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THE OIL POLLUTION ACT OF 1990:
REACTION AND RESPONSE

MICHAEL P. DONALDSON†

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I. INTRODUCTION

ON August 18, 1990, George Bush signed into law the Oil Pollution Act of 1990 (OPA). The eleven million gallon oil spill from the Exxon Valdez in Prince William Sound, Alaska in June 1989, followed within months by spills in the coastal waters of Rhode Island, the Delaware River and the Houston Ship Channel, prompted Congress to review the issues of oil pollution cleanup, compensation and liability.¹ These events demonstrated that "oil pollution from accidental tanker spills [was] a real and continuing threat to the public health, . . . welfare and the environment."² It became apparent that a comprehensive oil pollution liability and compensation act was necessary to address the concerns raised about future catastrophic oil spills and the need to prevent

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1. S. REP. NO. 94, 101st Cong., 2d Sess. 2, *reprinted in* 1990 U.S.C.C.A.N., 722, 723 [hereinafter S. REP. No. 94].

2. *Id.*

marine pollution and minimize resulting damage.³ These heightened concerns about oil spill disasters prompted the House and the Senate to come together and agree on specific terms for a comprehensive oil spill liability and compensation statute.

The OPA was a dramatic departure from existing compensation and liability regimes under both domestic and international law. It has provided a more comprehensive system of compensation and response to marine pollution than previously available. For years, Congress had grappled with possible solutions to the problems of oil spill cleanup and prevention. Instead of revising existing law, Congress drafted an extensive and revolutionary statute which marked a fundamental change to oil spill liability and compensation. Although it has been almost two years since the OPA was enacted, its full impact has not yet become apparent. Interested parties in both the domestic and international community continue to react, both positively and negatively, in the wake of this statute.

This article will describe the development of the OPA's liability and compensation framework, the attempts to adopt suggested international oil spill liability schemes, and the impact the OPA has had on those involved in the production and transportation of oil. First, this article will examine the general liability and compensation system that existed in the United States prior to the passage of the OPA. Second, significant changes in the liability system as a result of the passage of the OPA will be reviewed. Third, this article will discuss some of the suggested domestic and international approaches that were not adopted. Fourth, this article will consider some of the present economic concerns and reactions to the OPA and its impact on the consuming public. Finally, this article will suggest that a cooperative approach be adopted in developing solutions to the inherent problems involved in apportioning the risks and liabilities for oil pollution damages.

II. PRE-OPA OIL SPILL LIABILITY

With the 1967 sinking off the British Coast of the oil tanker Torrey Canyon, the world's attention focused on the issue of oil pollution damage and cleanup.⁴ The grounded Liberian super-tanker poured 120,000 tons of heavy crude oil onto a hundred

3. See *id.* at 2-4.

4. See S. EXEC. REP. NO. 28, 99th Cong., 2d Sess. 1 (1986) [hereinafter S. EXEC. REP. NO. 28].

miles of the British and French coasts.⁵ At that time, the shipping industry was entitled to limit its liability for oil pollution damages based upon a statute passed by the United States' Congress in the 19th century. This statute, entitled the Limitation of Liability Act, was enacted in 1851 to allow a shipper and certain charterers to limit their liability to the post-accident value of their vessel and their pending freight.⁶ The purpose behind the Limitation of Liability Act of 1851 was to promote investment in the American shipping industry.⁷ The Act sought to provide the American merchant shipping industry with a competitive edge over Great Britain, which already provided a similar measure of liability protection for their shipping industry.⁸ Since most of the concerns surrounding the enactment of this statute no longer exist, most courts and commentators consider it to be hopelessly outdated.⁹ Even prior to the enactment of the OPA, the courts slowly began to weaken and restrict the scope of the Limitation of Liability Act in oil pollution cases.¹⁰ The impact of each successive maritime

5. R. MICHAEL M'GONIGLE & MARK W. ZACHER, *POLLUTION, POLITICS AND INTERNATIONAL LAW* 5 (1979).

6. 46 U.S.C. §§ 183(a), 186 (1988). As provided in section 183(a) of the statute:

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, good, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Id. See also, 46 U.S.C. § 186 (1988) (providing that certain charterers will be deemed owners for purposes of limitation of liability).

7. *Just v. Chambers*, 312 U.S. 383, 385 (1941); *University of Texas Medical Branch v. United States*, 557 F.2d 438, 454 (5th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) ("purpose of [act] was to place [United States'] 'mercantile marine upon the same footing as that of Great Britain' " (citing 23 CONG. GLOBE, 31st Cong., 2d Sess. 714 (1851) (remarks of Sen. Davis)).

8. GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 10-3, at 820 (2d ed. 1975).

9. See *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437 (1954) (Black, J. dissenting) ("Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail"); *Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234, 239 (9th Cir. 1989) (recognizing many consider Act relic of past). See also, GILMORE & BLACK, *supra* note 8, at 822 (Act showing increasing signs of economic obsolescence); Mark E. King, Note, *In re Complaint of Armatur, S.A.: The Limitation of Liability Act and Maritime Environmental Disasters*, 21 ENVTL. L. 405 (1991).

10. See, e.g., *In Re Glacier Bay*, 944 F.2d 577, 578-79, 581, 583 (9th Cir. 1991) (Trans-Alaska Pipeline Authorization Act implicitly repealed Limitation of Liability Act); *In Re Hokkaido Fisheries Co.*, 506 F. Supp. 631, 634 (D. Alaska 1981) (Clean Water Act precluded application of Limitation of Liability Act).

disaster slowly shifted the attention and priorities of the United States and the world toward the protection of the environment from marine pollution caused by oil spill accidents.

Prior to the passage of the OPA, the existing federal statutory regime for oil spill liability and compensation was clearly inadequate.¹¹ There were four statutes, in addition to the Limitation of Liability Act of 1851, which addressed certain aspects of oil spill liability and compensation.¹² These statutes were known as the Federal Water Pollution Control Act (FWPCA),¹³ the provisions in Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA),¹⁴ the Deepwater Port Act of 1974 (DPA),¹⁵ and the Trans-Alaska Pipeline Authorization Act (TAPAA)¹⁶.

The FWPCA contained general oil spill cleanup provisions prior to the passage of the OPA. The FWPCA provided for the cleanup of oil spills and authorized the federal government to remove the oil once it had been discharged, if it was determined that the owner or operator of the vessel or facility would not properly remove it themselves.¹⁷ The FWPCA provided defenses

11. S. REP. NO. 94, *supra* note 4, at 1. The legislative history of the Oil Pollution Act exhibits substantial Congressional dissatisfaction with the patchwork of oil pollution protection measures, as exhibited in the following excerpt: [T]here is a fragmented collection of Federal and State laws providing inadequate cleanup and damage remedies, taxpayer subsidies to cover cleanup costs, third party damages that go uncompensated, and substantial barriers to victim recoveries — such as legal defenses, statutes of limitation, the corporate form, and the burdens of proof that favor those responsible for the spill.

Id.

12. *Id.* at 3.

13. 33 U.S.C. §§ 1251-1376 (1988), amended by 33 U.S.C.A. §§ 1319, 1321, 1324, 1251-1252, 1268-1270 (Supp. 1991).

14. 43 U.S.C. §§ 1801-1866 (1988), repealed by 43 U.S.C.A. §§ 1813-1824 (Supp. 1991).

15. 33 U.S.C. §§ 1501-1524 (1988), repealed by 33 U.S.C.A. § 1517 (Supp. 1991), amended by 33 U.S.C.A. § 1503 (Supp. 1991).

16. 43 U.S.C. §§ 1651-1655 (1988), repealed by 43 U.S.C.A. § 1653 (Supp. 1991), amended by 43 U.S.C.A. § 1652 (Supp. 1991).

17. 33 U.S.C. § 1321(c)(1) (1988) (amended 1990). This section provides:

Whenever any oil or a hazardous substance is discharged, or there is a substantial threat of such discharge, into or upon the waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, . . . the President is authorized to act to remove or arrange for the removal of such oil or substance at any time, unless he determines such removal will be done properly by the owner or operator of the vessel, onshore facility, or offshore facility from which the discharge occurs.

Id. Section 1321(a)(2) defines “discharge” as “any spilling, leaking, pumping,

to liability if the owner or operator could prove that the "discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether any such act or omission was or was not negligent."¹⁸ Additionally, the statute provided for specific dollar limits for cost recovery depending upon the vessel and its size.¹⁹ The FWPCA's oil spill liability limitations were considered inordinately lenient, and provided incomplete coverage for oil pollution damages.²⁰ However, unlimited liability for removal costs could be imposed on the owner or operator of a vessel or facility upon a showing that the "discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner."²¹

Other federal laws provided for cleanup costs and damages associated with specific oil spill matters. OCSLA imposed liability for the discharge of oil from offshore facilities located on the Outer Continental Shelf and for vessels transporting oil from such offshore facilities.²² The DPA addressed oil spill liability for owners and operators of vessels and licensees of deepwater ports.²³ Finally, the TAPAA applied specifically to vessels trans-

pouring, emitting, emptying or dumping, but excludes . . . [any discharges authorized or relating to a permit]." 33 U.S.C. § 1321(a)(2) (1988).

18. 33 U.S.C. § 1321(f)(1) (statute permits owner or operator to assert any combination of these defenses).

19. 33 U.S.C. § 1321(f)(1). The statute specifically provides:

[S]uch owner or operator of any vessel from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section shall, notwithstanding any other provision of law, be liable to the United States Government for the actual costs incurred under subsection (c) of this section for the removal of such oil or substance by the United States Government in an amount not to exceed, in the case of an inland barge \$125 per gross ton of such barge, or \$125,000, whichever is greater, and in the case of any other vessel, \$150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, \$250,000), whichever is greater

Id.

20. The legislative history of the Oil Pollution Act provides a good picture of Congress' disdain for the low liability limitations in the Federal Water Pollution Control Act (FWPCA). See S. REP. No. 94, *supra* note 1, at 724. As the legislative history states: "The [FWPCA] . . . has historically provided only partial protection. The Act sets inappropriately low limits of liability for owners and operators of vessels with respect to Federal oil spill removal costs and natural damages, and provides no coverage or compensation for other damages." *Id.* As a result, certain provisions of the FWPCA no longer apply to oil spills where liability is established under the Oil Pollution Act of 1990. See *infra* note 86 and accompanying text.

21. 33 U.S.C. § 1321(f)(1).

22. 43 U.S.C. § 1814.

23. 33 U.S.C. § 1517.

porting oil from the Trans-Alaska Pipeline to United States ports.²⁴ Separate oil spill funds for cleanup costs and damages were in place under each statute.²⁵ These oil spill funds were eventually consolidated into the fund established by the OPA.

III. THE OIL POLLUTION ACT OF 1990

After approximately 15 years of congressional debate and various proposed bills, Senate and House members compromised and enacted the Oil Pollution Act of 1990.²⁶ Interestingly, one of the previously failed attempts to enact a comprehensive oil pollution liability and compensation act surrounded the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).²⁷ CERCLA had initially included certain oil spill provisions which were ultimately dropped prior to the passage of that act.²⁸ During the process of drafting the OPA, Congress recognized that the existing patchwork of federal, state and local laws and regulations addressing oil spill liability and cleanup were insufficient.²⁹ The existing statutes did not

24. 43 U.S.C. § 1653.

25. Walter B. Jones, *Oil Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENVTL. L. REP. 10333, 10333-10334 (1989). The FWPCA fund was "made up of appropriated monies, recovered costs, and fines to cover federal government-incurred cleanup costs," and reached a high of \$24 million in 1985. *Id.* at 10333. "The Trans-Alaskan Pipeline System (TAPS) created a new fund specifically for marine accidents involving TAPS oil . . . the TAPS fund is derived *not* through appropriated, taxpayer monies . . . but through a five cent per barrel fee on oil carried by vessels leaving the pipeline terminus in Valdez, Alaska." *Id.* at 10334. The Deepwater Port Act created a fund similar to the TAPS fund, with liability limits of \$20 million for vessels and \$50 million for offshore oil ports covered by this act. *Id.* The OCSLA Amendments established another federal oil spill fund "with \$200 million to cover spills from offshore production facilities and vessels transporting oil from these facilities." *Id.* at 10335.

26. Phil Kuntz, *Oil Spill Liability Negotiators Find Another Sticking Point*, 48 CONG. Q. 1261 (Apr. 28, 1990).

27. Jones, *infra* note 25, at 10335.

28. *Id.* The Love Canal and Times Beach incidents prompted Congress to direct its attention toward a hazardous substances liability and compensation statute and away from oil spills. *Id.* Serious consideration was given to combining the hazardous substances and oil spill bills, but this proposal was eventually dropped in order to ensure the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 33 U.S.C.A. §§ 9601-9675 (Supp. 1991), with its coverage restricted to cleanup of hazardous substances. H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 32 (1989) [hereinafter H.R. REP. NO. 242]. Despite assurances to move the oil spill provisions quickly through the next Congress, politics and other delays prevented the passage of an oil spill statute until the Oil Pollution Act of 1990. See Jones, *supra* note 25.

29. H.R. REP. NO. 242, *supra* note 28, at 32.

adequately address oil spill liability and compensation.³⁰ A long process of compromise and drafting produced the Oil Pollution Act of 1990.³¹ This legislation has provided a comprehensive approach to oil spill prevention, response, liability and compensation.

A responsible party under the OPA is defined to include "any person owning, operating or demise chartering" a vessel.³² Additionally, responsible parties include, with certain exceptions, the owners or operators of onshore and offshore facilities, the licensee of deepwater ports, any owner or operator of a pipeline, and all responsible parties of abandoned vessels or facilities.³³ Third parties may also be treated as responsible parties for the purposes

30. S. REP. NO. 94, *supra* note 1, at 3.

31. Oil Pollution Act of 1990, Pub. L. No. 101-380, 1990 U.S.C.C.A.N. (104 Stat.) 484 (enacted August 18, 1990) (codified at 33 U.S.C. §§ 2701-2761; 26 U.S.C. §§ 4611, 9509 along with certain conforming amendments to other statutes).

32. Oil Pollution Act § 1001(32)(A), 33 U.S.C.A. § 2701(32)(A). The actual language of the statutory definition is even more inclusive, stating:

(32) "responsible party" means the following"

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

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

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

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

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

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

Id.

33. *Id.* § 1001(32)(B)(C)(D)(E)(F), 33 U.S.C.A. § 2701(32)(B)(C)(D)(E)(F). For the full text of § 1001(32), see *supra* note 32.

of determining liability under the OPA, if the responsible party can show that a discharge or threat of discharge and the resulting removal cost and/or damages were caused solely by the act or omission of the third party.³⁴ Responsible parties will be liable for the discharge or substantial threat of discharge of oil into or upon the navigable waters, adjoining shorelines or the exclusive economic zone of the United States.³⁵

Consistent with prior developments in the law and policy, the OPA specifically superseded the Limitation of Liability Act of 1851 with respect to the prevention of liability for the discharge or substantial threat of the discharge of oil.³⁶ Had the OPA not specifically superseded the Limitation Liability Act of 1851, the purpose behind the Act could have easily been subverted. Congress recognized that the Limitation of Liability Act of 1851 was clearly outdated and inconsistent with the intended liability and compensation scheme for parties responsible for oil pollution.³⁷ The OPA now governs all compensation actions for removal costs and damages for oil pollution notwithstanding the Limitation of Liability Act of 1851.³⁸

The standard of liability for owners or operators of any ves-

34. *Id.* § 1002(d)(1)(A), 33 U.S.C.A. 2702(d)(1)(A).

35. *Id.* § 1002(a), 33 U.S.C.A. § 2702(a). Section 1002(a) provides: [E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages . . . that result from such incident.

Id.

36. *Id.* § 1018(c), 33 U.S.C.A. § 2718(c). Directly contravening the Limitation of Liability Act of 1851 with respect to oil spills, the Oil Pollution Act explicitly provided that:

Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et. seq.), or section 9509 or the Internal Revenue Code of 1986 (26 U.S.C. 9509), shall in any way affect, or be construed to affect, the authority of the United States or any State or political subdivision thereof —

(1) to impose additional liability or additional requirements;

or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law; relating to the discharge, or substantial threat of a discharge, of oil.

Id.

37. S. REP. NO. 94, *supra* note 1, at 14.

38. H.R. CONF. REP. NO. 653, 101st Cong., 2d Sess. 103, *reprinted in* 1990 U.S.C.A.N. 722, 781 [hereinafter referred to as H.R. CONF. REP. NO. 653]. The Conference Report states in pertinent part:

Liability under this Act is established notwithstanding any other provision or rule of law. This means that liability provisions of this Act would govern compensation for removal costs and damages notwithstanding any limitations under existing statutes such as [the Limitation of Liabil-

sel, onshore or offshore facility for the discharge or substantial threat of discharge of oil is strict, joint and several.³⁹ Each responsible party will be liable for the removal costs incurred by the United States, a State or Indian tribe under the provisions of the FWPCA, the Intervention on the High Seas Act or under any state law.⁴⁰ The responsible party will also be liable for any removal costs incurred by any person as the result that person's cleanup activities undertaken consistent with the National Contingency Plan.⁴¹ If a responsible party voluntarily undertakes to clean up an oil spill it may be entitled to credit those amounts spent in the voluntary cleanup against its ultimate liability under the OPA.⁴² Additionally, when a third party is solely responsible for an oil spill and the responsible party incurs all removal costs and damages, it will then be subrogated to all rights of the United States and other claimants to recover those removal costs and damages against that third party.⁴³

The OPA expands the scope of recoverable damages by specifically enumerating six categories of damages for which responsible parties will be liable.⁴⁴ These damages include: natural resources damages;⁴⁵ "damages for injury to, or economic losses

ity Act of 1851] . . . , or under existing requirements that physical damage to the proprietary interest of the claimant be shown.

Id. at 103.

39. H.R. CONF. REP. NO. 653, *supra* note 38, at 102 (standard of liability held to be consistent with that under the FWPCA).

40. Oil Pollution Act § 1002(b)(1)(A), 33 U.S.C.A. § 2702(b)(1)(A). "Removal costs" are defined as "the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." *Id.* § 1001(31).

41. *Id.* § 1002(b)(1)(B), 33 U.S.C.A. § 2702(b)(1)(B).

42. *Id.* § 1004(a), 33 U.S.C.A. § 2704(a). The liability limits imposed under the OPA are calculated to include "any removal costs incurred by, or on behalf of, the responsible party." *Id.* Under the FWPCA, a responsible party who undertook to clean up an oil spill itself would not be entitled to credit those amounts against its ultimate liability. *See* United States v. Dixie Carriers, 736 F.2d 180, 183 (5th Cir. 1984). Commentators have recognized that such a provision acted as a disincentive for vessel owners and operators to voluntarily attempt to clean up oil spills. *See* Antonio J. Rodriguez & Paul Jaffe, *The Oil Pollution Act of 1990* 15 TUL. MAR. L.J. 1, 5 n.23 (1990) [hereinafter Rodriguez & Jaffe].

43. *Id.* § 1002(d)(1)(B), 33 U.S.C.A. § 2702(d)(1)(B).

44. *Id.* § 1002(b)(2), 33 U.S.C.A. § 2702(b)(2).

45. *Id.* § 1002(b)(2)(A), 33 U.S.C.A. § 2702(b)(2)(A). Section 1002(b), entitled "Covered Removal Costs and Damages," includes the following definition of damages to natural resources: "Damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage." *Id.* § 1002(b)(2)(A), 33 U.S.C.A. § 2702(b)(2)(A). "Natural resources" are defined in § 1001(20) to include "land, fish, wildlife, biota, air,

resulting from destruction of, real or personal property;"⁴⁶ damages for "loss of subsistence use of natural resources, . . . without regard to the ownership or management of the resources;"⁴⁷ "damages for the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real . . . [or] personal property, or natural resources;"⁴⁸ damages for "loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real [or personal] . . . property, or natural resources;"⁴⁹ and "[d]amages for "net costs of providing increased or additional public services during or after removal activities."⁵⁰

water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . , any state or local government or Indian tribe, or any foreign government." *Id.*

In general, the measure of natural resources damages under the OPA shall be:

- (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.

Id. § 1006(d)(1), 33 U.S.C.A. § 2706(d)(1). Additionally, the National Oceanic and Atmospheric Administration (NOAA), in consultation with other agencies, is to promulgate regulations for the assessment of natural resources damages. *Id.* § 1006(e)(1), 33 U.S.C.A. § 2706(e)(1). On March 13, 1992, NOAA published an advance notice of proposed rulemaking concerning these damage assessment regulations. 57 Fed. Reg. 8964 (1992). NOAA indicated that it will publish these proposed regulations by the statutory deadline of August 18, 1992. *Id.* Any assessment or determination of natural resources damages made in accordance with the statute and the regulations to be promulgated shall have the force and effect of a rebuttable presumption in favor of the trustee seeking recovery against the responsible party. *Id.* § 1006(e)(2), 33 U.S.C.A. § 2706(e)(2).

46. *Id.* § 1002(b)(2)(B), 33 U.S.C.A. § 2702(b)(2)(B).

47. *Id.* § 1002(b)(2)(C), 33 U.S.C.A. § 2702(b)(2)(C). "Subsistence use of natural resources" is not a defined term in the OPA. However, a Senate Report did discuss the recoverability of economic damages for both loss of use and loss of subsistence use of natural resources. S. REP. No. 94, *supra* note 1, at 12. In discussing these damages, the Senate Report recognized that "fishermen, for example, would not only receive the equivalent of unemployment compensation, but would also receive compensation to prevent loss of [their] . . . boat." *Id.* The Senate Report stated that "[l]ost wages are of limited value if the means of earning the wages, such as a boat, go uncompensated." *Id.* The example of a commercial fishermen was also used in the portion of the House Conference Report discussing the ability of a claimant under section 1002(b)(2)(E) of the Oil Pollution Act to recover for loss of profits or impairment of earning capacity resulting from injury to property or natural resources. H.R. CONF. REP. No. 653, *supra* note 38, at 103.

48. Oil Pollution Act § 1002(b)(2)(D), 33 U.S.C.A. § 2702(b)(2)(D).

49. *Id.* § 1002(b)(2)(E), 33 U.S.C.A. § 2702(b)(2)(E).

50. *Id.* § 1002(b)(2)(F), 33 U.S.C.A. § 2702(b)(2)(F). These recoverable

Natural resource damages are recoverable by trustees of the United States, state trustees, Indian tribe trustees, or by foreign trustees.⁵¹ The OPA also allows the federal and state governments to recover for loss of taxes, royalties, rents, fees or net profits due to injury or loss to property or natural resources.⁵² In addition, the net costs for providing "increased or additional public services during or after removal activities" will be recoverable by the affected states or local governments.⁵³

Individuals are now entitled to recover damages for a loss of profits or impairment of earning capacity from injury to property or natural resources.⁵⁴ As a result, a responsible party now may be liable to an individual claimant not only for injury or damage to the claimant's property,⁵⁵ but also for the claimant's lost profits or impairment of earning capacity⁵⁶ and any loss of subsistence use of natural resources,⁵⁷ regardless of ownership of the damaged property or resources.⁵⁸ Many of these specific damage categories were not compensable under pre-existing law.⁵⁹

The OPA provides defenses to a responsible party if the dis-

costs include "protection from fire, safety, or health hazards, caused by a discharge of oil." *Id.*

51. *Id.* §§ 1002(b)(2)(A), 1006(a), 33 U.S.C.A. 2702(b)(2)(A), 2706(a).

52. *Id.* § 1002(b)(2)(D), 33 U.S.C.A. § 2702(b)(2)(D).

53. Oil Pollution Act § 1002(b)(2)(F), 33 U.S.C.A. § 2702(b)(2)(F).

54. *Id.* § 1002(b)(2)(E), 33 U.S.C.A. 2702(b)(2)(E). The House Conference Report discusses the ability of claimants to recover under section 1002(b)(2)(E) of the Oil Pollution Act as follows: "The claimant need not be the owner of the damaged property or resources to recover for lost profits or income. For example, a fisherman may recover lost income due to damaged fisheries resources, even though the fisherman does not own those resources." H.R. CONF. REP. NO. 653, *supra* note 38, at 103. However, the House Conference Report does not really help define the scope of claimants allowed to recover under this provision, since commercial fishermen had already been identified as a specific group entitled to recover for economic losses resulting from damage or injury to natural resources. See *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1026 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986) (discussing *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974)); *Union Oil Co. v. Oppen*, 501 F.2d 558, 570 (9th Cir. 1974) (identifying economic losses suffered by commercial fishermen being of a "particular and special nature"). See also Rodriguez & Jaffe, *supra*, note 42, at 14-15 (discussing commercial fishing exception).

55. *Id.* § 1002(b)(2)(B), 33 U.S.C.A. § 2702(b)(2)(B).

56. *Id.* § 1002(b)(2)(E), 33 U.S.C.A. § 2702(b)(2)(E).

57. *Id.* § 1002(b)(2)(C), 33 U.S.C.A. § 2702(b)(2)(C).

58. See *supra* notes 47 and 54 and accompanying text.

59. In the past, under general maritime law, a claimant could not recover for economic losses without establishing some direct physical harm or damage to its person or property. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985), *cert denied*, 477 U.S. 903 (1986); *In re Exxon Valdez*, 767 F. Supp. 1509 (D. Alaska 1991).

charge or substantial threat of discharge of oil was "caused solely by an act of God; an act of war; an act or omission of a third party."⁶⁰ A responsible party may assert any combination of these defenses.⁶¹ However, these defenses may not be asserted if the responsible party fails to report a spill, does not cooperate with the responsible official in connection with removal activities, or fails to comply with any applicable orders issued.⁶² In some cases, a responsible party will not be liable to a claimant if the oil spill was caused by the gross negligence or willful misconduct of that particular claimant.⁶³

As would be expected, the limits of liability for a responsible party under the OPA are significantly higher than they were under the FWPCA. Under the OPA, a tank vessel's liability for "each incident shall not exceed . . . the greater of [either] \$1,200 per gross ton [or] . . . \$10,000,000" if the vessel is greater than 3,000 gross tons or \$2,000,000 if the vessel is 3,000 gross tons or less.⁶⁴ Additionally, other vessels are liable for \$600 per gross ton or \$500,000, whichever is greater.⁶⁵ Any onshore facility or deepwater port is liable up to \$350,000,000.⁶⁶ The liability limit

60. Oil Pollution Act § 1003(a)(1)(2)(3), 33 U.S.C.A. § 2703(a)(1)(2)(3). To be entitled to assert the third party defense, the third party must not be an employee or agent of the responsible party or a third party whose act or omission occurred in connection with any contractual relationship with the responsible party. *Id.* § 1003(a)(3), 33 U.S.C.A. § 2703(a)(3). Additionally under the third-party defense, the responsible party must establish, by a preponderance of the evidence that it:

- (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.

Id.

61. *Id.* § 1003(a)(4), 33 U.S.C.A. § 2703(a)(4).

62. *Id.* § 1003(c), 33 U.S.C.A. § 2703(c).

63. *Id.* § 1003(b), 33 U.S.C.A. § 2703(b).

64. *Id.* § 1004(a)(1), 33 U.S.C.A. § 2704(a)(1). See *supra* note 20 and accompanying text.

65. Oil Pollution Act § 1004(a)(2), 33 U.S.C.A. § 2704(a)(2).

66. *Id.* § 1004(a)(4), 33 U.S.C.A. § 2704(a)(4). The President has been given the authority to take into account the "size, storage capacity . . . proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks posed by the class or category of facility" in adjusting, by regulation, a limit of liability for any particular class or category of onshore facility. *Id.* § 1004(d)(1), 33 U.S.C.A. § 2704(d)(1). Additionally the Coast Guard has been given the authority to conduct a study on the relative operational and environmental risks posed by transportation of oil to deepwater ports and authority to institute a rulemaking procedure to lower the limits of liability if found to be appropriate. *Id.* § 1004(d)(2), 33 U.S.C.A. § 2704(d)(2).

for offshore facilities, except deepwater ports, is the total of all removal costs plus \$75,000,000.⁶⁷ All mobile offshore drilling units are first to be treated as tank vessels for liability purposes and then as offshore facilities for excess liability.⁶⁸

The liability limits under the OPA do not apply if the incident in question was caused by the responsible party's gross negligence or willful misconduct or violation of an applicable federal safety, construction or operating regulation.⁶⁹ Additionally, liability cannot be limited if the responsible party: (1) fails to report the oil spill as required by law and knows or has reason to know of the spill; (2) fails to provide reasonable cooperation and assistance requested by and in connection with the removal activities; (3) or fails to comply with an order regarding the removal activities.⁷⁰

Under the OPA, "responsible part[ies] . . . [must] establish and maintain . . . evidence of financial responsibility sufficient to meet the maximum amount of liability to which . . . the responsible party [would] be subject" in cases where the liability limits apply.⁷¹ These certificates of financial responsibility are required for any vessel over 300 gross tons using any place subject to the

67. *Id.* § 1004(a)(3), 33 U.S.C.A. § 2704(a)(3).

68. *Id.* § 1004(b), 33 U.S.C.A. § 2704(b).

69. *Id.* § 1004(c)(1), 33 U.S.C.A. § 2704(c)(1). The acts of a responsible party include those acts undertaken by an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party. *Id.* § 1004(c), 33 U.S.C.A. § 2704(c).

In order for the limits of liability not to apply, the violation of a federal regulation or standard by the responsible party or by those acting on its behalf should not be trivial or unrelated to the discharge of oil. S. REP. No. 94, *supra* note 1, at 14. However, the Senate Report indicated that:

A limit on liability is clearly of benefit to an owner or operator subject to the provisions of this legislation. Such a benefit should not be conferred, however, in instances where the conduct of the owner or operator indicates that such owner or operator is not, in good faith, attempting to comply with the applicable regulations or statutory requirements. In these instances, where compliance perhaps could have prevented or mitigated the effects of an oil spill, no such limits will apply.

Id.

70. Oil Pollution Act § 1004(c)(2), 33 U.S.C.A. § 2704(c)(2).

71. *Id.* § 1016, 33 U.S.C.A. § 2716. The Coast Guard recently published a notice of proposed rulemaking concerning regulations that will implement the financial responsibility requirements established under the OPA. 56 Fed. Reg. 49006 (1991) (to be codified at 33 C.F.R. Parts 130, 131, 132 and 137) (proposed September 26, 1991). In the notice of proposed rulemaking, the Coast Guard recognized that some vessel owners may encounter difficulty in obtaining these certificates of financial responsibility once the proposed rules go into effect. *Id.* at 49008. For further discussion of the financial responsibility requirements under the OPA, see *infra* notes 221-30 and accompanying text.

jurisdiction of the United States,⁷² or any vessel that operates in the exclusive economic zone of the United States to transport oil destined for the United States.⁷³ A vessel that does not comply with these provisions is subject to the government withholding clearance of the vessel, denying entry or detaining the vessel or to the actual seizure and forfeiture of the vessel to the United States.⁷⁴ A claimant under the OPA has the right to pursue a direct action for removal costs and damages against the guarantor which provides the certificate of financial responsibility.⁷⁵ However, in a direct action suit, the guarantor is allowed to assert the rights and defenses available to the responsible party under the OPA; any insurance policy defenses approved under the Act; or "the defense that the incident was caused by the willful misconduct of the responsible party."⁷⁶ The guarantor will not be liable for any removal costs or damages which exceed the amounts required under the certificate of responsibility.⁷⁷

These increased financial responsibility requirements under the OPA have produced some dramatic responses by the insurance industry. The protection and indemnity clubs (P & I clubs) that have traditionally insured a large majority of the world's shipping industry have, since the enactment of the OPA, insisted that they will not issue the certificates of financial responsibility as now required under the statute.⁷⁸ Further, it has been predicted that the P & I clubs will refuse to provide coverage if the proposed regulations covering financial responsibility under the OPA are adopted.⁷⁹

The enactment of the OPA put to an end, for the time being, the continuing debate between the House and Senate regarding preemption of state oil spill cleanup and compensation statutes.⁸⁰

72. Oil Pollution Act § 1016(a)(1), 33 U.S.C.A. § 2716(a)(1) (exceptions for non-self-propelled vessel that does not carry oil as cargo or fuel).

73. *Id.* § 1016(a)(2), 33 U.S.C.A. § 2716(a)(2).

74. *Id.* § 1016(b)(1)(2)(3), 33 U.S.C.A. § 2716(b)(1)(2)(3).

75. *Id.* § 1016(f), 33 U.S.C.A. § 2716(f).

76. *Id.*

77. Oil Pollution Act § 1016(g), 33 U.S.C.A. § 2716(g).

78. William DiBeneditto, *Lines Hit Coast Guard on Solvency Regulations*, J. COM., Feb. 4, 1992, at 8B.

79. Charles Anderson, *Oil Pollution Act Fouls the Regulatory Waters*, WALL ST. J., Feb. 20, 1992, at A18.

80. For years, the Senate and the House argued over whether a federal oil spill law should be allowed to preempt state oil spill statutes. See Kuntz, *supra* note 26 at 1261 ("[t]he Senate for years refused to allow federal law to preempt state laws, and its insistence on that point blocked action [to enact a federal statute]").

The OPA granted states the authority to impose additional liability and/or requirements with respect to the discharge or threat of discharge of oil in their respective states.⁸¹ Under the OPA, the states' authority to establish and maintain oil spill funds was preserved.⁸² The states can also require anyone to contribute to their funds.⁸³ Responsible parties will still be subject to any fines

Certain members of the Senate believed that the states should be entitled to retain and/or establish more stringent liability schemes than provided by a federal oil spill statute. Senator George J. Mitchell expressed the following view:

Equally important is the fact that this legislation does not prevent States from [enacting more stringent oil spill liability laws] States are entitled to maintain or enact oil spill liability and compensation legislation as well as emergency response laws For 8 long years I have struggled to enact oil spill legislation that is protective of the public health and the environment and that does not remove the rights of States to take whatever additional action they believe necessary to protect their waters and their citizens from oil spills.

135 CONG. REC. S9692 (daily ed. August 3, 1989) (statement of Sen. Mitchell).

On the other hand, the proponents of the preemption of the state law in the House believed that such an approach would promote a single comprehensive system allowing for quick response to cleanup and compensation for damages. Representative Shumway stated that:

As far as Federal preemption of State laws [is concerned], the House has passed this provision on at least five occasions in the past and in fact has previously defeated efforts on the floor to do away with preemption.

Preemption is needed to ensure that there is one unified, simple comprehensive system available to finance full cleanup and pay fully for damages.

Without preemption, we are left with the existing patchwork of confusing and sometimes competing Federal and State laws which cause delays in cleanup and further damage to the environment. No preemption . . . will result in more litigation and it will actually be worse for the environment.

135 Cong. Rec. H7959 (daily ed. Nov. 2, 1989) (statement of Rep. Shumway).

81. Oil Pollution Act § 1018(a)(1), 33 U.S.C.A. § 2718(a)(1).

82. *Id.* § 1018(b)(1), 33 U.S.C.A. § 2718(b)(1). Even prior to the enactment of the Oil Pollution Act, it was reported that twenty-four states had enacted comprehensive oil pollution statutes and at least twelve states had oil spill funds. S. REP. NO. 94, *supra* note 1, at 6. The list of states enacting oil spill statutes continues to grow. For a list of the states that, as of 1990, had enacted such oil spill legislation, see Rodriguez & Jaffe, *supra*, note 42, at 10 n.66.

A recent example of the creation of a state oil spill fund can be found in the Texas Oil Spill Prevention and Response Act of 1991. Under this Act, the Coastal Protection Fund was created to "provide immediately available funds for response to all unauthorized discharges, for cleanup of pollution from unauthorized discharges of oil, and for payment of damages from unauthorized discharges of oil." TEX. NAT. RES. CODE ANN. § 40.151 (Vernon Supp. 1992).

83. Oil Pollution Act § 1018(b)(2), 33 U.S.C.A. § 2718(b)(2). For example, pursuant to the Texas Oil Spill Prevention and Response Act of 1991, the Coastal Protection Fund is funded by imposing a two cent per barrel fee on "every person owning crude oil in a vessel at the time such crude oil is transferred to or from a marine terminal." TEX. NAT. RES. CODE ANN. § 40.154(a). See Michael K. Bell & James T. Brown, *The Texas Oil Spill Prevention and Response*

or penalties (criminal or civil) the state deems necessary to impose for actual or threatened oil spills within its borders.⁸⁴ The issue of preemption of state law divided the Congress for years. Finally, the House agreed to reverse its stance on preemption of state oil spill statutes, and the OPA, as enacted, has preserved states' autonomy over oil spill liability and regulation. However, the existence of duplicative state oil pollution statutes may create an inconsistent legal and regulatory framework that the House initially sought to avoid.⁸⁵

Conforming amendments are contained in the OPA which specifically amend, repeal or supersede various aspects of other oil spill statutes. Certain sections of the FWPCA concerning oil spill liability were superseded to the extent the provisions of the OPA applied.⁸⁶ The fund established under the FWPCA was repealed and all amounts remaining in the FWPCA fund were to be incorporated into the new oil spill fund created by the OPA.⁸⁷ The DPA was amended to adopt the financial responsibility provisions of the OPA.⁸⁸ Also, all amounts remaining in the Deepwater Port Fund were to be transferred into the new fund under the OPA.⁸⁹ Title III of the OCSLA was repealed by the OPA.⁹⁰ All funds remaining in the Offshore Oil Pollution Fund under OCSLA were to be deposited in the new OPA fund.⁹¹ Finally, certain provisions of the TAPAA which had provided for the reservation of amounts to its fund for existing claims were repealed, with the remaining amount (after certain rebates to the State of Alaska) to

Act of 1991: Liability v. Responsibility, 29 HOUS. LAW. 42 (Jan.-Feb. 1992) (discussing provisions of Texas Oil Spill Prevention and Response Act of 1991 including the provisions on the Coastal Protection Fund).

84. Oil Pollution Act § 1018(c), 33 U.S.C.A. § 2718(c).

85. See 135 CONG. REC. H7959 (daily ed. Nov. 2, 1969) (statement of Rep. Shumway) (“[w]ithout preemption, we are left with the existing patchwork of confusing and sometimes competing Federal and State laws . . .”); H. REP. NO. 242, *supra* note 28, at 34 (the House bill sought to establish “a clear and predictable legal and regulatory framework within which actual or potential claimants, spillers, and insurers will be able to make decisions relevant to oil pollution matters.”).

86. Oil Pollution Act § 2002(a), 33 U.S.C.A. § 1321(a) (subsections (f), (g), (h) and (i) of 33 U.S.C. § 1321 of FWPCA no longer apply with respect to any incident for which liability is established under the Oil Pollution Act).

87. *Id.* § 2002(b), 33 U.S.C.A. § 1321(b) (subsections (k) and (p) of 33 U.S.C. § 1321 of FWPCA were repealed by the OPA. All amounts remaining in the fund established under subsection (k) were to be deposited into the new OPA Fund).

88. *Id.* § 2003(a), 33 U.S.C.A. § 1503(a).

89. *Id.* § 2003(b), 33 U.S.C.A. § 1517(b).

90. *Id.* § 2004, 26 U.S.C.A. § 9509.

91. Oil Pollution Act § 2004, 26 U.S.C.A. § 9509.

be eventually deposited in the new fund under the OPA.⁹²

The funds previously established under other statutes were consolidated into the Oil Spill Liability Trust Fund (OPA Fund).⁹³ The OPA Fund is available for payment of removal costs and other costs, expenses, claims and damages available under the Act.⁹⁴ Nevertheless, the OPA Fund will not be available to pay claims to any claimants causing the incident in question by their own gross negligence or willful misconduct.⁹⁵ The OPA Fund is normally available only after the claim has first been presented to the responsible party or guarantor.⁹⁶ However, a direct presentation to the OPA Fund can be made if the responsible party denies liability for the incident, or cannot be identified, or if the source of discharge was a public vessel.⁹⁷ Also, a responsible party will be able to assert a claim against the OPA Fund if the responsible party is entitled to a defense or has reached its liability limit under the statute.⁹⁸ Further, a claimant may commence an action in court against the responsible party or guarantor if its claim is not settled within 90 days after it was presented to the responsible party⁹⁹ or after the advertising procedures are commenced under the statute.¹⁰⁰ Alternatively, a claimant may

92. *Id.* § 8102, 43 U.S.C.A. § 1653.

93. *Id.* § 9001, 26 U.S.C.A. § 9509. The OPA Fund is financed by a five-cent-per-barrel tax on all imported and domestic oil. 26 U.S.C.A. § 4611(c)(2)(B) (West Supp. 1991).

94. Oil Pollution Act § 1012(a), 33 U.S.C.A. § 2712(a).

95. *Id.* § 1012(b), 33 U.S.C.A. § 2712(b).

96. *Id.* § 1013(a), 33 U.S.C.A. § 2713(a).

97. *Id.* § 1013(b)(1)(A), 33 U.S.C.A. § 2713(b)(1)(A). Section 1014(c) describes the procedures and circumstances under which a direct claim can be made to the Oil Pollution Act Fund:

The President shall advertise or otherwise notify potential claimants of the procedures for direct presentation of their claims to the OPA Fund, if:

- (1) the responsible party and the guarantor both deny designation [by the President of the responsible party's vessel or facility as the source of discharge or threat of discharge of oil] . . . ,
- (2) the source of the discharge or threat was a public vessel, or
- (3) the President is unable to designate the source or sources of the discharge or threat . . .

Id. § 1014(c), 33 U.S.C.A. § 2714(c).

98. *Id.* § 1013(b)(1)(B), 1008(a), 33 U.S.C.A. § 2713(b)(1)(B), 2708(a). If a responsible party is entitled to limit its liability, then the responsible party may only assert a claim against the OPA Fund for amounts in excess of its liability limits under the statute. *Id.* § 1008(b), 33 U.S.C.A. § 2708(b).

99. Oil Pollution Act § 1013(c), 33 U.S.C.A. § 2713(c). The claimant may also bring an action against the responsible party or guarantor if liability for the claim is denied. *Id.* § 1013(c)(1), 33 U.S.C.A. § 2713(c)(1).

100. *Id.* The President is to designate the source or sources of a discharge or threat of a discharge of oil and notify the responsible party and the guarantor

choose to present its unsettled claim to the OPA Fund.¹⁰¹ Regulations are to be promulgated by the President regarding the claim "presentation, filing, processing, settlement and adjudication" procedures for the OPA fund.¹⁰² Maximum expenditure per incident by the OPA Fund has been expanded to \$1,000,000,000.¹⁰³

Another important aspect of the OPA Fund is the authority of state officials, in certain cases, to immediately draw up to \$250,000 from the fund for removal costs consistent with the National Contingency Plan.¹⁰⁴ This provides "a mechanism for immediate response by [a State] to discharges of oil posing a substantial threat to the public health or welfare."¹⁰⁵ Any payment of claims or obligations by the OPA Fund are "subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party."¹⁰⁶ However, the OPA Fund will be subrogated only to the extent that the responsible party is liable given any limits or defenses to liability.¹⁰⁷ Since the OPA Fund is financed by a five cent per barrel tax on imported and domestic oil¹⁰⁸, the costs associated with an oil spill will be compensated not just within the spiller's limits of liability, but "through a mechanism which spreads these excess costs to all users of oil."¹⁰⁹

Several provisions enacted under the OPA were directed at the prevention and removal of oil spills,¹¹⁰ the protection of Prince William Sound,¹¹¹ oil pollution research and development,¹¹² and the Trans-Alaska pipeline system.¹¹³ The prevention and removal provisions include, among other things, additional requirements and procedures for the issuance and re-

of this designation. *Id.* § 1014(a), 33 U.S.C.A. § 2714(a). *See also* § 1014(b), 33 U.S.C.A. § 2714(b).

101. Oil Pollution Act § 1013(c), 33 U.S.C.A. § 2713(c). In addition, the claimant may present claims for uncompensated damages and removal costs to the OPA Fund. *Id.* at § 1013(d), 33 U.S.C.A. § 2713(d).

102. *Id.* § 1013(e), 33 U.S.C.A. § 2713(e).

103. *Id.* § 9001(c), 26 U.S.C.A. § 9509(c).

104. *Id.* § 1012(d)(1), 33 U.S.C.A. § 2712(d)(1).

105. H. R. CONF. REP. NO. 653, *supra* note 38, at 115.

106. Oil Pollution Act § 1012(f), 33 U.S.C.A. § 2712(f).

107. S. REP. NO. 94, *supra* note 1, at 5.

108. 26 U.S.C. § 4611(c)(2)(B).

109. S. REP. NO. 94, *supra* note 1, at 6.

110. Oil Pollution Act, Title IV.

111. *Id.* Title V.

112. *Id.* Title VII.

113. *Id.* Title VIII.

view of licenses, certificates of registry and merchant mariner's documents.¹¹⁴ Of particular importance, the OPA directed the use of double hulls on all tank vessels by the year 2015.¹¹⁵

The OPA consolidated previously enacted oil spill liability and compensation statutes. This new statute was enacted in response to the marine pollution disasters at that time. However, other approaches were considered prior to the enactment of the OPA.

IV. PREVIOUSLY CONSIDERED APPROACHES

A. International Liability and Compensation Conventions

The world's attention focused on the problem of marine pollution caused by oil tanker spills with the wreck of the Torrey Canyon in May, 1967.¹¹⁶ Consequently, in 1969, an international conference sponsored by the Intragovernmental Maritime Consultative Organization (now known as the International Maritime Organization) (IMO),¹¹⁷ convened to address marine pollution problems caused by oil spills. Two conventions were adopted at that conference. One of the conventions, the International Convention on Civil Liability for Oil Pollution Damage (CLC),¹¹⁸ addressed the issues of liability and compensation for international oil spill pollution.¹¹⁹ At the time this convention was drafted, the potential recovery under the CLC for cleanups and compensation was considered inadequate.¹²⁰ The inadequacies were to be ad-

114. *Id.* §§ 4101-4103, 46 U.S.C.A. §§ 7101, 7106, 7107, 7109, 7302, 7701-03.

115. Oil Pollution Act § 4115, 46 U.S.C.A. §§ 1274(a), 3703a, 3715(a).

116. See Linda Rosenthal & Carol Raper, *Amoco Cadiz and Limitation of Liability for Oil Spill Pollution: Domestic and International Solutions*, 5 VA. J. NAT. RESOURCES L. 259, 278 (1985).

117. The International Maritime Organization (IMO) is a London-based specialized agency of the United Nations which addresses issues involving the prevention of marine pollution by means of international treaties and non-binding instruments. *International Maritime Organization*, Int'l Env't Rep. (BNA) 41:1001 (1987).

118. International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, *reprinted in* 9 I.L.M. 45 (1970) [hereinafter CLC].

119. *Id.* at preamble.

120. Beth Van Hanswyk, *The 1984 Protocols to the International Convention on Civil Liability for Oil Pollution Damages and the International Fund for Compensation for Oil Pollution Damages: An Option for Needed Reforms in the United States Law*, 22 INT'L LAW. 319, 322 (1988) [hereinafter Van Hanswyk]. "The CLC was designed to be the exclusive source of recovery for pollution damages against the shipowner." *Id.* at 322. The maximum liability imposed on any one vessel was approximately \$18.9 million, and "[e]ven in 1969, the amounts provided for under the CLC were considered inadequate." *Id.*

dressed by an international oil spill fund which was to supplement the amounts recoverable under the CLC.¹²¹ Thereafter, in 1971, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) was adopted.¹²² The Fund Convention supplemented the limits established by the CLC in order to ensure that full compensation would be available to victims of oil pollution incidents.¹²³

The United States did not ratify either convention due to arguments that coverage under each convention was inadequate to pay for damages from major oil spills.¹²⁴ Another concern with each convention was the fear that state oil pollution statutes would be preempted by the international conventions, leaving open the potential for uncompensated damage claims in the event of a major oil spill.¹²⁵

An IMO Diplomatic Conference was held in London in 1984 to address concerns about the inadequate liability limits and the other shortcomings of the CLC and the Fund Convention.¹²⁶ The United States was invited to attend,¹²⁷ and took an active role in the conference.¹²⁸ The conference produced the Protocol of

121. Van Hanswyk, *supra* note 120, at 322-23.

122. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, December 18, 1971, 11 I.L.M. 284 (1972) [hereinafter Fund Convention].

123. Fund Convention, *supra* note 122, at 284-85. The Fund is financed through contributions by oil companies that receive more than 150,000 tons of oil imports per year in the contracting nation. *Id.* art. 10, para. 1(a). The contracting nation had the option of assuming the obligations of the oil companies to make contributions to the Fund. *Id.* art. 14(1).

124. S. EXEC. REP. NO. 28, *supra* note 4, at 2. "As the CLC was being negotiated, it became apparent that the liability limits established under its provisions were likely to be insufficient to cover many significant oil spills." *Id.* "The U.S. failed to ratify either convention largely because critics argued that the 1969/1971 CLC/Fund coverage was inadequate." *Id.*

125. *Id.*

126. See Douglas A. Jacobsen & James D. Yellen, *Oil Pollution: The 1984 London Protocols and the Amoco Cadiz*, 15 J. MAR. L. & COM. 467, 480 (1984).

127. See *Technical Report of the Department of State* 5 (Oct. 7, 1985), reprinted in, S. TREATY DOC. NO. 12, 99th Cong., 1st Sess. (1985) [hereinafter *Technical Report*]. All members of the IMO, members of the United Nations were allowed to participate in the Diplomatic Conference regardless of whether they were members of the original conventions. *Id.*

128. See *Letter of Submittal of Department of State* vi-vii (Oct. 7, 1985), reprinted in, S. TREATY DOC. NO. 12, 99th Cong., 1st Sess. (1985) [hereinafter *Letter of Submittal*]. On Oct. 7, 1985, the Department of State submitted to the President the 1984 Protocols for transmittal to the Senate for its advice and consent to ratification. The Department of State reported: "The Department of Transportation and State coordinated with interested agencies of the Federal Government in negotiating the Protocols . . . Members of these groups served on the

1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC Protocol),¹²⁹ and the Protocol of 1984 to Amend the International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Protocol).¹³⁰ The United States signed these Protocols on February 12, 1985,¹³¹ but they have yet to be ratified by the Senate.¹³²

The 1984 Protocols provided increased liability limits and expanded the scope of compensation. Much like the OPA, the CLC Protocol imposes strict liability upon the vessel owner up to a specified monetary limit.¹³³ Under the CLC Protocol, a vessel owner's strict liability for any one incident is limited to 3 million "units of account" for a ship not exceeding 5,000 units of tonnage — amounting to a liability limit of approximately \$4.32 million.¹³⁴ For ships in excess of 5,000 units of tonnage, each additional unit of tonnage adds another 420 "units of account," up to a limit of 59.7 million units of account, or \$85.9 million.¹³⁵

Under the Fund Protocol an additional 135 million units of account or approximately \$194.4 million would be available to oil spill victims.¹³⁶ Additionally, the Fund Protocol provides for approximately \$288 million to be available for any one incident

United States delegation to the Diplomatic Conference which adopted the Protocols." *Id.*

129. *Protocol of 1984 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969*, May 25, 1984, reprinted in Reference File 1, Int'l Env't Rep. (BNA) 21:1531 (1989) [hereinafter CLC Protocol].

130. *Protocol of 1984 to Amend the International Convention on the Establishment of International Fund for Compensation for Oil Pollution Damage, 1971*, May 25, 1984, reprinted in Reference File 1, Int'l Env't Rep. (BNA) 21:1731 (1989) [hereinafter Fund Protocol].

131. *See Letter of Submittal, supra* note 128, at VII.

132. *See Statement by President Bush Upon Signing H.R. 1465*, 26 WEEKLY COMP. PRES. DOC. 1265-66 (Aug. 27, 1990) [hereinafter Signing Statement].

133. CLC Protocol, *supra* note 129, art. 6, para. 1.

134. *Id.* The unit of account referred to in the CLC Protocol is the special drawing right (SDR) as defined by the International Monetary Fund. *See* CLC Protocol, *supra* note 129, at art. 6, para. 4. Put another way, a unit of account "refers to the monetary value used to determine the amount of money for which a shipper may be liable." Stephen T. Smith, Comment, *An Analysis of the Oil Pollution Act of 1990 and the 1984 Protocols on Civil Liability for Oil Pollution Damage*, 13 HOUS. J. INT'L L. 115, 118 n.23 (1991) [hereinafter Smith]. As of January 1, 1991, one unit of account was calculated to equal \$1.44. *See id.* at 131.

135. CLC Protocol, *supra* note 129, art. 6, para. 1(b). *See also* Smith, *supra* note 134, at 132. Under the CLC Protocol, a ship's tonnage refers to the gross tonnage of the vessel calculated in accordance with the tonnage measurement regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969. CLC Protocol, *supra* note 129, art. 6, para. 5.

136. Fund Protocol, *supra* note 130, art. 6., para. 3(a). *See* Smith, *supra* note 129, at 133.

when a minimum of three Parties to the 1984 Protocols have combined total imports of oil exceeding 600 million tons in the previous calendar year.¹³⁷

The CLC also provides the vessel owner with certain defenses to liability. A vessel owner shall not be liable for pollution damage when such damage is caused by: an act of war, a natural phenomenon, acts or omissions of third parties, or negligent or wrongful acts committed by governmental entities in the maintenance of lights or other navigational aids.¹³⁸ Additionally, a vessel owner may be wholly or partially exonerated from liability to a claimant to the extent the pollution damage resulted from the actions of that claimant.¹³⁹

The CLC Protocol does have, however, an unlimited liability provision. Under the CLC Protocol, a vessel owner is not entitled to limit its liability if it can be proved that the pollution damage resulted from the vessel owner's "personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."¹⁴⁰ Additionally, the CLC Protocol excludes certain parties from liability, such as servants or agents of the owner, members of the crew, and charterers.¹⁴¹ However, these parties can be liable under the

137. CLC Protocol, *supra* note 129, art. 6, para. 3(c). See Smith, *supra* note 134, at 133.

138. CLC, *supra* note 118, art. III, para. 2(a)(b)(c). Article III, paragraph 2 states in pertinent part:

No liability for pollution damage shall attach to the owner if he proves that the damage:

(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or

(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or

(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

Id.

139. *Id.* art. III, para. 3.

140. CLC Protocol, *supra* note 129 art. 6, para. 2.

141. CLC Protocol, *supra* note 129, art. 4, para. 2. The CLC Protocol specifically provides that no claim for compensation for pollution damages may be made against:

- (a) the servants or agents of the owner or the members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer . . . including a bareboat charterer . . . manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a . . . public authority;

CLC Protocol if the pollution damage resulted from their "personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."¹⁴² The CLC Protocol defines pollution damage as "loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship."¹⁴³ The definition of damage provides that "compensation for impairment of the environment other than loss of profit[s] from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken."¹⁴⁴ Finally, the CLC Protocol definition of pollution damage includes the "costs of preventive measures and further loss or damage caused by [such] preventive measures."¹⁴⁵

Despite the United States' active involvement in the development of the 1984 Protocols, the House and Senate considered and rejected these protocols as possible solutions to the global challenge of oil spill cleanup and prevention. Instead, Congress widened the scope of liability and compensation for oil pollution damages available under existing international and federal law by enacting the OPA.

B. Approaches Suggested by Congress

Prior to the OPA's passage, the House and the Senate considered several alternative approaches and solutions to oil spill liability and compensation. In 1989, the House sought to establish a comprehensive system of liability and compensation for damages caused by oil pollution.¹⁴⁶ The legislators recognized that the United States, as the world's largest consumer of oil and petroleum products, transported primarily by oil tankers, was susceptible to the adverse impacts of large oil spills on its environment.¹⁴⁷ After the Exxon Valdez incident, Congress concluded

-
- (e) any persons taking preventative measures;
 - (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);

Id.

142. *Id.*

143. *Id.* art 2, para. 6(a).

144. *Id.*

145. *Id.* art. 2, para. 6(b).

146. H.R. REP. NO. 242, *supra* note 28, at 31. The House acknowledged that "while existing laws permit the U.S. government to be compensated for certain cleanup and removal costs, there is no comprehensive legislation in place that promptly and adequately compensates those who suffer other types of economic loss as a result of an oil pollution incident." *Id.*

147. *Id.* The House Committee on Merchant Marine and Fisheries noted

that the existing "patchwork of Federal, state, and local laws and regulations" was "clearly inadequate to address the problems associated with avoiding or cleaning up oil spills."¹⁴⁸

A proposed House Bill sought to "impose joint, several, and strict liability on those producing, handling, or transporting oil to encourage a high standard of care and make certain that those responsible for [oil] pollution would be held primarily responsible for the cost."¹⁴⁹ The bill sought to guarantee quick and fair compensation for losses whether or not a spiller admitted liability for the discharge of oil.¹⁵⁰ Also, the cost to the taxpayers was to be reduced by the creation of an Oil Spill Liability Trust Fund, funded by the oil industry, to be available for reimbursing individuals and the government for cleanup activities.¹⁵¹ Importantly, the legislation sought to "establish a clear and predictable legal and regulatory framework within which actual or potential claimants, spillers, and insurers [would] be able to make decisions relevant to oil pollution matters."¹⁵² The legislation also sought to encourage efforts to improve international standards of oil pollution liability and compensation.¹⁵³

Although similar to the OPA as now enacted, the House Bill contained certain provisions not included in the OPA. For example, regarding the elements of liability, the House Bill provided that oil cargo owners would be subject to secondary liability for oil spills,¹⁵⁴ meaning that the oil cargo owner would share with the shipper the liability for removal costs and damages for oil spills.¹⁵⁵ The proposed liability limits for tank vessels were the same as provided under the current OPA. However, in the case of oil spills from a vessel, the vessel owner or operator would be

that over one-half of the nation's crude oil supply was imported by tankers and that almost one-quarter of its domestic oil was transported by tankers from Alaska. *Id.* Also, in 1989, "[a]pproximately 8,800 oil pollution incidents occur[red] in the U.S. Waters every year . . . [and] [s]ince 1972, . . . the Coast Guard [had] . . . responded to approximately 158,000 spills totalling more than 177,000,000 gallons of oil." *Id.* at 34. The House Committee discussed the Exxon Valdez oil spill and identified some of the adverse effects it had on the environment, such as loss of wildlife which included "thousands of seabirds, hundreds of sea otters, nearly a hundred bald eagles, as well as other species of waterfowl and marine mammals . . ." *Id.* at 31.

148. *Id.* at 32.

149. *Id.* at 34.

150. H.R. REP. NO. 242, *supra* note 28, at 34.

151. *Id.*

152. *Id.*

153. *Id.*

154. H.R. CONF. REP. NO. 653, *supra* note 38, at 102.

155. H.R. 1465, 101st Cong., 1st Sess. § 1002 (1989).

liable for the first 50 percent of the liability limits, while the cargo owner would be liable for the second 50 percent.¹⁵⁶ If an owner or operator was subject to unlimited liability, the cargo owner's liability would still be capped at no more than 50 percent of the applicable liability limits normally in place.¹⁵⁷

Additionally, the House Bill proposed implementation of the CLC Protocol and the Fund Protocol.¹⁵⁸ The Senate had no similar provisions in their proposed legislation at that time.¹⁵⁹ The House Bill sought to incorporate many of the existing provisions of the OPA and also to implement 1984 Protocols. This was to be accomplished by requiring the OPA Fund to indemnify and defend any responsible party in any action brought under any local, state or federal law for any incident not covered by the CLC Protocol.¹⁶⁰ After the Fund had made payment to the claimants, it would then collect any reimbursable costs from the vessel owner or operator and/or from the International Fund as provided under the 1984 Protocols.¹⁶¹ None of these provisions were included in the existing OPA.

Title III of the House Bill contained provisions for implementing the 1984 Protocols. In its analysis of Title III of the House Bill, the House Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs (House Subcommittee) recognized that the major point of controversy surrounding implementation of the 1984 Protocols was whether the 1984 Protocols would require the limited preemption of state and federal oil spill laws.¹⁶² The Bush Administration expressed its support for the implementation of the 1984 Protocols.¹⁶³ The Administration supported limited preemption of

156. H.R. CONF. REP. NO. 653, *supra* note 38, at 106.

157. *Id.*

158. *Id.* at 125.

159. *Id.*

160. *Id.*

161. H.R. CONF. REP. NO. 653, *supra* note 38, at 125-26. This provision has been viewed by some commentators as ingeniously providing for both ratification of the 1984 Protocols and permitting the higher federal and state liability limits. See Rodriguez & Jaffe, *supra* note 42, at 24 n.156.

162. *Oil Pollution Liability and Compensation Act: Hearing and Markup Before the Subcommittee on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 101st Cong., 1st Sess 1 (1989) [hereinafter *Hearings*].

163. *Id.* at 11 (statement of Hon. Jeffrey Shane, Asst. Sec'y for Policy and Int'l Affairs, Dept. of Transportation). Testifying before the House Committee, Jeffrey N. Shane, the Assistant Secretary for Policy and International Affairs, Department of Transportation, urged that "the 1984 Protocols have a number of practical advantages for the United States. . . ." *Id.* at 7. According to Shane, these included, "liability sharing between ship owners and oil interests . . . com-

state laws to the extent necessary to implement the 1984 Protocols.¹⁶⁴ In his testimony before the House of Representatives, Assistant Secretary Jeffrey Shane, a spokesman for the Department of Transportation, urged the view that the international scheme put forth in the protocols made the prospects for recovery from liable foreign companies much more likely.¹⁶⁵ Even though some state schemes imposed higher liability limits than those contained in the Protocols, Assistant Secretary Shane pointed out that the difficulty many states could have in recovering from foreign entities indicated the need for a more effective international scheme, as detailed in the 1984 Protocols.¹⁶⁶ The seriousness of this problem was highlighted by the fact that most of the oil imported to the United States is delivered in foreign-owned tankers.¹⁶⁷ The benefits to implementation of the 1984 Protocols presented to the House Subcommittee included: enforceability of United States judgments against polluters in foreign jurisdictions;¹⁶⁸ the establishment of a "uniform, predictable, and insurable worldwide liability and compensation regime;"¹⁶⁹ and a means by which a major portion of domestic oil spill costs and damages would be covered by an international compensation framework.¹⁷⁰

Some of the adverse results predicted if the 1984 Protocols were *not* implemented included the use of limited-asset shipowners in the shipping industry¹⁷¹ and diminished availability of ship-

pulsory insurance and enforceability of U.S. judgments in foreign courts . . . [and] an International [oil spill cleanup] FUND [of] up to \$260 million." *Id.* at 7-8. As Shane described, the U.S. delegation that attended the Diplomatic Conference for the 1984 Protocols was able to negotiate an increase in maximum ship-owner liability from \$18 million to \$78 million. *Id.* at 7.

164. *Id.* at 8.

165. *Id.*

166. *Id.* at 8. Assistant Secretary Shane indicated in his testimony that "unlimited liability under some state's laws is largely illusory . . . in that actual recoveries of major amounts are extremely problematical." *Id.*

167. *Hearings, supra* note 162, at 92 (statement of the International Association of Independent Tanker Owners). In fact, in a report submitted by the U.S. Coast Guard, it was reported that imported oil was arriving at U.S. ports in "ever-increasing volumes — 8.6 million barrels per day of crude oil in July 1989" which was "almost all carried by foreign-flag tankers." *Id.* at 29.

168. *Id.* at 24 (*Analysis of Alternative Approaches to Tanker Oil Spill Liability and Compensation*, prepared by Temple Barker & Sloane, Inc. for the U.S. Coast Guard).

169. *Hearings, supra* note 162, at 24.

170. *Id.*

171. *Id.* at 33 (*Analysis of Alternative Approaches to Tanker Oil Spill Liability and Compensation*, prepared by Temple Barker & Sloane, Inc. for the U.S. Coast Guard). The International Association of Independent Tanker Owners (IN-

owner insurance for tankers transporting oil to the United States.¹⁷² Based upon the testimony and evidence presented, the House Subcommittee decided to report favorably on Title III of the House Bill with the recommendation that the bill be reported to the House without further amendments.¹⁷³

The Senate also examined alternative approaches to oil spill liability and compensation. Specifically, the Senate in 1986 considered incorporating the 1984 Protocols into proposed oil spill legislation. At that time, the Senate Committee on Foreign Relations believed that the ratification of the 1984 Protocols was in the best interest of the United States because it created a framework for timely settlement of claims for oil pollution damages and consistent enforcement for marine pollution resulting from oil spills.¹⁷⁴ However, the Committee also recognized that the 1984 Protocols would provide only a small portion of the comprehensive response to oil pollution damages the Committee anticipated would be included in the pending federal oil pollution legislation and under existing state statutes.¹⁷⁵

While the Senate Committee understood that some state liability laws would be preempted by the Protocols, they also realized that a certain amount of preemption would be necessary for the 1984 Protocols to produce their intended results.¹⁷⁶ The ap-

TERTANKO) submitted a statement warning that if a law is enacted imposing strict unlimited liability on the shipowner it would "either stop the flow of oil or will force . . . the larger and more responsible companies [from calling on U.S. ports] . . . in favor of smaller companies with few or single ships and otherwise negligible assets." *Id.* at 97.

172. *Id.* at 32. INTERTANKO, in its statement submitted to the House Subcommittee, indicated that "[m]utual insurance arrangements covering shipowner liability represented by Protection and Indemnity Insurance, are largely dependent upon the prospect of consistent international regimes providing for both liability and limitation." *Id.* at 93. The statement then concludes that any increase in liability limits under a federal statutory regime would reduce available insurance coverage and/or increase premiums. *Id.* at 98.

173. *Id.* at 69-70.

174. S. EXEC. REP. NO. 28, *supra* note 4, at 3. The Senate Committee identified certain benefits provided by the 1984 Protocols which included "establishing internationally recognized and enforceable jurisdiction over a shipowner, its guarantor, and the International Fund." *Id.* at 5.

175. *Id.* The Committee concluded that "the ratification [of the Protocols, subject to a reservation and certain understandings] . . . is the best way to synchronize the Protocols with the United States comprehensive oil pollution legislation being considered by Congress so as to preserve existing state liability regimes, and to protect the legitimate interests of the coastal States." *Id.*

176. *Id.* at 4. Art. 4, para. 2 of the CLC Protocol, provides that "[n]o claim for compensation for pollution damage may be made against the [ship]owner [except] . . . in accordance with [the Protocols]." The Senate Committee recognized that "the 1984 Protocol effectively pre-empts action for 'pollution dam-

proach recommended by the Senate Committee proposed a possible solution to the preemption issue. The Senate suggested that the 1984 Protocols be ratified subject to a "reservation" allowing claimants to bring actions in state courts after all remedies had been exhausted under the international and federal liability and compensation regimes.¹⁷⁷ In particular, the claimant was first to pursue and exhaust all remedies under the 1984 Protocols, and then seek to recover under the proposed federal oil spill fund, if available, before seeking a remedy in the state courts under state statutory or common-law theories.¹⁷⁸

Nevertheless, critics believed this approach would effectively

age' against shipowners brought under any other law." S. EXEC. REP. NO. 28, *supra* note 4, at 4. "Some believe[d] that this would be inappropriate . . . [where] state laws [could] have provided compensation for oil pollution damages, except that they had been pre-empted by the Protocols." *Id.* However, the Senate Committee concluded that "it was impossible to reap the benefits offered by the Protocols without some pre-emption of state liability laws." *Id.*

177. *Id.* at 5. In order to afford claimants the opportunity to pursue uncompensated claims in federal and state courts, the Senate Committee suggested that the 1984 Protocols be ratified subject to a reservation. A reservation is defined as "a unilateral statement made by a state when signing, ratifying, accepting, approving, or acceding to an international agreement, whereby it purports to exclude or modify the legal effect of certain provisions of that agreement in their application to that state." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 cmt. a (1987) [hereinafter RESTATEMENT]. For multilateral agreements, "a state entering a reservation not acceptable to all other parties may nonetheless become a party to the agreement, and the agreement would be in force even between the objecting and reserving state—except as to the provisions to which the reservation relates . . ." *Id.* at cmt. b. The reservation suggested by the Senate Committee provided:

Notwithstanding Article III, paragraph 4 of the Convention on Civil Liability for Oil Pollution Damage 1969, as amended, to the extent that oil pollution damages in respect of anyone incident may exceed the total amount recoverable under [the 1984 Protocols] . . . and the applicable . . . [f]ederal oil pollution liability and compensation statute, claimants may seek recovery in [state courts] . . . pursuant to applicable [s]tate statutes and common law, after remedies available under the [1984 Protocols] and the applicable . . . [f]ederal oil pollution liability and compensation statute have been exhausted, except that . . . no claimant shall be entitled to assert [in any action under a state statute or common law] any substantive or procedural right based on any provision of the [1984 Protocols].

Id. at 20-21.

178. *Id.* at 4-5. The Senate Committee indicated that it did "not intend to provide claimants with a second avenue of recovery for damages which have already been ruled upon by a competent court, or settled upon, under the procedures of the Protocols or [f]ederal law, or both." *Id.* at 4. Instead, the Senate Committee intended that the "claimant would first proceed according to the Protocols, and then, if uncompensated damages still remained, would proceed to seek recovery from the [federal] domestic [oil spill] fund . . ." *Id.* Accordingly, the claimant would have to exhaust all remedies available under the Protocols and federal law before seeking recovery for uncompensated damages under state or common law. *Id.* at 5.

preempt the further protection that could be afforded by state oil pollution statutes.¹⁷⁹ However, at that time, there had never been an oil spill that had caused damages in excess of the amounts provided under the 1984 Protocols, leading the Senate Committee to believe that most claimants would not need to pursue claims in the state courts.¹⁸⁰ Based upon this assumption, the Senate Committee thought that the international community need not react negatively to the proposed "reservation" since it would not disrupt the operation of the 1984 Protocols.¹⁸¹

Along with the state preemption issues, the Senate Committee also grappled with the problems associated with the vague definition of "pollution damages" found under the 1984 Protocols. The Senate Committee proposed to remedy this problem by attaching certain clarifications or understandings to the United States' instrument of ratification.¹⁸² These understandings would have identified the specific types of damages covered under the Protocol definitions, such as loss of profits due to oil pollution damage¹⁸³ and loss of subsistence resources.¹⁸⁴ The understandings would also have identified what damages were not covered

179. S. EXEC. REP. NO. 28, *supra* note 4, at 4-5. Senator Mitchell expressed his objection to the 1984 Protocols as follows:

The protocols, as currently drafted, preempt Federal and State law. This is unacceptable to me, as I indicated in testimony before the Senate Foreign Relations Committee earlier this year. I will continue to oppose the protocols unless they are accompanied by a reservation that provides the protocols are not preemptive.

132 CONG. REC. S14143 (daily ed. Sept. 27, 1986) (statement of Sen. Mitchell).

Further, Senator Mitchell has indicated that "[r]atification of the Protocols . . . would prohibit federal or state law from imposing liability on persons other than in accordance with the Protocols." George J. Mitchell, *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 ENVTL. L. 237, 242 (1991).

180. S. Exec. Rep. No. 28, *supra* note 4, at 5 (the Senate Committee identified the Amoco Cadiz oil spill with estimated damages of \$230,000,000).

181. *Id.*

182. *Id.* at 5-6. An understanding is a unilateral declaration that does not purport to "exclude, limit, or modify the state's legal obligation" under the international agreement. RESTATEMENT, *supra* note 177, at cmt. g. An understanding will not be considered a reservation if it "reflects the accepted view of the agreement." *Id.* However, another party to the international agreement may challenge the understanding and treat it as a reservation which it does not wish to accept. *Id.*

183. Compare S. EXEC. REP. NO. 28, *supra* note 4, at 6 with Oil Pollution Act § 1002(b)(2)(E), 33 U.S.C.A. § 2702(b)(2)(E) (enacted OPA provided for an expanded version of this loss of profits damage category).

184. Compare S. EXEC. REP. NO. 28, *supra* note 4, at 6 with Oil Pollution Act § 1002(b)(2)(C), 33 U.S.C.A. § 2702(b)(2)(C) (the OPA provided an expanded version of this loss of subsistence resources damage category).

under the Protocol definition.¹⁸⁵ After addressing the concerns identified in the reservation and understandings, the Senate Committee recommended that the Senate not ratify the 1984 Protocols until Congress enacted the pending federal oil pollution statute.¹⁸⁶

For the most part, the approaches taken by the House and Senate could not be adopted today without undoing the statutory system in place under the OPA. However, the approaches considered as the OPA was formed illustrate how Congress sought to develop a cooperative system of addressing oil spill liability and cleanup. The advantages to an international liability compensation system were outweighed by competing federal and state interests and objectives in environmental protection. The result was the present OPA.

The comprehensive nature of the OPA becomes apparent when compared to the 1984 Protocols. For example, the definition of "pollution damage" under the 1984 Protocols is ambiguous and required clarification as previously recognized by the Senate Committee.¹⁸⁷ In contrast, the OPA provides six specific categories of damages recoverable by various claimants including the United States, states, Indian tribes and other claimants for damages incurred as a result of an oil spill.¹⁸⁸ Further, the OPA has a broad definition of responsible party.¹⁸⁹ Certain parties shielded from liability under the 1984 Protocols are clearly defined as responsible parties under the OPA.¹⁹⁰ Finally, the provisions of the OPA provide for the imposition of unlimited liability on the part of the responsible party if the incident in question was caused either by gross negligence or willful misconduct or by the violation of applicable federal, safety, construction or operating regulation by the responsible party.¹⁹¹ By contrast, the CLC Protocol provides for unlimited liability only on the part of the vessel

185. S. EXEC. REP. NO. 28, *supra* note 4, at 6.

186. *Id.* at 7.

187. *See infra* notes 182-84 and accompanying text.

188. *See* Oil Pollution Act § 1002(b)(2)(A)(B)(C)(D)(E)(F), 33 U.S.C.A. § 2702(b)(2)(A)(B)(C)(D)(E)(F). *See also supra* notes 48-58 and accompanying text.

189. Oil Pollution Act § 1001(32), 33 U.S.C.A. § 2701(32). For the full text of section 1001(32), *see supra* note 32.

190. *Compare* CLC Protocol, *supra* note 129, art. 4, para. 2 with Oil Pollution Act § 1001(32), 33 U.S.C.A. § 2701(32). *See infra* notes 32 and 141 and accompanying text.

191. Oil Pollution Act § 1004(c), 33 U.S.C.A. § 2704(c). *See infra* notes 69-70 and accompanying text.

owner, where pollution damage results from the acts or omissions of the owner committed with the intent to cause such damage recklessly and with knowledge that such damage would probably result.¹⁹² These inconsistencies will probably prevent the ratification of the 1984 Protocols in the future. Nevertheless, the problem of liability and compensation for oil spill disasters is still one of worldwide importance and concern.

V. CONCERNS AND REACTIONS TO THE OIL POLLUTION ACT OF 1990

A. Reaction by Industry

The enactment of the unique oil spill liability and compensation regime under the OPA has had a profound impact on the international and domestic community. The OPA does not further uniformity of international trade, but may actually hinder the free flow of imported oil into the United States.¹⁹³ Adding to this impact is the existence of state oil spill liability and compensation statutes. The practical issue that arises is this: how can these inconsistent international, federal and state laws be reconciled? To do nothing could lead to economic disaster. After the enactment of the OPA, the shipping industry threatened to boycott United States ports because of the unlimited liability the industry may face under the existing patchwork of the federal and state laws.¹⁹⁴ The threat of unlimited liability under the OPA has also prompted some members of the insurance industry to refuse to issue certificates of financial responsibility required under the Act.¹⁹⁵

When President Bush signed the Oil Pollution Act of 1990 he recognized the global challenge of addressing oil pollution,¹⁹⁶ and therefore urged the Senate to give immediate consideration

192. CLC Protocol, *supra* note 129, art. 6, para. 2.

193. See *infra* notes 211-20 and accompanying text.

194. *Intertanko to Attend US Oil Pollution Act Hearing*, ENERGY NEWS FIN. REP., Oct. 18, 1991, available in LEXIS, Nexis Library, Reuter File [hereinafter *Intertanko to Attend*].

195. Stacy Shapiro, *P&I Clubs Deny Unlimited Cover for Oil Spills*, BUS. INS., Sept. 30, 1991 at 22. [hereinafter Shapiro]. The "protection and indemnity clubs" (P & I clubs) "have no intention of becoming the 'guarantors' for oil companies under unlimited liability laws . . . 'they are not willing to subject themselves and their members to the risks associated with giving anticipatory guarantees, either under the Oil Pollution Act or individual states' acts.'" *Id.*

196. Signing Statement, *supra* note 132, at 1266. "[T]he solutions we devise must be broad enough to address the needs of all nations." *Id.*

to ratifying the international protocols.¹⁹⁷ President Bush also expressed concern that the OPA in its present form might cause larger oil shipping companies, in an effort to avoid liability, to be “replaced by smaller companies with limited assets and reduced ability to pay for the cleanup of oil spills.”¹⁹⁸ The President also recognized that vessel owners would be faced with substantially increased financial responsibility.¹⁹⁹ Several industrial groups have responded with warnings about the potential adverse affect the OPA will have on the shipping and insurance industry.

The increased liability under the OPA for vessel owners has the shipping industry concerned.²⁰⁰ The OPA allows states to enact their own oil spill liability and cleanup statutes.²⁰¹ Additional oil spill liability and penalties imposed by the states are not subject to limitation by the OPA or the Limitation of Liability Act of 1851.²⁰² This leads to more uncertainty for vessel owners, along with an even greater exposure to liability beyond that specifically set forth in the OPA.²⁰³

The potential threat of almost unlimited liability under the OPA and the various state statutes has caused many oil shipping concerns to cut back on oil deliveries to United States’ ports.²⁰⁴ Some commentators predicted that responsible oil transporters would leave the industry instead of facing the threat of unlimited liability.²⁰⁵ Some shipping companies even threatened to boycott

197. *Id.*

198. *Id.*

199. *Id.* In addition to increased financial responsibilities under the OPA, the oil industry has had to begin preparing contingency plans and start replacing oil transport fleets with safer oil tankers. “A balance has been sought to give the industry the flexibility to meet the requirements of the Act without incurring excessive costs.” *Id.*

200. Robin Price, *U.S. Oil Spill Law to Cause Growing Tanker Problem*, 89 OIL & GAS J. 21 (Sept. 30, 1991) [hereinafter Price].

201. Oil Pollution Act § 1018, 33 U.S.C.A. § 2718.

202. *Id.*

203. Price, *supra* note 207, at 21.

204. *Id.* “‘Due to concern about the environmental risks associated with deliveries to U.S. waters, shipping into the U.S. . . . by Chevron International [sic] . . . will be reduced significantly.’” *Id.* In addition to Chevron, Royal Dutch/Shell Group has also indicated plans to cut the size of its fleet considerably, and to phase out its third-party transportation business. *Id.*

205. Price, *supra* note 207, at 22. As pointed out by Price:

[O]nly six of 24 U.S. coastal states place a limit on damage liability, and vague, general terms in some of those states’ spill laws could add up to unlimited liability. As a result, some say responsible transporters will be scared out of the industry, with the vacuum filled by less responsible transporters, thus increasing the risk of spills.

Id.

the United States prior to the passage of the OPA.²⁰⁶ The threatened pull out from the United States market by the shipping industry was believed, by some, to be unfounded.²⁰⁷ Less than two years after the enactment of the OPA, only a few companies have actually pulled out of the United States market.²⁰⁸ However, more are likely to follow in the wake of the new regulations being promulgated by the Coast Guard to enforce the financial responsibility and emergency planning and response requirements under the OPA.²⁰⁹

Not all reaction in the industry has been negative. In 1990, the Marine Spill Response Corp. (MRSC) was formed by the oil industry.²¹⁰ The not-for-profit corporation's expenses are being paid by petroleum producers and transporters.²¹¹ The corporation recently placed orders for sixteen 210 foot offshore response vessels.²¹² The vessels are to come complete with oil skimmers and containment boom systems.²¹³ It is hoped that the MRSC will fill many of the OPA's requirements in developing new response plans to quickly clean up oil spills and protect the environment.²¹⁴ A response system is supposed to be in place by February, 1993.²¹⁵ Costs for this response program are expected to reach \$900 million over the first five years.²¹⁶

Shipping concerns, like Exxon Shipping, have taken a positive approach to the OPA by focusing more on safety in an effort

206. Price, *supra* note 207, at 23.

207. *Nations Seen Acting Unilaterally on Oil Pollution Without Worldwide Scheme*, 14 Int'l Env't Rep. (BNA) 274, 275 (May 22, 1990) (statement of Edmund Welch, Chief Counsel of House Committee on Merchant Marine and Fisheries) [hereinafter *Nations Seen Acting Unilaterally*].

208. Janet Porter, *Spill Plan Worries Small Tanker Owners*, J. COM., Feb. 14, 1992, at 5B [hereinafter *Spill Plan*]. "Despite widespread threats by tanker operators to boycott the United States after the enactment of the [OPA], only a handful of companies such as Anglo-Dutch oil company Royal Dutch/Shell and Danish shipping company Maersk actually withdrew." *Id.*

209. *Id.* at 5B. "[O]nce the new regulations concerning financial responsibility and emergency response arrangements come into effect, many shipping companies may have to stop calling at U.S. ports in order to avoid breaking the law." *Id.*

210. *Oil Industry Announces Formation of Spill Cleanup Response Organization*, 21 Int'l Env't Rep. (BNA) 901 (Sept. 14, 1990).

211. *Oil Spills*, 22 Int'l Env't Rep. (BNA) 1274 (Sept. 6, 1991) [hereinafter *Oil Spills*].

212. *Id.*

213. Matthew L. Wald, *Oil-Spill Organization Gearing Up*, N.Y. TIMES, Sept. 5, 1991, at D7.

214. *Oil Spills*, *supra* note 201, at 1274.

215. Wald, *supra* note 203, at D7.

216. *Id.*

to reduce their exposure to oil spill liability.²¹⁷ Exxon Shipping has begun to compile a database of all state and federal laws and regulations in order to assure full compliance under the law.²¹⁸ Also, Conoco, Inc. has already started conversion of its tanker fleet to double hulled vessels, and has supported the required use of double hulls on all tankers in U.S. waters by the year 2015.²¹⁹ Nevertheless, some non-U.S. companies and independent tanker operators, with the most to lose, may very well avoid U.S. ports.²²⁰ It still remains to be seen what the full impact of the OPA will be on the shipping industry.

One of the major concerns of vessel owners is the inaccessibility of insurance. The protection and indemnity clubs (P & I clubs) that write liability coverage for more than 95% of the world's shipping fleet have said that they will not issue the certificates of financial responsibility required under the OPA.²²¹ Recently, the Coast Guard published a notice of proposed rulemaking for regulations that would implement the financial responsibility provisions of the OPA.²²² In the proposed rulemaking, the Coast Guard acknowledges that certain vessel operators might encounter difficulty in securing the statutorily required certificates of financial responsibility once this rule goes into effect.²²³ The Coast Guard has recognized that the P & I clubs have refused to issue the insurance guaranties required under the OPA.²²⁴ In an attempt to remedy this problem, the Coast Guard sought to solicit specific information about other possible approaches to compliance with the financial responsibility requirements of the OPA.²²⁵ Public comment on the proposed rulemaking was initially to end on November 25, 1991; however, upon request, the comment deadline was extended by the Coast Guard to January 24, 1992.²²⁶

A hearing was held on November 6, 1991 before the House Subcommittee on Coast Guard and Navigation of the Committee

217. Price, *supra* note 207, at 24.

218. *Id.*

219. *Conoco Has Its First Double Hulled Tanker*, 90 OIL & GAS J. 30 (Jan. 27, 1992).

220. Price, *supra* note 207, at 24.

221. Shapiro, *supra* note 195, at 22.

222. 56 Fed. Reg. 49,006 (1991) (to be codified at 33 C.F.R. Parts 130, 131, 132 and 137) (proposed Sept. 26, 1991).

223. *Id.* at 49,008.

224. *Id.*

225. *Id.*

226. 56 Fed. Reg. 61,216 (1991).

on Merchant Marine and Fisheries concerning the proposed rules for certificates of financial responsibility required by the OPA.²²⁷ During the hearing, the Subcommittee heard testimony on how the proposed financial responsibility regulations were to be implemented and the impact those regulations would have on insurers, vessel owners and operators.²²⁸ Pursuant to the statute, a claimant under the OPA has the right to pursue a direct action lawsuit for removal costs and damages against the guarantor which issues the certificate of financial responsibility.²²⁹ The P & I clubs expressed their continued unwillingness to issue certificates of financial responsibility under the OPA and thereby lay themselves open to a multitude of unknown potential claimants.²³⁰ Also, shipping industry representatives warned the Subcommittee of the adverse effects the financial responsibility requirement has had on their industry, resulting in lower quality oil transportation and higher risks of oil pollution.²³¹

B. International Reactions

The enactment of the OPA and the refusal by the United States to implement the 1984 Protocols has undermined the ef-

227. *Certificates of Financial Responsibility Under the Oil Pollution Act: Hearing Before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 102d Cong. 1st Sess. 1 (1991) [hereinafter *Subcommittee Hearings*].

228. *Id.* In his opening statement Rep. Billy Tauzin, Chairman of the Subcommittee on Coast Guard and Navigation indicated that the Subcommittee wanted to hear "comments and suggestions . . . [on] how the Coast Guard can structure these [financial responsibility] rules to accomplish the goals of the Oil Pollution Act." *Id.* at 2.

229. Oil Pollution Act § 1016(f), 33 U.S.C.A. § 2716(f).

230. *Id.* at 30 (testimony of Terence Coghlin, Chairman of the Managers of the United Kingdom P & I Club, Chairman Designate of the International Group of P & I Clubs). Testifying before the House Subcommittee, Mr. Coghlin indicated that "the overall effect of [the OPA] is to undermine the very basis of the Clubs' insurance cover . . . by expos[ing] itself as a guarantor, without policy defenses and possibly without financial limit, to a multitude of unknown potential claimants . . . for damages of unprecedented size and scope." *Id.*

231. *Id.* at 49 (testimony of Andreas K.L. Ugland, Chairman, Ugland Group of Grimstad Norway, Member, INTERTANKO). In his testimony before the Subcommittee, Mr. Ugland explained that none of the 300 tanker owner members of Intertanko had the assets sufficient to satisfy the self-insurance provisions of the Coast Guard's proposed rule and the traditional insurance market could not provide necessary insurance cover. *Id.* Stathes J. Kulukundis, Director of the Greek Shipping Cooperation Committee, stated before the Subcommittee that shipowners "are trading on a seriously underinsured basis . . ." and playing "a form of maritime Russian roulette risking complete [financial] ruin . . . exposing the Federal Oil Liability Trust Fund to substantial unrecoverable payments in the event . . . the limit of the owner's liability insurance is exceeded and its reachable assets exhausted." *Id.* at 50-51.

fectiveness of an international liability and compensation system.²³² As a result, higher liability limits will not be available under the 1984 Protocols,²³³ making other nations reluctant to ratify the 1984 Protocols in light of their increased financial burden.²³⁴ The result may create a two-tiered international market. In such an international market, one set of standards would apply to the United States and another set of standards would apply to the rest of the world.²³⁵ Nonetheless, the foreign vessel owner, dependent upon its trade with the United States, may continue to service this market despite concerns surrounding higher liability exposure.²³⁶ Many of the increased costs of doing business in the United States market will ultimately be passed onto the consuming public.²³⁷

However, the impact of the OPA may also be a positive impetus for change in the international community. Some nations, including Canada and Germany, are already considering enacting legislation similar to the OPA.²³⁸ Nations may begin to turn away from the existing international liability and compensation system and adopt their own legislation in response to the OPA.²³⁹ Already, the OPA requirement for double hulled tankers has received international attention. The IMO's Marine Environment Protection Committee (MEPC) agreed to consider the incorpora-

232. See *Nations Seen Acting Unilaterally*, *supra* note 214, at 274 (“[w]ithout U.S. participation, the 1984 protocols’ entry into force conditions are difficult to fulfill.”).

233. See *Oil Pollution Compensation Fund Members Near Accord on System Without U.S. Role*, 14 Int’l Env’t Rep. (BNA) 159 (Mar. 27, 1991) (“introduction of [the OPA] blocked entry into force of the protocol’s higher limits worldwide”).

234. *Nations Seen Acting Unilaterally*, *supra* note 214, at 274.

235. Price, *supra* note 207, at 24.

236. See Charles Anderson, *Oil Pollution Act Fouls the Regulatory Waters*, WALL ST. J., Feb. 20, 1992, at A18 (most foreign-flag tankers “[r]ecognizing the value of this trade . . . are responding positively to the Oil Pollution Act and are attempting to comply with its provisions.”)

237. See, e.g., Price, *supra* note 207, at 26 (“[s]hipowners will pass along the extra costs to cargo owners, who will in turn pass it on to consumers.”). Janet Porter, *Oil Pollution Act Pushes Up Rates to the US, Tanker Owners Say; Other Officials Cite Ship Quality*, J. COM., Nov. 13, 1991, at 5B (INTERTANKO research indicates OPA has cost American oil companies and consumers an extra \$420 million for transportation).

238. Price, *supra* note 207, at 24.

239. See *Nations Seen Acting Unilaterally*, *supra* note 214, at 274 (“[n]ations may take unilateral action on oil pollution and tanker issues if current attempt fails to rescue international liability and compensation arrangements.”). Janet Porter, *Industry Reviews Lobbying Tactics, Fearing European Spill Legislation*, J. COM., May 14, 1991 at 8B (“[w]hile there are no formal proposals for similar legislation in the European Community, many think it only a matter of time before Europe follows suit”).

tion of the double hull requirement for all new tankers into its International Convention for the Prevention of Pollution from Ships, 1973 and its 1978 Protocol (MARPOL 73/78).²⁴⁰ This has produced an outcry from the shipping industry for recognition of alternatives to the double hull design.²⁴¹ MEPC agreed to accept alternative designs which would be measured against the double hull concept in assessing the abilities of such designs to minimize oil spills.²⁴² Based upon its review, the IMO was expected to propose a regulation allowing shipowners to build new tankers either under the double hull standard or under the alternatively proposed mid-deck tanker design.²⁴³ However, the proposed regulation is being opposed by some nations until a regulation covering existing tankers is approved.²⁴⁴ Although the OPA has elicited a certain amount of negative criticism and reactions, it has also sparked healthy debate which is likely to lead to safer design requirements for ships worldwide.

VI. CONCLUSION

In 1991, world oil demand was at the staggeringly high level of sixty-six million barrels a day.²⁴⁵ In 1990, oil imports to the United States averaged about 7.6 million barrels per day.²⁴⁶ This accounted for "more than half of the oil consumed in the United

240. William Hayden, *Double-hulled Tankers of Tomorrow*, PROC. MARINE SAFETY COUNCIL, Vol. 48, No. 2, at 11 (March - April, 1991). The International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL) was adopted at the International Conference on Marine Pollution held in London in 1973. See *International Convention for the Prevention of Pollution from Ships, 1973*, Nov. 2, 1973, 12 I.L.M. 1319 (1973). Annex I of MARPOL covered regulations for the prevention of pollution by oil. *Id.* at 1335. In 1978, Annex I of MARPOL was revised at the International Conference on Tanker Safety and Pollution Prevention, held in London. See *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973*, Feb. 17, 1978, 17 I.L.M. 546, 550 (1978). MARPOL and its 1978 Protocol became effective on October 2, 1983. See Jeff B. Curtis, Comment, *Vessel-Source Oil Pollution and Marpol 73/78: An International Success Story?*, 15 ENVTL. L. 679 (1985). The new requirement of double hull design would be introduced through a new regulation 13F to Annex I of MARPOL and its 1978 Protocol. See *Marine Organization to Set Rules on Double Bottom Hulls for Oil Tankers*, 14 Int'l Env't Rep. (BNA) 390, 391 (July 17, 1991) [hereinafter *Marine Organization to Set Rules*].

241. *Marine Organization to Set Rules*, *supra* note 240 at 390.

242. *Id.*

243. Alan Abrams, *N. European Move Could Sink Plans for Tanker Designs*, J. COM., Feb. 27, 1992, at 8B.

244. *Id.*

245. James Tanner, *Pollution Worries Spark Energy Taxes, and That Has Oil Exporters Concerned*, WALL ST. J., Oct. 18, 1991, at B7.

246. Eric Harrison, *Persian Gulf Crisis Reopening Debate Over Synthetic Fuel*, L.A. TIMES, Dec. 26, 1990, at D1.

States.”²⁴⁷ The ever-increasing demand for oil must be viewed together with society’s growing concerns about the adverse effects oil pollution has on our environment.

Vessel owners, oil cargo interests and the consuming public have already or will be affected by the enactment of the OPA. Vessel owners involved in an oil spill are held responsible, at the very least, for damages up to a specified monetary limit, regardless of fault.²⁴⁸ In some cases, the vessel owner’s liability can be unlimited.²⁴⁹ Oil cargo interests now must contribute to the OPA Fund²⁵⁰ in the form of five cent per barrel tax imposed on all domestic and imported oil.²⁵¹ The failure of the OPA to preempt state statutes requires the oil and shipping industry to comply with varying state laws which may subject them to unlimited liability²⁵² or more stringent regulatory requirements.²⁵³ The consuming public will almost certainly feel the effects of the OPA in the form of higher prices for petroleum products.²⁵⁴ The existing liability and compensation scheme of state and federal laws has created uncertainty and been described as a “uniquely draconian patchwork of laws.”²⁵⁵

If the OPA is ever revisited, some of the earlier analysis and approaches of the House and Senate should be reconsidered. As recognized previously by the House Committee on Merchant Marine and Fisheries, oil spill liability and compensation legislation should establish “a clear and predictable legal and regulatory framework within which actual or potential claimants, spillers, and insurers will be able to make decisions relevant to oil pollution matters.”²⁵⁶ If all the interested parties work together, a predictable legal and regulatory framework can be developed. However, each must be willing to accept responsibility for the

247. *Id.*

248. Oil Pollution Act § 1004(a), 33 U.S.C.A. § 2704(a).

249. *Id.* § 1004(c), U.S.C.A. § 2704(c).

250. 26 U.S.C.A. § 9509 (West Supp. 1991).

251. 25 U.S.C.A. § 4611(c)(2)(B) (West Supp. 1991).

252. Price, *supra* note 207, at 22.

253. *See, e.g.* CAL. GOV’T CODE ANN. § 8670.37.53 (West Supp. 1992) (statute requires vessels to maintain certificates of financial responsibility of at least \$500 million, which are to increase to \$1 billion by the year 2000).

254. *See, e.g.*, Price, *supra* note 207 at 26 (“shipowners will pass along the extra insurance costs to cargo owners, who will in turn pass it on to consumers . . .”).

255. Shapiro, *supra* note 195, at 22 (quoting Richard Yowell, underwriter for Lloyd’s of London syndicate 79).

256. *See* H.R. REP. NO. 242, *supra* note 28, at 34.

need and demand for oil and the inherent risks in oil transportation.

Major legislative revisions are probably not necessary if a cooperative approach is taken toward the implementation of the OPA. Cooperation between the shipping industry, the insurance industry, oil cargo interests and the government will provide for a workable oil spill liability and compensation regime. If flexibility is demonstrated by all interests involved, drastic changes to the OPA will not be needed. For example, the implementation of regulations regarding the financial responsibility provisions have prompted a great deal of debate. Even so, Richard Quegan, chairman of the American Petroleum Institute Marine Transportation Committee, recognized "that there is flexibility within the regulatory process to resolve our problems, but it is going to take a spirit of cooperation and flexibility [from] all concerned."²⁵⁷ This sort of willingness to cooperate in addressing the OPA is indispensable.

The federal and state governments must also be as flexible in their approach to the OPA. One of the main concerns of the industry surrounds the threat of unlimited liability under state law regimes that were not preempted by the OPA. States must heed these concerns or face wholesale boycotts of their ports by the tanker industry or possible preemption by Congress if the OPA is revisited.

The higher standard of care imposed on those involved in the transportation, handling and production of oil by the OPA can be looked upon as a positive development in the protection of our environment. However, a flexible approach must be taken in addressing the industry's concerns about the OPA in light of the economic ramifications of the statute. All interested parties must continue to work together to establish a clear and predictable legal framework within which private citizens, federal and state governments, oil transporters, oil cargo interests and insurers are able to abide by the risks and responsibilities involved in the production, transportation, handling and consumption of oil.

257. *Subcommittee Hearings, supra* note 227 at 52 (testimony of Mr. Richard Quegan, Chairman, API Marine Transportation Committee).

