision for expeditious payout is not included, but would provide additional protection for private citizens.

Given the ineffective response to the *Exxon Valdez* spill,[460] improved planning is very important. The National Contingency Plan amendments are fairly ambitious.[461] Putting equipment and designated personnel closer to potential spills will cut response time. The National Response Unit provisions, such as Coast Guard strike teams,[462] should also help with rapid response. Of course, the real question is whether this will be any better than what was called for in the 1977 Clean Water Act. Providing for funding of the National Contingency Plan out of the Fund may make the necessary difference.

Requiring oil spill response plans both from areas likely to experience a spill[463] and from tankers[464] should help minimize spill costs as well. Testing these plans with random drills[465] should ensure their vitality. The down side is the additional cost for tanker owners to create their plans and participate in drills and the federal government's coordination of it all. Another cautionary eyebrow is raised by the rapid timing demanded. The quality of plans drawn up in only one year is questionable.

If all of the planning called for is implemented, other problems may be created. With district groups, area groups, strike teams, on-scene coordinators, and an overall coordinator, [466] perhaps too much planning and response is called for. The Coast Guard is burdened with many new responsibilities, maybe more than it can handle. Moreover, the Fund is to pay for all of this, perhaps impacting the amount of money available for spill compensation.

The prevention provisions of the Act explore new territory. On the one

457. *See supra* discussion notes 430-36.
458. *See supra* discussion notes 319-21.
459. S. REP. No. 94, 101st Cong., 2d Sess. 10, *reprinted in* 1990 U.S. CODE CONG. & ADMIN. NEWS 731.
460. Nulty, *supra* note 4, at 48; Edelman, *supra* note 1, at 3, col. 1.
461. *See supra* discussion notes 323-31.
462. *See supra* discussion notes 334-38.
463. *See supra* notes 344-53.
464. *See supra* notes 354-59.
465. *See supra* notes 362-64.
466. *See supra* notes 325-53.

hand, the provisions on crew standards,[467] and the teeth behind them in the way of fines and bans on foreign tankers from countries with standards less stringent than those of the United States,[468] should have a substantial impact. The double hull requirement,[469] and the allowance for any better technology that may be developed,[470] should prove equally valuable. On the other hand, from the tanker owner's point of view, this is all quite expensive.[471]

The Act does not preempt state statutes; they remain in effect. During Congressional floor discussion, much ado was made about continuing to let states enforce their own, sometimes stricter, standards.[472] California's passage of an oil spill bill,[473] in the month following passage of the Act, indicates states still feel their statutes are necessary. The problem is that such statutes leave tanker owners subject to requirements that vary as they cross state lines. This myriad of regulation hampers shippers' abilities to maximize efficiency and economics and still have logistically feasible operations.[474] The cost of determining the applicable regulations, complying with them, and purchasing insurance to cover absolute liability is prohibitive.[475]

Another potential problem with continued existence of state statutes is coordination of benefits when a state fund and the Oil Spill Liability Trust Fund would both cover costs. The Act does not allow double recovery from the Fund but does not deal with double recovery from the Fund and another separate fund.[476] Provisions prohibiting double recovery and establishing a payout hierarchy are needed.

Tanker owners face another obstacle when their vessels move between ports. Tanker oil spill response plans must be consistent with all Area Contingency Plans,[477] which means different responses for different ports. The same is true for the proper equipment required on board.[478] The definition of proper will undoubtedly change between warm and cold water ports, like Alaska and Texas, as oil behaves differently at different temperatures.[479]

The increased fines for discharge,[480] and reduced defenses under the

467. *See supra* notes 365-74, 383-85.

468. *See supra* notes 386-88.

469. *See supra* notes 375-81.

470. *See supra* note 382.

471. Edelman, *supra* note 1, at 23, col. 2. The *Exxon Valdez* cost $125 million to build; a double hull would cost 10-15% more. Retrofitting the 153 U.S. tankers could cost about $30 million each, or a total cost of more than $4 billion. *Id.*

472. 136 CONG. REC. S11,536-48 (daily ed. Aug. 2, 1990); 136 CONG. REC. H6,920-49 (daily ed. Aug. 3, 1990).

473. *See supra* notes 144-47.

474. Post, *supra* note 121, at 547.

475. *Id.*

476. Oil Pollution Act, *supra* note 8, at § 1012(i).

477. *See supra* notes 434-59.

478. *See supra* notes 350-61.

479. T. POST, PRIVATE COMPENSATION FOR INJURIES SUSTAINED BY THE DISCHARGE OF OIL FROM VESSELS ON THE NAVIGABLE WATERS OF THE UNITED STATES 10 (Sea Grant Technical Bulletin No. 22, 1971).

480. *See supra* notes 437-48.

Act,[481] are presumably designed to provide additional deterrence. It is not clear, in the wake of Exxon facing a $2 billion plus bill, that additional deterrence is necessary. Arguably, this is merely a meaningless additional burden on tanker owners.

The Act does not preempt common law access to other damages.[482] This is certainly good for the tort lawyer interested in developing new theories of damages. On the other hand, it is a frightening prospect for oil tanker owners.

Congress chose not to adopt any international protocols.[483] Arguably, that weakens the effect of existing protocols without a large nation like the United States involved.[484] Higher liability exposure for tanker owners here diminishes the incentive for foreign tankers to come to the United States.[485] The refusal to adopt international protocols is also narrow-minded. There is no guarantee of no effect on the United States or its residents, just because a spill is not in United States waters.

VI. CONCLUSION

Fifteen years in the making and unanimously approved,[486] the Oil Pollution Act of 1990 has a lot of hopes riding on it. The increases in liability limits, types of damages, and pre-spill planning should be good for claimants. The pre-spill planning and prevention activities should be good for all. It is always cheaper to clean up quickly or not spill at all.

The Fund is probably the most important part of the Act. It is directly funded out of sure money since collection of the earmarked tax started eight months before passage of the Act. However, the Fund must pay for many activities including planning, prevention, and potential damage payments. Unfortunately, the United States may have left itself open to fewer foreign tankers wanting to comply, especially in the face of a growing myriad of state regulations.

481. *See supra* notes 295-301.
482. *See supra* notes 396-408.
483. *See supra* notes 409-10.
484. Van Hanswyk, *supra* note 162, at 325.
485. Schoenbaum, *supra* note 52, at 159.
486. 136 CONG. REC. S11,547 (daily ed. Aug. 2, 1990). 136 CONG. REC. H6,949 (daily ed. Aug. 3, 1990).