

ANATOMY OF AN OIL SPILL: THE EXXON VALDEZ AND THE OIL POLLUTION ACT OF 1990

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I. Introduction

Every year, thousands of oil spills are reported that either pollute or threaten to pollute the waters of the United States.¹ Between 1980 and 1986 alone, from eighty to ninety-one million gallons of oil have been spilled in U.S. waters.² Names like the *Torrey Canyon*, the *Argo Merchant*, the *Amoco Cadiz* and the *Exxon Valdez* symbolize the devastation and disaster that accompany large scale spills.³

The *Torrey Canyon*⁴ accident first alerted the world to the dangers associated with the carriage of oil by supertankers and the overall lack of protection from spills when she ran aground off the coast of England in 1967 and spilled nineteen million gallons of oil

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¹ H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 1, at 28 (1989) [hereinafter H.R. REP. 242, pt. 1].

² 2 WILLIAM H. RODGERS, ENVIRONMENTAL LAW AIR AND WATER § 4.35, at 96 (1986 & Supp.).

³ Charles Openchowski, Federal Implementation of the Oil Pollution Act of 1990, 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,605 (1991). The tanker *Torrey Canyon* ran aground off the coast of England in 1967, spilling 19 million gallons of oil. H.R. REP. NO. 1489, 94th Cong., 2d Sess. 13 (1976) [hereinafter H.R. REP. 1489]. In December 1976, the *Argo Merchant* ran aground off Massachusetts and spilled over seven million gallons of oil. *In the Wake of the Argo Merchant*, SCI. NEWS, Jan. 21, 1978, at 38. The *Amoco Cadiz* dumped over 67 million gallons of oil off the northern coast of France in March 1978. *Amoco Cadiz: A Lasting Disaster*, SCI. NEWS, Aug. 5, 1978, at 85. Over 10 million gallons of oil were spilled in Prince William Sound, Alaska, when the *Exxon Valdez* struck a reef in March 1989. RODGERS, *supra* note 2, at 96. Other major spills include: the *Puerto Rican*, spilling two million gallons off San Francisco, California, in October 1984; the *Avenus*, spilling almost three million gallons off Louisiana in July 1984; and the *Burmah Agate*, spilling over 10 million gallons in Galveston Bay, Texas, in November 1979. *Id.*

⁴ *In Re Barracuda Tanker Corp.*, 281 F. Supp. 228 (S.D.N.Y. 1968), *modified*, 409 F.2d 1013 (2d Cir. 1969). The registered owner of the *Torrey Canyon* was the Barracuda Tanker Corporation, and at the time of the spill, she was under a 20 year charter to Union Oil Company of California. *Id.* at 229. At the time of the accident, the *Torrey Canyon* was en route from the Persian Gulf with 119,328 tons of crude oil. *Id.*

into the ocean.⁵ The United States was especially alarmed, due to its large consumption of oil and gas, much of which is transported by tankers and barges.⁶ As a result, the United States Congress, concerned with the environmental dangers of such spills and determined to protect United States waters, deliberated over comprehensive oil spill legislation for more than a decade.⁷ Finally, the Oil Pollution Act of 1990 was enacted.⁸ This note will consider the long journey toward its passage, its provisions for oil spill response, liability and prevention and the effect it has had thus far on these issues.

II. *Prior Legislation: Pre-Oil Pollution Act*

The Water Quality Improvement Act was signed into law in 1970.⁹ Two years later, it was reorganized and reenacted as part of the Federal Water Pollution Control Act (FWPCA).¹⁰ FWPCA was the starting point for federal oil spill legislation, as embodied in section 311, which is the section dealing with oil pollution and hazardous substance liability.¹¹ It contained a strong declaration of congressional policy: "[I]t is the policy of the United States that there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States, adjoining shore-

⁵ H.R. REP. 1489, *supra* note 3, at 13. This spill caused immeasurable damage to the marine environment and businesses in England and France. HERBERT R. BAER, ADMIRALTY LAW OF THE SUPREME COURT, § 27-1, at 182 (2d ed. 1969 & Supp. 1977). Although the damages from the *Torrey Canyon* accident were difficult to compute, approximately \$15,000,000 was spent on oil cleanup and approximately \$25,000,000 in claims were asserted, which were ultimately settled for about \$7,000,000. H.R. REP. 1489, *supra* note 3, at 13.

⁶ H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2 at 31 (1989) [hereinafter H.R. REP. 242, pt. 2]. The United States imports one-half of its crude oil supply by tankers, and one-quarter of the supply is transported by tankers from Alaska. *Id.*

⁷ S. REP. NO. 94, 101st Cong., 1st Sess. 1 (1989) [hereinafter S. REP. 94]. See H.R. REP. NO. 242, pt. 2, *supra* note 6, at 31.

⁸ Pub. L. No. 101-380, 103 Stat. 484, 33 U.S.C. §§ 2701-2761 (1990) [hereinafter Act].

⁹ Pub. L. No. 91-224, 84 Stat. 91 (Apr. 3, 1970) 33 U.S.C. §§ 1151-1175 (1970). See generally Nicholas J. Healy & Gordon W. Paulsen, *Marine Oil Pollution and the Water Quality Improvement Act of 1970*, 1 J. MAR. L. & COM. 537 (1970).

¹⁰ 33 U.S.C. §§ 1251-1376 (1982 & Supp. V 1987). See generally Note, *Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs*, 93 HARV. L. REV. 1761 (1980); Glenn Fjermedal, Comment, *Federal Oil Spill Fund Legislation: A Future Standard*, 53 ALB. L. REV. 161 (1988).

¹¹ 33 U.S.C. § 1321 (1982 & Supp. V 1987). See RODGERS, *supra* note 2, at 511, 512; Fjermedal, *supra* note 10, at 163.

lines, or into or upon the waters of the contiguous zone. . . ."¹² As implemented, the statute prohibits discharges of oil that may be harmful as determined by the President.¹³

To respond promptly to a discharge, section 311 requires the person in charge of a vessel or facility that is leaking oil to immediately report the discharge to the appropriate agency.¹⁴ Section 311 also delineates a cleanup scheme.¹⁵ The President may authorize the removal of oil spills unless he/she determines the owner or operator of the vessel or facility responsible will remove the spill properly.¹⁶ Pursuant to this authority, the President is to prepare a National Contingency Plan to govern the response to spills.¹⁷ If a

¹² 33 U.S.C. § 1321(b)(1) (1982). Oil is defined as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse and oil mixed with wastes other than dredged spoil." *Id.* § 1321(a)(1). The contiguous zone "means the entire zone established by the United States under Article 24 of the Convention on the Territorial Sea and the Contiguous Zone." *Id.* § 1321(a)(9). This Convention declares that the contiguous zone "may not extend beyond 12 miles from the baseline from which the breadth of the territorial sea is measured." Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 24, 516 U.N.T.S. 206, 220. The territorial sea is measured from the low water line along the coast. *Id.* art. 3, at 208.

¹³ *Id.* § 1321(b)(3). The President considers the harm "to the public health or welfare of the United States, including but not limited to, fish, shellfish, wildlife, and public and private property, shorelines and beaches." *Id.* § 1321(b)(4). The standard for this determination is known as the sheen test - an oil discharge that causes a film or sheen on the water. 40 C.F.R. § 110.3(b) (1985). See generally RODGERS, *supra* note 2, at 513. This test approaches a no-discharge policy and therefore applies to discharges of a few gallons. *Id.* at 514. Such a spill is considered to be a harmful discharge. *Id.* at 513.

¹⁴ 33 U.S.C. § 1321(b)(5) (1982). If notification is not given, the person shall be fined not more than \$10,000 and/or imprisoned for up to one year. *Id.* The "appropriate agency" includes the Coast Guard and the Environmental Protection Agency. RODGERS, *supra* note 2, at 519.

¹⁵ 33 U.S.C. § 1321(c) (1982).

¹⁶ *Id.* § 1321(c)(1). The On Scene Coordinator (OSC) is to make a reasonable effort to have the discharger perform removal actions. 40 C.F.R. § 300.52(c) (1985). Removal is properly carried out when "(i) the cleanup is fully sufficient to minimize or mitigate threat to the public health, welfare, and the environment (removal efforts are 'improper' to the extent that Federal efforts are necessary to further minimize or mitigate those threats); and (ii) the removal efforts are in accordance with applicable regulations including this plan [the NCP]." 40 C.F.R. § 300.55(a)(4) (1985). If this is not being done, the (OSC) determines if a federal response is appropriate.

¹⁷ 33 U.S.C. § 1321(c)(2) (1982). The plan is to include: assignment of duties and responsibilities among federal and state agencies; storing and maintaining equipment and supplies; establishing a national center to carry out the plan; a system of surveillance and notice of spills; procedures to contain and remove oil; provisions regarding dispersants; and a system for state cleanup and reimbursement of costs. *Id.* See also

spill creates a substantial threat to the public welfare, the United States may direct and coordinate all cleanup efforts.¹⁸

The owner or operator of a vessel is liable to the United States for costs incurred for the removal of oil, except where the party "[c]an prove that a discharge was caused solely by an act of God,¹⁹ an act of war, negligence on the part of the United States Government,²⁰ or the act or omission of a third party...."²¹ Liability is lim-

RODGERS, *supra* note 2, at 521. The Plan that was enacted is the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300 (1985).

The National Oil and Hazardous Substances Pollution Contingency Plan establishes a response network composed of the National Response Team, Regional response teams, on scene coordinators and the National Strike Force. *Id.* § 300.32-34. The National Response Team consists of representatives of various federal agencies. *Id.* § 300.23. Its function is to maintain national readiness to respond to a major discharge of oil, review regional responses to oil spills, develop procedures to coordinate the actions of federal, state and local governments and private entities in responding to oil spills, monitor research and development in the response area and monitor response training. *Id.* § 300.32.

The Regional Response Team is the regional mechanism for responding to spills. The United States is divided into 10 regions. The team is to plan for use of dispersants, review regional and local responses to spills, conduct training exercises, recommend changes to the National Contingency Plan and (OSC) actions and be prepared to respond to spills outside the region. *Id.* The regional team is also to prepare regional contingency plans with information on available resources. *Id.* § 300.42.

The OSC is an official designated by the Coast Guard to coordinate and direct responses to spills. *Id.* § 300.6. The OSC is to develop local contingency plans for his/her area of responsibility. *Id.* § 300.43. The OSC is to assess the discharge, the removal possibilities and identify responsible parties. *Id.* § 300.52. The responsible party is to respond to the spill; however, if effective actions are not being taken, or the responsible party is unknown or somehow unavailable, the OSC can authorize a federal response. *Id.* The National Strike Force, consisting of strike teams, are available to assist the OSC and to assist in removal. *Id.* § 300.34. These teams are to have specialized containment equipment and rapid transportation available. *Id.*

¹⁸ 33 U.S.C. § 1321(d) (1982).

¹⁹ The act of God defense is defined as "an act occasioned by an unanticipated grave natural disaster." 33 U.S.C. § 1321(a)(12). Courts have interpreted this to mean an occurrence that "results solely from a grave natural disaster and if that grave natural disaster is wholly unanticipated." *Sabine Towing & Transportation Co. v. United States*, 666 F.2d 561 (Ct. Cl. 1981). In this case, a freshet condition (an increased rate of flow in a river due to spring runoff of melted snow and rain) that washed logs, rocks and other debris down a river was not an act of God within the meaning of the statute. *Id.* at 563. Therefore, the plaintiff could not recover its cleanup costs incurred when its vessel spilled 30,000 to 50,000 gallons of oil after striking an object deposited in the river as a result of the freshet. *Id.* at 563, 566.

²⁰ *See, e.g., Gaspar v. United States*, 460 F. Supp. 656 (D. Mass. 1978). In that case, the United States attempted to recover cleanup costs under 33 U.S.C. § 1321 that resulted when a fishing vessel collided with an unmanned barge and caused an oil discharge in Gloucester Bay, Massachusetts. *Gaspar*, 460 F. Supp. at 659, 662. The

ited to \$150 per gross ton or \$250,000 for a vessel carrying oil as cargo.²² The limit does not apply and full liability is assessed if the United States can show that the discharge is the product of "willful negligence or willful misconduct within the privity and knowledge of the owner."²³

Section 311 also provides for regulation of facilities and vessels.²⁴ The President is mandated to issue regulations establishing methods and procedures for removal of oil, establishing criteria for regional and local contingency plans, establishing methods of preventing oil spills and governing inspection of oil-carrying vessels.²⁵ President Richard Nixon delegated this authority to the Coast Guard and the EPA.²⁶

Finally, section 311 provides for a revolving fund of \$35,000,000.²⁷ The fund is to be used for implementing the National Contingency Plan and for compensating owners or operators who have removed oil pursuant to section 311 but have a defense to liability.²⁸

In subsequent years Congress enacted additional funds to sup-

court held that the collision was caused solely by the negligence of the United States, as the Coast Guard improperly anchored and improperly lighted the barge. *Id.* The United States was therefore not entitled to clean up costs. *Id.* at 662.

²¹ 33 U.S.C. § 1321(f)(1).

²² *Id.*

²³ *Id.* See generally RODGERS, *supra* note 2, at 523, 526-27.

²⁴ 33 U.S.C. § 1321(j) (1982).

²⁵ *Id.*

²⁶ Exec. Order No. 12,777, 56 Fed. Reg. 54,757 (1991). The EPA regulations require owners and operators of facilities that could be expected to discharge oil to prepare an oil spill contingency plan. 40 C.F.R. § 112 (1985). See generally RODGERS, *supra* note 2, at 530. The Coast Guard regulations are detailed rules regarding equipment, construction and procedures for transfer of oil. 33 C.F.R. §§ 151-156 (1985). See generally RODGERS, *supra* note 2, at 530.

²⁷ 33 U.S.C. § 1321(k) (1982). This fund was never fully capitalized at that amount. S. REP. 94, *supra* note 7, at 3. Regardless, this amount is inadequate to handle large oil spills. *Id.* For example, Exxon spent \$2.5 billion in cleaning up the Valdez spill. Don J. Benedictis, *Oil Spill Settlement Okayed*, A.B.A. J., Dec. 1991, at 31.

²⁸ 33 U.S.C. § 1321(k) (1982). See also *supra* note 19-21 and accompanying text. The fund is financed through general revenues. See Fjermedal, *supra* note 10, at 176; S. REP. 94, *supra* note 7, at 3. Between 1971 and 1982, the United States paid \$124 million from the fund but recovered only \$49 million from spillers. *Id.* For example, the United States spent over \$500,000 to prevent an oil spill in Lost Harbor, Alaska, when a vessel went aground on a rocky shore. *Kyoei Kaiun Kaisha Ltd. v. M/V Bering Trader*, 795 F. Supp. 1054, 1057 (W.D. Wash. 1991). The government could only recover \$305,000, as the owner's liability was capped at \$150 per gross ton and the vessel was 2036 gross tons. *Id.* See also *supra* note 22.

plement oil spill compensation. The Trans-Alaska Pipeline Authorization Act²⁹ establishes the Trans-Alaska Pipeline Liability Fund, a non-profit corporate entity that may sue or be sued in its own right.³⁰ The fund is strictly liable, along with owners and operators of vessels, for damages resulting from vessel-related discharges of oil that has been transported through the pipeline.³¹

Another limited compensation scheme is found in the Deepwater Port Act of 1974, which pertains to regulation of deepwater ports by the Secretary of Transportation.³² This act establishes strict liability for certain discharges of oil within a "safety zone" surrounding a deepwater port.³³ The Deepwater Port Liability

²⁹ Pub. L. No. 93-153, 87 Stat. 584 (1973) codified as amended at 43 U.S.C. §§ 1651-1655 (1982 & Supp. V 1987)). The Trans-Alaska Pipeline is a 48 inch oil pipeline, S. REP. NO. 207, 93d Cong., 1st Sess. 8 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2417, 2424, constructed to transport the reserves of oil located in Prudhoe Bay, Alaska, to the port of Valdez, Alaska. 43 U.S.C. § 1651(c) (1982). This oil was needed due to domestic shortages of oil and the increasing dependence on foreign sources. *Id.* § 1651(a).

The purpose of the act was to ensure the prompt construction of the pipeline without further delay, *id.*, and to establish strict liability for the holder of the pipeline right-of-way for pipeline-related damages and owners/operators of vessels for vessel-related damages. *Id.* §§ 1653(a)(1), (c)(1). See RODGERS, *supra* note 2, at 552. Liability is capped at \$50,000,000 for the former and \$100,000,000 for the latter, with the owner liable for the first \$14,000,000 and the fund liable for the balance. *Id.* §§ 1653(a)(2), (c)(3).

³⁰ *Id.* § 1653(c)(4). The fund is administered by the holders of the pipeline right-of-way, *id.*, and financed by a fee of five cents per barrel paid by the owner of the oil. *Id.* § 1653(c)(5).

³¹ 43 U.S.C. § 1653(c)(1) (1982).

³² Pub. L. No. 93-627 (1974), 88 Stat. 2126 (1975) codified at 33 U.S.C. §§ 1501-1524 (1982 & Supp. V 1987). See 33 C.F.R. § 137.1 (1985). A deepwater port is defined as "any fixed or floating manmade structure other than a vessel . . . located beyond the territorial sea and off the coast of the United States and which is used or intended for use as a port or terminal for the loading or unloading and further handling of oil for transportation to any State. . . ." 33 U.S.C. § 1517(f) (1982). These ports are used to offload oil tankers that have drafts, *see infra* note 170, that exceed the capability of United States ports. Sidney A. Wallace & Temple L. Ratcliffe, *Water Pollution Laws: Can They Be Cleaned Up?* 57 TUL. L. REV. 1343, 1347 (1983).

There is only one such port, the Louisiana Offshore Oil Port (LOOP), Walter B. Jones, *Oil Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENVTL L. REP. (Envtl. L. Inst.) 10,333, 10,334 (1989), located 18 miles off the coast of Louisiana in the Gulf of Mexico. 52 F.R. 10,712, 10,715 (1987). The port has never had a serious spill. *Offshore Oil Port Is Clean - and Unprofitable*, L.A. TIMES, Dec. 12, 1989, at D1.

³³ 33 U.S.C. § 1517(d) (1982). Owners and operators of vessels are liable for damages resulting from a spill from a vessel within a safety zone. *Id.* Liability is capped at the lesser of \$150 per gross ton or \$20,000,000 unless the result of gross negligence or

Fund,³⁴ modeled after the Trans-Alaska Pipeline Liability Fund,³⁵ is strictly liable for damages in excess of those paid by owners and operators and licensees of deepwater ports.³⁶

Two additional compensation programs were instituted by the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA)³⁷ - the Offshore Oil Pollution Compensation Fund (OOPCF) and the Fishermen's Contingency Fund.³⁸ The OOPCF is available for removal costs incurred under the applicable provisions delineated in the United States Code.³⁹ The Fishermen's Contingency Fund is established to compensate commercial fishermen for damages to their fishing gear caused by activities con-

willful misconduct. *Id.* A safety zone is defined as a zone established by the Secretary of Transportation circumscribing deepwater ports. *Id.* § 1502(16). The zone is established to promote navigational and environmental safety and the protection of life and property. 33 C.F.R. § 150, app. A (1989). The safety zone mandates avoidance of specific areas such as anchorages. *Id.* No use incompatible with the operation of the port will be permitted. 33 U.S.C. § 1509(d) (1982).

Licensees of deepwater ports are liable for damages that result from a discharge from such a port or from vessels moored there. 33 U.S.C. § 1517(e) (1982). Liability is capped at \$50,000,000 unless damage was caused by gross negligence or willful misconduct. *Id.*

³⁴ *Id.* § 1517(f).

³⁵ See *supra* notes 29-30 and accompanying text.

³⁶ 33 U.S.C. § 1517(f) (2) (1982). The fund is capitalized by a fee of two cents per barrel collected from owners of oil loaded or unloaded at a deepwater port. *Id.* § 1517(f) (3). See RODGERS, *supra* note 2, at 553.

³⁷ Pub. L. No. 95-372, 92 Stat. 630, 632 (1978) codified as amended at 43 U.S.C. §§ 1331-1356, 1801-1866 (1982 & Supp. V 1987). OCSLA pertains to the granting and regulating of oil and gas leases on submerged lands of the Outer Continental Shelf. *Id.* §§ 1334, 1337, 1344. Owners and operators of vessels that are the source of oil pollution are strictly liable for costs incurred and damages, *id.* § 1814(a), limited to the greater of \$300 per gross ton or \$250,000, *id.* § 1814(b)(1), except if caused by the willful misconduct or gross negligence within the privity or knowledge of the owner/operator. *Id.* § 1814(b). See generally Robert B. Krueger & Louis H. Singer, *An Analysis of the Outer Continental Shelf Lands Act Amendments of 1978*, 19 NAT. RESOURCES J. 909 (1979).

³⁸ 43 U.S.C. §§ 1812, 1842 (1982).

³⁹ *Id.* § 1813(a)(2). The applicable provisions of the United States Code are 33 U.S.C. § 1321 (c), (d) and (l). Damages covered include "injury to, or destruction of, real or personal property; loss of use of real or personal property; injury to, or destruction of, natural resources; loss of use of natural resources; loss of profits or impairment of earning capacity due to injury to, or destruction of, real or personal property or natural resources; and loss of tax revenue for a period of one year due to injury to real or personal property." *Id.* § 1813(a)(2). The fund is financed by a fee of three cents per barrel on oil obtained from the Outer Continental Shelf, paid by the owner of the oil. *Id.* § 1812(d). The fund is not to exceed \$200,000,000. *Id.* § 1812(a).

nected with the Outer Continental Shelf oil and gas leases.⁴⁰

III. Comprehensive Oil Spill Legislation

These various federal enactments formed a patchwork of sometimes conflicting laws concerning liability for oil discharges.⁴¹ Complicating matters even further were the assorted state statutes pertaining to oil spill liability and compensation funds which differed widely in their standards.⁴² Congress, recognizing the conflicts and the deficiencies in the existing laws, directed the Attorney General to study the matter and make recommendations for legislation to provide a comprehensive system of oil spill liability and compensation.⁴³ The Attorney General submitted his report in 1975 and President Ford forwarded proposed legislation to Congress to implement the recommendations of that report.⁴⁴

As a result, H.R. 14862, Oil Pollution Liability,⁴⁵ was recommended to the House of Representatives for passage in 1976, representing the action undertaken by the Subcommittee on Coast Guard and Navigation on the various recommendations and proposals from the Attorney General and the President.⁴⁶ Its basic

⁴⁰ *Id.* § 1843(c)(1). Compensation is "[f]or actual and consequential damages, including resulting economic loss, due to damages to, or loss of, fishing gear by materials, equipment, tools, containers, or other items associated with the Outer Continental Shelf oil and gas exploration, development or production activities." *Id.* The Secretary of Commerce collects a fee from holders of leases or exploration permits to finance the fund. *Id.* § 1842 (b)(1). The fund is not to exceed \$2,000,000. *Id.* § 1842 (a)(1).

⁴¹ H.R. REP. 1489, *supra* note 3, at 14. See H.R. REP. 242, pt. 2, *supra* note 6, at 32.

⁴² H.R. REP. 242, pt. 1, *supra* note 1, at 28. See, e.g., ALASKA STAT. § 46.04 (1991 & Supp. 1992); FLA. STAT. ANN. § 376.011 (West 1988 & Supp. 1993); ME. REV. STAT. ANN. tit. 38, §§ 541-560 (West 1989 & Supp. 1992); N.C. GEN. STAT. §§ 143-215.75-94 (1990 & Supp. 1992); N.Y. NAV. LAW. § 170 (McKinney 1989 & Supp. 1993).

⁴³ H.R. REP. 1489, *supra* note 3, at 14. This direction was a provision of the Deepwater Port Act of 1974. 33 U.S.C. § 1517(n) (1982). Congress stressed that the Attorney General should address the means of "[I]mplementing a uniform law providing liability for cleanup costs and damages from oil spills." *Id.* The study that was completed was entitled "Methods and Procedures for Implementing a Uniform Law Providing for Cleanup Costs and Damages Caused by Oil Spills From Ocean Related Sources." Jones, *supra* note 32, at 10,334.

⁴⁴ H.R. REP. 1489, *supra* note 3, at 14.

⁴⁵ H.R. 14862, 94th Cong., 1st Sess. (1976).

⁴⁶ H.R. REP. 1489, *supra* note 3, at 14. It established strict, joint and several liability for all damages arising out of or directly resulting from oil pollution. *Id.* at 5. Liability, unless caused by gross negligence or willful misconduct, would not exceed \$300 per gross ton for a ship, up to a maximum of \$30,000,00. *Id.* Defenses to liabil-

purpose was to ensure an unlimited, readily accessible compensation fund to which victims of oil pollution would have recourse.⁴⁷ The bill attempted to organize the subject of compensation for oil pollution by establishing a uniform system of settling claims and assuring that none would go uncompensated.⁴⁸ It provided that claims for damages by oil spills would be financed from one fund.⁴⁹ To prevent duplicate sources of compensation for damages provided under the act, the bill contained preemptive provisions under which any claim for damages of the type listed in the act could be asserted pursuant to it, and no federal or state court could entertain actions for such damages except as provided by the act.⁵⁰

The Senate also took action with respect to comprehensive oil spill legislation. In 1977, the Senate Committee on Commerce, Science and Transportation favorably reported on and recommended the passage of S. 2083, Oil Pollution Liability and Compensation.⁵¹ The bill's purpose was to establish a comprehensive oil pollution compensation fund.⁵² The bill, however, was modified and the portion of it relating to oil pollution was not enacted.⁵³

ity include spills due to acts of war, or natural phenomenon or acts of omissions of a third party. *Id.*

⁴⁷ H.R. REP. 242, pt. 2, *supra* note 6, at 32. The fund was established by collecting a fee from owners of refineries receiving oil and from owners of terminals receiving oil for export or import, not to exceed three cents per barrel of oil received. H.R. REP. 1489, *supra* note 3, at 3. Claims for damages resulting from economic loss, directly resulting from or arising out of oil pollution, may be asserted for costs for removal; destruction of or injury to personal or real or property; loss of use of personal or real property; destruction of, or injury to natural resources; impairment of earning capacity or loss of profits due to destruction of or injury to personal or real property or natural resources; and tax revenue loss for a period of one year due to injury to personal or real property. *Id.* at 4. Claims may be asserted by, among others, an owner or operator of a vessel involved in an oil spill incident provided he/she is entitled to a defense to liability or a limitation of liability, by the President or any State as trustees for natural resources and by a U.S. claimant who owns or leases the property involved. *Id.*

⁴⁸ H.R. REP. 1489, *supra* note 3, at 12-13.

⁴⁹ *Id.*

⁵⁰ *Id.* at 10.

⁵¹ Oil Pollution Bill Considered, CONG. Q. ALMANAC, 670 (1977).

⁵² *Id.* See *supra* notes 47-50 and accompanying text.

⁵³ S. REP. NO. 94, *supra* note 7, at 2. The modified bill that was enacted became the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. See *infra* note 56.

Neither of these bills, nor the several other related bills that were introduced in the following years, was passed.⁵⁴ For the next fourteen years, Congress attempted to pass a comprehensive oil pollution and compensation bill.⁵⁵ These efforts, however, failed because the House of Representatives and the Senate had been unable to resolve their differences over such legislation.⁵⁶

IV. *The Exxon Valdez*

On March 16, 1989, oil spill legislation was once again introduced in Congress.⁵⁷ On March 24, 1989, the dire need for such legislation became crystal clear. On that day a 987 foot tank vessel named the *Exxon Valdez* set sail for California from the Trans-Alaska Pipeline Terminal at Valdez, Alaska.⁵⁸ En route, the vessel struck Bligh Reef in Prince William Sound, and spilled nearly

⁵⁴ See H.R. REP. 242, pt. 2, *supra* note 6, at 32-33. These bills include: Oil Pollution Liability and Compensation Act, H.R. 85, 96th Cong., 1st Sess. (1979); Comprehensive Oil Pollution Liability and Compensation Act, H.R. 3278, 98th Cong., 1st Sess. (1983); Oil Pollution Liability and Compensation, H.R. 1232, 99th Cong., 1st Sess. (1985); Oil Pollution Liability and Compensation Act of 1986 S. 2799, 99th Cong., 2d Sess. (1986); Oil Pollution Liability and Compensation Act of 1987, H.R. 1632, 100th Cong., 1st Sess. (1987)

⁵⁵ 135 CONG. REC. H7955 (daily ed. Nov. 2, 1989) (statement of Rep. Jones). See *supra* note 54 concerning the bills that were introduced.

⁵⁶ *Id.* at H7963. These differences include liability limits and preemption issues. See also *id.* at H7958 and H7971. Preemption was a major stumbling block. Russell V. Randle, *The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects*, 21 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,121, 10,133 (1991). Generally, senators opposed preemption while representatives supported it. *Id.* at 10,133. Proponents, including oil companies and shippers, argued that state laws would merely be duplicative and only serve to confuse and hinder the process. *Id.* Opponents stated that several states have oil pollution laws and they should be able to impose a greater degree of protection for its citizens. *Id.* See also S. REP. 94, *supra* note 7, at 6. They felt the best way to combat the complacency that was a major factor in the Valdez spill was to involve the local citizens in the operation. RODGERS, *supra* note 2, at 99. The debate went on for years until finally the Senate and House could agree, resulting in the Oil Pollution Act of 1990. Randle, *supra*, at 10,119, 10,133. In the 96th Congress, consideration was given to including oil in the coverage of the Comprehensive Environmental Response, Compensation, and Liability Act [hereinafter CERCLA] 42 U.S.C. §§ 9601-9657 (1982 & Supp. IV 1986), amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986). H.R. REP. 242, pt. 2, *supra* note 6, at 32. However, hazardous substances were considered to be a more pressing problem than oil so the plan was dropped to ensure enactment of CERCLA. *Id.*

⁵⁷ The Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, H.R. 1465, 101st Cong., 1st Sess. (1989).

⁵⁸ James I. Crowley, *In the Wake of The Exxon Valdez: Charting the Course of Pilotage Regulation*, 22 *J. MAR. L. & COM.* 165 (1991).

eleven million gallons of oil.⁵⁹ The ensuing ecological disaster and inadequate and unprepared cleanup effort made it all too apparent that the existing levels of oil spill prevention, preparedness and response were insufficient to handle a major spill.⁶⁰

The *Exxon Valdez* oil spill and its botched cleanup were the result of many different factors that conspired to make such an environmental disaster inevitable. The spill was the end result of a long chain of mistakes in seamanship, including unqualified pilots on the bridge, violations of basic sailing rules and lax Coast Guard monitoring.⁶¹ Another factor that played a part in the spill was the

⁵⁹ H.R. REP. 242, pt. 2, *supra* note 6, at 31.

⁶⁰ H.R. REP. 242, pt. 1, *supra* note 1, at 28.

⁶¹ Timothy Egan, *Elements of Tanker Disaster: Drinking, Fatigue, Complacency*, N.Y. TIMES, May 22, 1989, at B7 [hereinafter *Elements of Tanker Disaster*]. The events preceding the spill are as follows: At 9:15 P.M. the tanker *Exxon Valdez* departed Valdez, Alaska, loaded with 53,094,510 gallons of North Slope crude oil. *Exxon Valdez Oil Spill: Hearings on H.R. 1465 before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 13 (1989) (background memorandum dated April 5, 1989, to members of the Subcommittee on Coast Guard and Navigation) [hereinafter *Merchant Marine Background Memo*]. The vessel set sail through Valdez Narrows under the command of local harbor pilot, Captain William Murphy. *Elements of Tanker Disaster, supra*, at B7. At 11:24 P.M. Captain Murphy disembarked, returning control to Captain Joseph Hazelwood. *Merchant Marine Background Memo, supra*, at 13. At 11:39 P.M. Captain Hazelwood radioed the Coast Guard to inform them he was moving the vessel from the outbound traffic lane to the inbound lane to avoid ice floes from the Columbia Glacier. *Id. See also* Richard Behar, *Joe's Bad Trip*, TIME, July 24, 1989, at 42. The Coast Guard then lost radar contact with the vessel. George Church, *The Big Spill*, TIME, Apr. 10, 1989, at 40. If contact had been maintained, the Coast Guard could have warned the *Exxon Valdez* that she was too close to Bligh Reef. *Id.*

At 11:50 P.M. Captain Hazelwood turned over the vessel to Third Mate Gregory Cousins. Behar, *supra*, at 46. It was questionable whether Cousins was licensed "to pilot a vessel through Alaska coastal waters." Church, *supra*, at 40. *See also* Crowley, *supra* note 58, at 166. Coast Guard Commandant, Admiral Paul Yost, Jr., has stated that Cousins "was competent, but he was not technically qualified." Behar, *supra*, at 47. *See also* Crowley, *supra* note 58, at 167. (concluding that had Cousins been licensed, the *Exxon Valdez* might not have gone aground).

Hazelwood ordered Cousins to return to the outbound lanes when the vessel neared Busby Island. Behar, *supra*, at 46. Cousins said he gave the order to do so at 11:55. P.M. *Id.* However, the ship's course recorder establishes the turn was not made until 12:01 A.M. *Elements of Tanker Disaster, supra*, at B7. In those six minutes the vessel had traveled another 1.3 miles closer to Bligh Reef. *Id.* When the vessel finally did turn, it was not responding well. Behar, *supra*, at 46. It is possible that the helmsman, Robert Kagan, used a counter-rudder maneuver to slow the ship if he had felt the *Valdez* was turning too sharply back into the outbound lane. *Id.* Such a maneuver was registered in the ship's course recorder. *Id.* Due to the unresponsiveness, Cousins ordered a hard right rudder. *Id.* At 12:04 A.M. the *Exxon Valdez* went aground on Bligh Reef, gashing open her hull. *Merchant Marine Background Memo, supra*, at 13.

fatigue of the *Valdez* crew, which was exhausted from working twelve to fourteen hour days.⁶² Captain Joseph Hazelwood's possible alcoholic condition was also investigated as a contributing factor.⁶³ Treated for alcohol abuse in 1985, Hazelwood was in charge of the *Exxon Valdez* at a time when he was not licensed to drive in his home state of New York due to a drunken driving conviction.⁶⁴ Hazelwood was legally drunk ten hours after the spill when his blood alcohol level was first tested.⁶⁵ However, it is impossible to know what role, if any, his drinking played in the events preceding the spill.⁶⁶

The response to contain and clean up the largest oil spill in United States history was confused and inadequate.⁶⁷ The State of

⁶² Behar, *supra* note 61, at 47. Personnel cutbacks throughout the merchant marine fleet, approved by the Coast Guard after oil companies argued that their new technology did not merit larger staffing, resulted in fewer sailors working longer hours. At the time of the spill, the *Exxon Valdez* carried a "bare-bones" staff of 20, down from a crew of 24 in 1986. *Id.*

⁶³ *Id.* at 42-47. Hazelwood was investigated and indicted for operating a watercraft while intoxicated, negligent discharge of oil, and reckless endangerment. Hazelwood v. State, 836 P.2d 943, 945 (Alaska App. 1992). He was acquitted on the charges of reckless endangerment, endangerment of life and operating a watercraft while intoxicated. Mark Hansen, *Hazelwood's Conviction Overturned*, 78 A.B.A. J., Oct. 1992, at 25. He was convicted of negligent discharge of oil. *Id.* However, that conviction was reversed. Hazelwood, 836 P.2d at 954. Because Captain Hazelwood immediately reported the oil spill, as required by 33 U.S.C. § 1321(b)(5), he was immune from prosecution. *Hazelwood*, 836 P.2d at 945.

⁶⁴ Behar, *supra* note 61, at 42-47. In 1984, Hazelwood was arrested for drunken driving in Huntington, N.Y., and later convicted. After leaving a bar, he drove his van into another car and left the scene of the accident. He was arrested in his driveway. *Id.* at 45. He entered a rehabilitation program in 1985, but less than six months later he was again arrested and convicted of drunken driving and his license was revoked. *Id.*

⁶⁵ Church, *supra* note 61, at 40. Hazelwood's blood alcohol level was .06%, which was slightly more than half the .10% drunk driving limit set by the state of Alaska and 50% higher than the .04% limit set by the Coast Guard for seamen operating a moving ship. At the time of the spill, his blood alcohol level may have been as high as .22%. However it is possible that he was drinking in the hours after the accident occurred. *Id.* See also Behar, *supra* note 61, at 43. But see J. Alexander Tanford, et al., *Novel Scientific Evidence of Intoxication: Acoustic Analysis of Voice Recordings from the Exxon Valdez*, 82 J. CRIM. L. & CRIMINOLOGY, 579 (1992) (concluding that Captain Hazelwood was probably intoxicated at the time the *Exxon Valdez* ran aground based on acoustic analysis of audio tapes of Hazelwood's voice taken before and after the spill).

⁶⁶ Behar, *supra* note 61, at 45. Captain Hazelwood has admitted to drinking two beers over a five hour period before boarding the ship, and two bottles of Moussy, .5% alcohol beer, once aboard the vessel. *Id.*

⁶⁷ Andrew H. Malcolm, *How the Oil Spilled and Spread: Delay and Confusion off Alaska*, N.Y. TIMES, Apr. 16, 1989, at A1.

Alaska directed the Alyeska Pipeline Service Co., a consortium of oil companies that manages the Trans-Alaska Pipeline,⁶⁸ to prepare and implement the initial response to oil spill emergencies.⁶⁹ In its contingency plan, Alyeska detailed its procedures for handling a 200,000 barrel spill in Prince William Sound, which provided for a specific amount of cleanup equipment available and that any large spill was to be contained within five hours of an accident.⁷⁰ Additionally, chemical dispersants were to be the chief method of breaking up the oil.⁷¹ However, when it actually came to handling a major spill, reality proved to be far different from Alyeska's contingency plan.

Alaskans, their economy dependent upon the oil industry, put too much trust in Alyeska to live up to its paper promises.⁷² Lulled by almost twelve years of oil shipping through Valdez without a major accident, oil company executives, state regulators and federal officials were blinded to the potential for an environmental

⁶⁸ *Id.*

⁶⁹ *Exxon Oil Spill, pt. 2: Hearings before the Senate Commerce, Science, and Transportation Comm.*, 101st Cong., 1st Sess. 4 (1989) (The Alaska State Approval Process for Alyeska Pipeline Service Company's Oil Spill Contingency Plan for Prince William Sound).

⁷⁰ *Id.* at 5. Alyeska's response stated that "two oil skimmers and 4500 feet of boom would be on scene in three hours. A barge, one more skimmer, and 3000 more feet of boom would be on scene in five hours." *Id.* Containment booms with foam flotation use a flexible skirt that extends below the water to prevent oil from escaping when it is then scooped up by skimmers. A skimmer utilizes an absorbent conveyor belt to draw the oil on board where rollers scrape and squeeze the oil from the belt. Bryan Hodgson, *Alaska's Big Spill-Can the Wilderness Heal?* NAT'L GEOGRAPHIC, Jan. 1990, at 5, 18, 19.

⁷¹ Timothy Egan, *Exxon Concedes It Can't Contain Most of the Oil Spill*, N.Y. TIMES, Mar. 30, 1989, at A1. The dispersant breaks up the oil into tiny droplets that eventually dissolve. It acts to change the surface tension between the oil and the water, allowing the oil to dissolve in the water. Richard Mauer, *Alaska Aide Assails Oil Industry for 'Inadequate' Response to Spill*, N.Y. TIMES, Mar. 29, 1989, at A22. See also *Elements of Tanker Disaster*, *supra* note 61, at B7. The use of dispersants was preauthorized in certain areas in Prince William Sound. *Exxon Valdez Oil Spill: Hearings on H.R. 1465 before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. 5 (1989) (Alyeska State Approval Process for Alyeska Pipeline Service Company's Oil Spill Contingency Plan For Prince William Sound) [hereinafter *Exxon Valdez Oil Spill Hearings*].

⁷² *Elements of Tanker Disaster*, *supra* note 61, at B7. Oil accounts for 80% of Alaska's state revenue. Timothy Egan, *Fishermen Fear Spill Will Hurt Into the 90's*, N.Y. TIMES, Mar. 28, 1989, at B5 [hereinafter *Fishermen Fear*].

disaster such as the *Valdez* spill.⁷³ Hence, the oil industry was allowed to curtail preparations for environmental emergencies to save money.⁷⁴

In the case of the *Exxon Valdez*, a high price was paid for such complacency. The first full emergency crew arrived at the spill site fourteen hours after the *Valdez* went aground, and it was another twenty-one hours until the ship was surrounded by oil containment equipment.⁷⁵ By that time the oil could not be contained by booms, floating plastic fences and scooped up by skimmers.⁷⁶ Additionally, attempts to use chemical dispersants in the first few days following the spill failed as well.⁷⁷

⁷³ *Elements of Tanker Disaster*, *supra* note 61, at B7. When working with the State of Alaska on its contingency plan, Alyeska reported studies that concluded a spill of 200,000 barrels in Prince William Sound would occur only once every 241 years. *Id.*

⁷⁴ Keith Schneider, *Under Oil's Powerful Spell, Alaska Was Off Guard*, N.Y. TIMES, Apr. 2, 1989, at A1. Alyeska had let its old equipment run down to the point where it was taxed to the limit to clean up even a small spill. Church, *supra* note 61, at 40. Alyeska's equipment was overburdened when it cleaned up a small spill of a mere 1500 barrels in January 1989. *Id.* An emergency team prepared for round-the-clock response to oil spills in Valdez Harbor and Prince William Sound was disbanded in 1981, which state officials allowed. *Exxon Valdez Oil Spill Hearings*, *supra* note 71, at 4 (statement of Clifton E. Curtis, Executive Director, Oceanic Society). "State government failed to keep Alyeska to the mark; the legislature denied its watchdog agency funds for inspecting oil terminals" and was further reduced to taking the oil companies at their word for their preparedness. Church, *supra* note 61, at 40.

⁷⁵ *How the Oil Spilled and Spread: Delay and Confusion Off Alaska*, N.Y. TIMES, Apr. 16, 1989, at A30. This was due to the fact that the barge to carry the cleanup equipment was damaged by a winter storm and was out of service for repairs. *Political, Economic Fallout Spreads from Exxon Valdez Crude Oil Spill*, OIL & GAS J., Apr. 10, 1989, at 14 [hereinafter *Political, Economic Fallout*].

⁷⁶ *Political, Economic Fallout*, *supra* note 75, at 13-14. Booms and skimmers are commonly used techniques to clean up oil spills. Michael Harwood, *The Rising Tide of Oil Spills*, N.Y. TIMES MAG., Apr. 9, 1978, at 68. They also have been used for years in urban harbors, where oil spills are a chronic problem. *Id.* However, this equipment is limited. Skimmers are not very effective when waves are higher than four or five feet, *id.*, because when the skimmer is being rocked on the waves, it cannot continuously take in the oil. *Id.* Booms are also ineffective in rough seas; if the current is moving too quickly it will carry the oil along with it. *Id.* Booms and skimmers were used in the *Mega Borg* spill, Jerry Adler et al., *More Oil on the Waters*, NEWSWEEK, June 25, 1990, at 61, *see also infra* note 237, and the *Amoco Cadiz* spill, Harwood, *supra* at 32.

⁷⁷ *Political, Economic Fallout*, *supra* note 75, at 15. If used quickly, dispersants can be effective in breaking up spills before they reach the shore. *Id.* Exxon delayed use of the dispersants while waiting for Coast Guard approval, although Alaska Governor Steve Cowper said Exxon had preauthorization to use dispersants in the area affected by the spill. *Id.* In the two days following the spill, the sea was very calm, lacking the energy necessary to mix the dispersants, thus rendering the first attempts to use them ineffective. *Id.*; Hodgson, *supra* note 70, at 36; Mauer, *supra* note 71, at A22. Although

As a result of the early unsuccessful attempts to contain and minimize the spill, the oil slick spread 1000 square miles.⁷⁸ Subsequently, Exxon admitted it had lost its best chance to contain the spill.⁷⁹ Its delayed reaction clean-up campaign cost over \$2 billion and involved over 11,000 workers.⁸⁰

The consequences of the spill were devastating. Eleven million gallons of oil assaulted the inviolate waters of Prince William Sound.⁸¹ Oil had spattered or soaked at least 1200 miles of shoreline.⁸² Experts estimate that countless animals perished.⁸³ The an-

approved by the Coast Guard OSC on March 26, it was not until March 27, that Exxon had amassed a sufficient quantity of the dispersants at the spill site. *Political, Economic Fallout*, *supra* note 75, at 15. By then, winds had increased to 70 mph, grounding all aircraft that would have dumped the dispersants. *Id.* A drop was attempted at a later time, but it was too late for the dispersant to be effective. *Id.*

⁷⁸ *Political, Economic Fallout*, *supra* note 75, at 13. The slick spread from Bligh Reef, the site of the spill, southwest through Prince William Sound and more than 100 miles into the Gulf of Alaska. *Id.* at 16. See H.R. REP. No. 241, 101st Cong., 1st Sess. pt. 1, at 9 (1989) [hereinafter H.R. REP. 241]. The oil reached the beaches of several islands in the Sound, all uninhabited by people, but rich in wildlife. *Political, Economic Fallout*, *supra* note 75, at 16. Many types of waterfowl have their summer nesting colonies in the Sound. Church, *supra* note 61, at 41. Many fish hatcheries and spawning areas are also located in the region. *Id.* See Hodgson, *supra* note 70, at 12. The spill also hit wildlife refuges, Chugach National Forest and Katmai National Park and Preserve, populated by moose and brown bear. Hodgson, *supra* note 70, at 12-13; Timothy Egan, *Wildlife Death Toll Climbs as Spill Clings to Alaska*, N.Y. TIMES, May 5, 1989, at A1 [hereinafter *Wildlife Death Toll*].

⁷⁹ Timothy Egan, *Fisherman and State Take Charge of Efforts to Control Alaska Spill*, N.Y. TIMES, Mar. 29, 1989, at A1 [hereinafter *Fishermen and State Take Charge*]. Transportation Secretary Samuel Skinner stated that most of the damage was done in the first hours of the spill and that a quicker response might have diminished it somewhat. *Political, Economic Fallout*, *supra* note 75, at 14. The oil spread so quickly through Prince William Sound, that by March 29, five days after the spill, Exxon admitted it lost its opportunity to control it. Timothy Egan, *Exxon Concedes It Can't Contain Most Of Oil Spill*, N.Y. TIMES, Mar. 30, 1989, at A1. By that date, Exxon had scooped up less than 4000 of the 240,000 barrels spilled. *Fishermen and State Take Charge*, *supra* at A1. Two months after the spill, only four miles of shoreline had been declared cleaned. *Wildlife Death Toll*, *supra* note 78, at A1. See also *supra* notes 77-78 and accompanying text.

⁸⁰ Hodgson, *supra* note 70, at 4. Beaches were scoured with everything from high pressure hot water jets to shovels, rakes and paper towels. *Id.* at 8. Workers used high pressure hoses with 140 degree fahrenheit water to blast oil from rocks and wash it to the water's edge for collection by skimmers. *Id.* at 18. Methods such as these also killed shoreline organisms. *Id.* at 4.

⁸¹ *Id.* at 5.

⁸² *Id.* at 8.

⁸³ *Wildlife Death Toll*, *supra* note 78, at A1. A majority of the otters froze to death because their fur lost insulation when coated with oil. *Id.* at B5. Other otters suffered liver and kidney damage by ingesting oil while trying to clean their coats. Hodgson,

imals that did survive struggled with a toxic habitat, facing certain death as oil infiltrated their food chain and accumulated in their systems.⁸⁴ The spill has had, and will continue to have, a tremendous impact on Alaska's fishing and tourism industries, which are estimated to be worth millions of dollars annually.⁸⁵

The *Exxon Valdez* tragedy finally provided the necessary catalyst for resolution of congressional differences and passage of a comprehensive bill.⁸⁶ After the environmental and economic tragedy incurred in Alaska, the climate was ripe for change.⁸⁷ After years of effort to harmonize existing oil pollution legislation, Congress was at last ready to take action.

V. *The Oil Pollution Prevention, Removal, Liability and Compensation Act of 1989 - H.R. 1465*

H.R. 1465, The Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, was introduced on March 16, 1989, by Representative Walter B. Jones (D-N.C.) and Representative Robert W. Davis (R-M.I.).⁸⁸ The bill was referred jointly to the House Committees on Merchant Marine and Fisheries and Public Works and Transportation.⁸⁹ At that time, the bill dealt only with liability and compensation issues.⁹⁰ Following the catastrophic *Valdez* spill, several Congressional committees held extensive hearings on the spill and the cleanup effort.⁹¹ In light of the *Exxon*

supra note 70, at 26. Respiratory ailments were caused by oil weakening the lung membranes. *Id.* See also Janet Raloff, *An Otter Tragedy*, SCI. NEWS., Mar. 27, 1993, at 100. Bald eagles fed on the otters, which killed them. Birds also died by drowning, smothering or choking on oil. *Wildlife Death Toll*, *supra* note 78, at B5.

⁸⁴ *Wildlife Death Toll*, *supra* note 78, at A1, B5.

⁸⁵ Hodgson, *supra* note 70, at 8. The state canceled the opening of the herring fisheries and restricted the salmon take. *Id.* at 8. Fishermen fear that their catches of salmon, herring, shrimp and crab will be ruined for years. Church, *supra* note 61, at 39. Even if the fish remain healthy, the spill has tarnished the reputation of Prince William Sound fish. *Fishermen Fear*, *supra* note 72, at B5. Biologists are uncertain how severe the damage will be to the local fisheries. The costs may be as high as \$100,000,000 a year until the early 1990s. *Id.*

⁸⁶ Randle, *supra* note 56, at 10,119.

⁸⁷ *Id.*

⁸⁸ H.R. REP. 242, pt. 2, *supra* note 6, at 33.

⁸⁹ *Id.*

⁹⁰ *Id.* at 32.

⁹¹ *Id.* See *infra* note 93.

Valdez disaster, it became clear that the scope of the bill needed to be expanded to include issues of prevention and removal.⁹²

Many different interests testified at the hearings, all with recommendations for comprehensive oil spill legislation.⁹³ The views of the oil industry were represented mainly by the American Petroleum Institute, a trade association representing over 200 members, consisting of companies involved in various aspects of the gas and oil industry.⁹⁴ API believed oil spill legislation should incorporate four fundamental principles involving removal costs and damages, funds for removal and replacement and preemption.⁹⁵

The Coast Guard supported enhancing the existing cleanup regime, whereby the responsible party would conduct the cleanup with the added provision of a Coast Guard on scene coordinator (OSC) directing the persons involved.⁹⁶ The Coast Guard recom-

⁹² *Id.*

⁹³ See generally *Oil Pollution and Compensation: Hearings on H.R. 1465 before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 101st Cong., 1st Sess. (1989) [hereinafter *Oil Pollution and Compensation Hearings*]; *Oil Transportation and Cleanup Technology: Hearings on H.R. 1465 before the Subcomm. on Transportation, Aviation and Materials of the House Comm. on Science, Space, and Technology*, 101st Cong., 2d Sess. (1990) [hereinafter *Oil Transportation and Cleanup Technology Hearings*]; *Exxon Valdez Oil Spill: Hearings before the Subcomm. on Coast Guard and Navigation of the House Merchant Marine and Fisheries Comm.*, 101st Cong., 1st Sess. (1989) [hereinafter *Exxon Valdez Hearings*]. Organizations that testified include environmental groups (such as the National Wildlife Federation, the Oceanic Society, and the Natural Resources Defense Council), the Coast Guard, state Attorneys General, oil companies (represented by the American Petroleum Institute) and the Coastal States Organization.

⁹⁴ *Oil Pollution and Compensation Hearings*, *supra* note 93, at 1 (1989) (statement of Jerry Aspland, President, Arco Marine Inc.). The companies are involved in exploring, transporting, refining and marketing. *Id.* at 1.

⁹⁵ *Id.* at 2.

First, the spiller should be "on the front line," responsible for removal costs and damages directly resulting from the spill, up to the applicable liability limit. Second, a reasonably sized fund should be created through contributions from companies that handle oil to supplement the costs of removal and compensation for direct damages over and above the liability of the spiller. Third, all oil spill removal costs, economic losses directly resulting from the discharge and actual costs incurred to restore or replace environmental losses should be compensated. Fourth, the comprehensive federal regime should be the *only* liability system for a discharge of oil into the marine environment.

Id.

⁹⁶ *Oil Transportation and Cleanup Hearings*, *supra* note 93, at 3-4 (1990) (statement of Captain David Whitten, Acting Chief, Office of Marine Safety, Security, and Environmental Protection, Coast Guard).

mended and independently initiated various studies to enhance oil spill prevention and response capability.⁹⁷

Various environmental groups testified, including the Natural Resources Defense Council (NRDC), which highlighted the existing limitations on adequately responding to oil spills, alleging that this was mainly due to primitive technology.⁹⁸ The NRDC recommended preventive measures to ensure that oil spills do not occur in the first place, including "double hulls and bottoms, better pilotage, navigational aids and minimizing tanker transport in sensitive areas."⁹⁹

As a result of these hearings, the committees realized that additional issues of oil spill prevention and removal needed to be addressed.¹⁰⁰ Subsequently, the House Merchant Marine and Fisheries Committee supplemented H.R. 1465 with a prevention and removal package.¹⁰¹ The bill was approved by the Subcommittee on Coast Guard and Navigation and the House Committee on

⁹⁷ *Id.* at 4-5. These studies included: a study to investigate the design of tankers; studies to upgrade and develop new equipment; plans to collect information on oil spill response techniques, environmental impacts and human health risks to be used in responding to future spills; and research and development projects dealing with new cleanup technologies. *Id.* at 4. The project for new cleanup technology was conducted with Environment Canada and the United States Minerals Management Service on areas including in-situ burning and laser fluorosensors. *Id.* at 5. The Ship Structure Committee (an interagency committee composed of the Maritime Administration, the Coast Guard, American Bureau of Shipping and Naval Sea Systems Command) was involved in a study to improve tanker safety by gaining knowledge of design, materials and methods of construction of ship structures. *Id.* at 4.

⁹⁸ *Id.* at 5, 7 (statement of Sarah Chasis, Senior Attorney, NRDC). Current spill containment and cleanup equipment becomes inoperative in anything other than calm weather and seas. Most booms lose their effectiveness when waves reach three to four feet in height and currents exceed one knot. *Id.* Yet currents in New York Harbor and San Francisco Harbor regularly surpass one knot, and the offshore waters used by tankers heading for port pass these levels as well. Additionally, skimmers lose effectiveness with increasing wave heights, as one to five feet are the operation limit for most. *Id.* Dispersants can be toxic to marine life. They have low levels of effectiveness and "merely shift the location of the spill impact from the surface to the water column and the ocean bottom." *Id.*

⁹⁹ *Id.*

¹⁰⁰ H.R. REP. 242, pt. 2, *supra* note 6, at 32.

¹⁰¹ *Approval of Liability Bills Spurred by Alaska Spill*, CONG. Q. ALMANAC 684 (1989) [hereinafter *Approval of Liability Bills*]. A title was added on prevention and response covering various issues such as response plans, computer listing of emergency response resources, vessel traffic systems, gauging of plating thickness, overflow and tank level and pressure monitoring devices, research and development programs and consideration of alcohol abuse. H.R. REP. 242, pt. 2, *supra* note 6, at 15-23.

Merchant Marine and Fisheries and was reported on September 18, 1989, following markup in May, June and September.¹⁰²

On August 3, 1989, the House Public Works and Transportation Committee approved its own version of the legislation, H.R. 3027, which is similar to H.R. 1465.¹⁰³ It also approved H.R. 1465 after inserting the language of its own bill (H.R. 3027).¹⁰⁴ On October 3, 1989, the new compromise oil spill package was introduced by Representative Jones (D-N.C.) and its provisions were substituted for the language of H.R. 1465.¹⁰⁵

VI. Provisions of H.R. 1465

A. Title I - Liability and Compensation

Title I of H.R. 1465 pertains to oil pollution liability and compensation.¹⁰⁶ The responsible party for a vessel or facility that discharges oil, or poses a substantial threat of a discharge, is jointly, severally and strictly liable for removal costs and damages.¹⁰⁷ Covered removal costs are those "costs for removal actions taken by the United States, a state, or Indian tribe, which are not inconsistent with the national contingency plan" and costs incurred by any other person for actions consistent with the National Contingency Plan.¹⁰⁸ The types of damages for which a responsible party is liable include natural resource damages,¹⁰⁹ loss of subsistence use, damages to real or personal property, loss of profits and earning

¹⁰² H.R. REP. 242, pt.2, *supra* note 6, at 47-51.

¹⁰³ *Approval of Liability Bills*, *supra* note 101, at 684.

¹⁰⁴ *Id.* "Like the Merchant Marine measure, H.R. 3027 provided liability caps for non-negligent spillers, created a \$1 billion fund to pay for spill cleanup, environmental restoration and victim compensation." *Id.*

¹⁰⁵ Amy Stern, *New Oil-Spill Liability Package Remains Stalled in House*, 47 CONG. Q. 2626 (Oct. 7, 1989). See George Hager, *Oil Spill Liability Compromise Finally Reaches House Floor*, 47 CONG. Q. 2938 (Nov. 4, 1989).

¹⁰⁶ H.R. 1465, 101st Cong., 1st Sess., tit. I (1989).

¹⁰⁷ H.R. 1465 § 1002(a)(1), (2). The responsible party is the owner or operator of a vessel or facility. H.R. 1465 § 1001(28).

¹⁰⁸ H.R. REP. 242, pt. 2, *supra* note 6, at 4.

¹⁰⁹ Natural resources include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or any Indian tribe, or any foreign government." H.R. 1465 § 1001(17).

capacity due to loss of real or personal property or natural resources, and loss of revenues.¹¹⁰

The liability of a responsible party is not to exceed \$1200 per gross ton for a tank vessel greater than 3000 gross tons or \$10,000,000.¹¹¹ The owner or operator of a tank vessel is liable for the first 50% of the amount and the owner of the oil is liable for the remainder.¹¹² These limits vastly exceed those established by prior legislation and those introduced in previous bills.¹¹³ The responsible parties for vessels are charged with establishing and maintaining evidence of financial responsibility sufficient to meet the maximum amount of liability to which they could be sub-

¹¹⁰ H.R. REP. 242, pt. 1, *supra* note 1, at 31. A person is "entitled to recover damages equal to the loss of profits or impairment of earning capacity, based on prior profits or earnings, due to damage to real or personal property or natural resources." Additionally, the person must derive at least 25% of earnings from activities utilizing the property or resource. Loss of subsistence use is recoverable by anyone who so uses the damaged or lost natural resources. *Id.*

Natural resource damages are "for injury to, destruction of, or loss of natural resources." H.R. 1465 § 1002(b)(2)(A). Liability is to the United States or to a state for resources under their respective purviews. H.R. REP. 242, pt. 1, *supra* note 1, at 33. These damages are recoverable by the appropriate trustee. H.R. 1465 § 1002(b)(2)(A). The President designates federal officials and the governor of each state designates state officials who act as trustees on behalf of the public for natural resources. H.R. REP. 242, pt. 1, *supra* note 1, at 33. The trustees assess the damages and develop a plan for the restoration or replacement of the resources. *Id.*

The measurement of damages for injury to natural resources is the "cost of restoring, rehabilitating, replacing, or acquiring the equivalent of the damaged natural resources" plus the value of the lost public uses of the resources pending restoration. H.R. REP. 242, pt. 2, *supra* note 6, at 8. This measurement is consistent with the holding of *Ohio v. Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989). In that case, the D.C. Court of Appeals invalidated federal regulations which limited damages recoverable by trustees to the lesser of "(a) the cost of restoring or replacing the equivalent of an injured resource, or (b) the lost use value of the resource . . ." as they were contrary to the clearly expressed intent of Congress in CERCLA. *Ohio*, 880 F.2d at 438. See Richard W. Dunford, *Natural Resource Damages from Oil Spills: A Comparison of the Ohio Decision and the Oil Pollution Act*, 22 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,263, 10,264 (1992). The court held that natural resource damages should include restoration costs, diminution in value of the resources prior to restoration and the cost of assessing the damages. *Ohio*, 880 F.2d at 441-59. See generally Frank B. Cross, *Natural Resource Damage Valuation*, 42 *VAND. L. REV.* 269 (1989).

¹¹¹ H.R. 1465 § 1004(a)(1)(A), (B).

¹¹² *Id.* § 1004(b)(1)(A)(i), (ii).

¹¹³ Liability limits in previous bills were \$300 per gross ton for tank vessels. See *supra* note 46. Limits in § 311 of FWPCA were \$150. 33 *U.S.C.A.* § 1321(f) (1982).

jected.¹¹⁴ The responsible party is not entitled to a limitation of liability if the spill is proximately caused by the willful misconduct or gross negligence of the responsible party, a violation of federal safety regulations, or if the responsible party fails to report the spill.¹¹⁵ Furthermore, a responsible party can establish a complete defense to liability if the incident resulted from an act of war, an act of God or was solely caused by an act or omission of a third party.¹¹⁶ These defenses to liability do not apply if the responsible party fails to report the incident as required by law.¹¹⁷

The Oil Spill Liability Trust Fund¹¹⁸ is intended to replace existing federal funds and to form one consolidated fund.¹¹⁹ The bill provides that claims for damages or removal costs should first be presented to the responsible party.¹²⁰ However, if the responsible party is entitled to a defense to or a limitation of liability, claims are then presented to the fund.¹²¹ The fund is to be used for payment of removal costs that are incurred by federal authorities, costs incurred by trustees for their work with natural resources damages,¹²² payment of costs related to the National Contingency Plan and all uncompensated removal costs and damages.¹²³

The last section of the title on liability and compensation is preemption.¹²⁴ The bill states that "except as provided in this Act,"

¹¹⁴ H.R. 1465 § 1016(a)(1)(B). Such financial responsibility may be established by "evidence of insurance, surety bond, guarantee, letter of credit, qualification as self-insurer, or other evidence of financial responsibility." *Id.* § 1016(e).

¹¹⁵ *Id.* § 1004(c)(1)(A),(B), (2)(A).

¹¹⁶ *Id.* § 1003(a)(1), (2). These defenses are intended to be the only defenses available to a responsible party and no other defenses are allowed to the liability established in the bill. H.R. REP. 242, pt. 1, *supra* note 1, at 32.

¹¹⁷ H.R. 1465 § 1003(a). *See also supra* note 14.

¹¹⁸ I.R.C. § 9509 (1986).

¹¹⁹ Randle, *supra* note 56, at 10,126. Under the Internal Revenue Code, the trust fund is financed by a five cents per barrel tax on crude oil received at U.S. refineries or on petroleum products imported to, consumed in, or warehoused in the United States. I.R.C. § 4611 (1986). *See also* Randle, *supra* note 56, at 10,126. In addition to these tax revenues, the fund is further capitalized by the transfer of the Deepwater Port Liability Fund, *see supra* note 34, the Offshore Oil Pollution Compensation Fund, *see supra* note 39, I.R.C. § 9509(b)(3), (4), (6) and the fund of § 311(k) of the FWPCA, *see supra* note 27. H.R. 1465 §§ 2002-2004.

¹²⁰ H.R. 1465 § 1013(a)(1).

¹²¹ *Id.* § 1013(b).

¹²² *See supra* note 110.

¹²³ H.R. 1465 § 1012(a)(1)-(2), (5)(C), (7).

¹²⁴ *Id.* § 1018. Preemption is "a doctrine adopted by U.S. Supreme Court holding that certain matters are of such a national, as opposed to local, character that federal

"no action arising out of a discharge of oil, or a substantial threat of a discharge of oil. . . may be brought in any court of the United States or of any State. . ." ¹²⁵ Preemption had long prevented Congress from enacting oil spill legislation. ¹²⁶ Senate Majority Leader George J. Mitchell (D-Me.) maintained the Senate's position opposing preemption, considering it a preclusion to passage of an oil spill package. ¹²⁷

The oil industry, as represented by the American Petroleum Institute, supported preemption. ¹²⁸ It stressed the need for the establishment of a "single, comprehensive fund to supplement the liability of the responsible party and to replace the existing patchwork of state and federal liability laws and funds." ¹²⁹ They further believed that ship and facility owners needed to operate under a single set of rules and not be subjected to the laws and regulations of a variety of jurisdictions. ¹³⁰

However, most organizations opposed preemption. ¹³¹ The Oceanic Society, the Environmental Policy Institute and the Friends of the Earth supported non-preemption and the preservation of state liability laws. ¹³² The National Association of Attorneys

laws take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law." BLACK'S LAW DICTIONARY 1177 (6th ed. 1990). The doctrine originates from the supremacy clause of the Constitution, which states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2. See generally Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, U. ILL. L. F. 515 (1972).

¹²⁵ H.R. 1465 § 1018(a)(1).

¹²⁶ See *supra* note 56.

¹²⁷ George Hager, *Oil Spill Liability Compromise Finally Reaches House Floor*, 47 CONG. Q. 2938 (Nov. 4, 1989). Senator Mitchell went so far as to say "there will not be legislation" if the House sustained its preemption stance. *George Hager, Deadlock Likely to Continue on Oil Spill Liability Law*, 47 CONG. Q. 1183 (May 20, 1989).

¹²⁸ See *infra* note 129.

¹²⁹ *Oil Pollution and Compensation Hearings*, *supra* note 93, at 6 (statement of Jerry Aspland).

¹³⁰ *Id.* at 9. The API felt that one comprehensive regime would allow the parties to know their legal status and responsibilities in the event of a serious spill and would eliminate the confusion resulting from the melange of state and federal laws. *Id.*

¹³¹ 135 CONG. REC. H7971 (daily ed. Nov. 2, 1989) (statement of Rep. Miller). Some of the only lobbying in support of preemption was done by the oil companies and the shipping industry, not the potential victims of oil spills. *Id.*

¹³² *Oil Pollution and Compensation Hearings*, *supra* note 93, at 11 (statement of Clifton Curtis, Executive Director, Oceanic Society, also representing Environmental Policy Institute and Friends of the Earth).

General (NAAG) also supported non-preemption.¹³³ NAAG's maintained that a state's highest priority is to protect its coastline and to compensate its victims.¹³⁴ NAAG contended that each state should be able to develop its own law to reflect its unique resources and different interests.¹³⁵

As a result of support for states' rights to provide for their own liability and compensation laws, Representative George Miller (D-Cal.) and Representative Gerry E. Studds (D-Mass.) offered an amendment to preserve state authority.¹³⁶ The amendment provided that nothing in the act could be construed or interpreted as preempting any state from imposing any additional liability or requirements with respect to the discharge of or pollution by oil within the state.¹³⁷

Those representatives who supported the amendment emphasized the rights of states to protect their resources and their citizens.¹³⁸ It was their position that states should have the right to set higher standards of oil pollution liability and systems of compensation than were allowed under the proposed bill and they further believed that states that had achieved strong oil spill liability laws should not have to lower their standards.¹³⁹ Representatives cited a longstanding tradition that federal environmental laws should not preempt state laws.¹⁴⁰

Representatives who opposed the amendment pointed to the "confusing and sometimes conflicting patchwork of Federal and State laws" that would remain in existence without preemption.¹⁴¹

¹³³ *Pending Oil Spill Legislation: Hearings on S.686 before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 101st Cong., 1st Sess., 9 (1989) [hereinafter *Pending Oil Spill Legislation Hearings*] (resolution of NAAG entitled *Supporting Oil Spill Liability Legislation and Opposing Preemption of State Law*).

¹³⁴ *Id.* at 4 (statement of Maine Attorney General James E. Tierney).

¹³⁵ *Id.* at 9 (NAAG resolution).

¹³⁶ 135 CONG. REC. H8132 (daily ed. Nov. 8, 1989) (statement of Rep. Miller).

¹³⁷ *Id.*

¹³⁸ 135 CONG. REC. H7969 (daily ed. Nov. 2, 1989) (statement of Rep. Dyson). Several states, including Alaska, have laws that impose unlimited liability for oil spills. See *supra* note 42.

¹³⁹ 135 CONG. REC. H8129, 8123 (daily ed. Nov. 8, 1989) (statement of Rep. Miller).

¹⁴⁰ 135 CONG. REC. H8130 (daily ed. Nov. 8, 1989) (statement of Rep. Studds). State laws were not preempted in the Clean Water Act, 33 U.S.C. § 1321(o)(2) (1982); the Trans-Alaska Pipeline Act, 43 U.S.C. § 1653(9) (1982); or the Deepwater Ports Act, 33 U.S.C. § 1517(k)(1) (1982). *Id.*

¹⁴¹ 135 CONG. REC. H7959 (daily ed. Nov. 2, 1989) (statement of Rep. Shumway). See also RODGERS, *supra* note 2, at 511, 548.

They stressed that the system of liability and compensation in the bill is intended to be comprehensive and definitive.¹⁴² It provides for extremely generous terms of liability and swift compensation.¹⁴³ The representatives alleged that the amendment would destroy its basic comprehensive integrity and the equity it would establish between citizens of all the states.¹⁴⁴

The *Exxon Valdez* disaster finally broke the stalemate and forced members to act. In the wake of the *Valdez* tragedy, members would not allow preemption to kill the bill.¹⁴⁵ After much debate, the amendment preserving state authority was passed.¹⁴⁶

B. Title IV - Prevention & Removal

The most important component in fighting oil pollution is preventing the spilling of oil in the first instance.¹⁴⁷ However, as long as oil is carried by water borne means, accidents will happen.¹⁴⁸ The *Exxon Valdez* incident clearly demonstrated that improvements must be taken in the way spills are handled.¹⁴⁹ Therefore, an entire section of H.R. 1465 is dedicated to issues of preventing and removing oil spills.¹⁵⁰

Subtitle A of Title IV concerns prevention.¹⁵¹ As human error is a significant cause of tanker accidents, several of the stipulations dealt with merchant mariners,¹⁵² stating that anyone applying for a license, certificate of registry or merchant mariner's document must make available the information contained in the National

¹⁴² 135 CONG. REC. H8129 (daily ed. Nov. 8, 1989) (statement of Rep. Hammerschmidt).

¹⁴³ 135 CONG. REC. H8132 (daily ed. Nov. 8, 1989) (statement of Rep. Jones).

¹⁴⁴ *Id.* at H8137 (statement of Rep. Tauzin). "The Miller-Studds Amendment destroys the basic right of one citizen to the same treatment in one state that he might receive in another." *Id.*

¹⁴⁵ George Hager, *Panel's Oil Spill Liability Law to Preempt State Law*, 47 CONG. Q. 1250 (May 27, 1989).

¹⁴⁶ 135 CONG. REC. H8148 (daily ed. Nov. 8, 1989). The vote was 279 ayes, 143 nays and 11 abstentions. *Id.*

¹⁴⁷ H.R. REP. 242, pt. 1, *supra* note 1, at 28.

¹⁴⁸ Tammy M. Alcock, *Ecology Tankers and the Oil Pollution Act of 1990: A History of Efforts to Require Double Hulls on Oil Tankers*, 19 ECOLOGY L. Q. 97, 98 (1992) (paraphrasing Admiral J.W. Kime, Coast Guard Commandant).

¹⁴⁹ H.R. REP. 242, pt. 1, *supra* note 1, at 28.

¹⁵⁰ H.R. 1465, 101st Cong., 1st Sess., tit. IV (1989).

¹⁵¹ *Id.* tit. IV (A) (1989).

¹⁵² *Exxon Valdez Hearings*, *supra* note 93, at 13 (statement of Clifton E. Curtis, Executive Director, Oceanic Society).

Driver Registry regarding the individual's driving record.¹⁵³ Another provision relevant to that concern is that allowing senior officers to remove the master or the individual in charge of the ship and to temporarily take command upon the reasonable belief that he/she is under the influence of alcohol or dangerous drugs and is unable to command the vessel.¹⁵⁴ Licenses will be suspended if an individual performs a safety sensitive job on a vessel and there is probable cause to believe that the holder of the license performed that function while using dangerous drugs or alcohol, was denied a motor vehicle license by a state for cause within a five year period prior to suspension or has been convicted of violating any law for which a license may be suspended.¹⁵⁵

Other provisions include section 4110, which directs the Secretary of Transportation to "conduct a study to determine whether existing laws and regulations are adequate to ensure the safe navigation of vessels transporting oil. . . ."¹⁵⁶ Another added provision

¹⁵³ H.R. 1465 § 4101(a), (b). This provision is a reaction to the intoxication of *Exxon Valdez* Captain Joseph Hazelwood and the fact that his driver's license was suspended for drunken driving. RODGERS, *supra* note 2, at 104. See also *supra* note 63-65 and accompanying text. The National Driver Registry is maintained by the Secretary of Transportation and contains information submitted by the chief driver licensing official in each state regarding any individual:

- (1) who is denied a motor vehicle license by such state for cause; (2) whose motor vehicle operator's license is canceled, revoked, or suspended by such state for cause; or (3) who is convicted under the laws of such state of the following motor vehicle related offenses or comparable offenses: (A) Operation of a motor vehicle while under the influence of, or impaired by, alcohol or a controlled substance; (B) a traffic violation arising in connection with a fatal traffic accident, reckless driving, or racing on the highways; (C) failure to render aid or provide identification when involved in an accident which results in a fatality or personal injury; or (D) perjury or the knowledgeable making of a false affidavit or statement to officials in connection with activities governed by a law or regulation relating to the operation of a motor vehicle.

23 U.S.C. § 401 (1990 & West Supp. 1993). The licensing official shall report the individual's legal name, date of birth, and at the Secretary's discretion, height, weight, eye and hair color, the name of the state reporting the individual and the social security account number and/or the motor vehicle operator's license number. *Id.*

¹⁵⁴ H.R. 1465 § 4104.

¹⁵⁵ *Id.* § 4103(a). A license may be suspended for acts of incompetence, misconduct or negligence, an offense described in the National Driver Register Act, see *supra* note 153, or an offense that would prevent the issuance or renewal of a license, certificate of registry or merchant mariner's document. See 46 U.S.C. § 7703 (1983).

¹⁵⁶ H.R. 1465 § 4110(a). The study should include: appropriate crew sizes on tankers; adequacy of qualifications and training of crewmembers; adequacy of navigation equipment and systems on tankers; ability of crewmembers to make emergency ac-

is the requirement of construction, maintenance or improvement by the Secretary of Transportation of vessel traffic service systems to direct the movement of vessels upon navigable waters in any port of the United States, and the ability of the Secretary to require vessels to use those systems.¹⁵⁷

Several amendments to the subtitle on prevention were offered.¹⁵⁸ The most significant amendment was the establishment of a double hull¹⁵⁹ requirement for tank vessels of at least 10,000 gross tons.¹⁶⁰

tions to remove or prevent a discharge oil; evaluation of areas to be designated as zones where tanker traffic should be limited or prohibited; and evaluate tanker design, including double hulls. *Id.* § 4110(b).

¹⁵⁷ *Id.* § 4107. Factors to be considered include the nature, volume and frequency of vessel traffic in the area and the risks of collisions, spills and damages associated with such traffic, which could be reduced or eliminated by installation, expansion or improvement of a vessel traffic system. *See also* H.R. REP. 242, pt. 1, *supra* note 1, at 42.

¹⁵⁸ These included: establishing minimum standards for plating thickness (hull thickness) for vessels transporting oil and providing for periodic gauging of that thickness; establishing minimum standards for devices for warning persons of overfills and tank levels of oil as well as monitoring the pressure in oil cargo tanks to warn a crew when oil is leaking, 135 CONG. REC. H8254 (daily ed. Nov. 9, 1989), offered by Representative Cardin; establishing programs for testing individuals applying for or renewing licenses for use of alcohol and dangerous drugs, 135 CONG. REC. H8260 (daily ed. Nov. 9, 1989), offered by Representative Traficant; establishing rules for defining the conditions under and designating the waters upon which tank vessels may operate with the autopilot engaged, 135 CONG. REC. H8261 (daily ed. Nov. 9, 1989), offered by Representative Studts and Representative Davis. All of these amendments were passed. *See* 135 CONG. REC. H8255, 8261 (daily ed. Nov. 9, 1989).

¹⁵⁹ "A double hull is a second complete hull enclosing the original hull and cargo tanks." Alcock, *supra* note 148, at 100. The double hull gives an extra layer of protection to safeguard the vessel's cargo in the event of a grounding accident. *Id.* at 107.

¹⁶⁰ 135 CONG. REC. H8262 (daily ed. Nov. 9, 1989). This amendment was offered by Representative Gallo (D-N.J.). *Id.* The amendment applied to all tank vessels for which construction began after the date of enactment and to all tank vessels 15 years after the date of enactment. *Id.* Amendments were offered to this amendment: requiring double bottoms for self-propelled tank vessels of at least 20,000 deadweight tons, 135 CONG. REC. H8263 (daily ed. Nov. 9, 1989), offered by Representative Torricelli; striking the requirement of at least 10,000 gross tons so that smaller barge vessels within a larger barge are covered, 135 CONG. REC. H8272 (daily ed. Nov. 9, 1989), offered by Representative Gunderson. Both of these amendments were passed. One amendment to the amendment that was rejected was an amendment requiring double hulls and bottoms unless the Secretary of Transportation determined that "the requirement will not enhance tank vessel navigation, safety or protection of the environment; or an equal or greater benefit to navigation safety and protection of the environment would be achieved by other construction designs." 135 CONG. REC. H8264 (daily ed. Nov. 9, 1989).

Predictably, the oil industry opposed the double hull requirement, while environmental organizations supported it.¹⁶¹ The American Petroleum Institute recommended a study conducted by an independent body to determine the merits of double bottom construction.¹⁶² API contended that there was no contemporary research or data that clearly established that double bottoms would provide a greater pollution benefit.¹⁶³ The NRDC, on the other hand, felt that double hulls could be the single most important step taken to prevent oil spills.¹⁶⁴

There was lively debate in the House of Representatives as well. Members who supported the amendment were frustrated by all the years of studying the issue without taking any action.¹⁶⁵ They wanted to mandate double hulls to take positive action to prevent future spills,¹⁶⁶ and in doing so pointed to the fact that tankers carrying liquified natural gas and other highly combustible materials are already required to have double hulls.¹⁶⁷ They also stressed the findings of a Coast Guard study which concluded that the size of the *Exxon Valdez* spill would have been reduced from 25% to 60% if the tanker had been equipped with a double bot-

¹⁶¹ See *infra* note 162-64 and accompanying text. See generally Alcock, *supra* note 148, at 107-14 (summarizing arguments for and against double hulls).

¹⁶² *Oil Transportation and Cleanup Technology: Hearings before the Subcomm. on Transportation, Aviation and Materials of the House Comm. on Science, Space and Technology*, 101st Cong., 2d Sess. 5 [hereinafter *Hearings on Oil Transportation and Cleanup Technology*] (statement of Edwin Roland, President, Amoco Transport Company). It was mentioned that the National Academy of Sciences would conduct the study. See *id.*

¹⁶³ *Id.* at 41.

¹⁶⁴ *Oil Transportation and Cleanup Technology Hearings*, *supra* note 93, at 7 (statement of Sarah Chasis). A study by the Tanker Advisory Center analyzed 26 major spills worldwide and concluded that double hulls would have prevented or minimized the amount of oil spilled in 16 of them. In four other spills, there was not enough information to make a judgment and in the six other remaining, the spills were caused by problems in transfer operations. *Id.* at 2-3. Available data suggests double hulls do avoid or mitigate the frequency of accidents. RODGERS, *supra* note 2, at 106. See also Alcock, *supra* note 148, at 108 (citing various studies that conclude that many spills, including the *Exxon Valdez*, could have been prevented or lessened by double hulls).

¹⁶⁵ 135 CONG. REC. H8263 (daily ed. Nov. 9, 1989) (statement of Rep. Gallo). Studies of double hulls date back to 1975, with a report entitled *Oil Transportation by Tankers*, which concluded that double hulls on tankers offered a significant degree of protection from oil pollution in the event of a grounding or collision. *Id.* See also *id.* at H8269 (statement of Rep. Saxton).

¹⁶⁶ 135 CONG. REC. H8263 (daily ed. Nov. 9, 1989).

¹⁶⁷ *Id.* See also Alcock, *supra* note 148, at 110.

tom.¹⁶⁸ They believed that further delay would only risk another massive spill and the resulting environmental damage.¹⁶⁹

Members opposed to the amendment stated that a double bottom could cause a tanker to be less stable and therefore susceptible to sinking.¹⁷⁰ Those representatives favored mandating double hulls only after a study by the Secretary of Transportation determined that there was no better way to protect the environment by any other construction design.¹⁷¹ In the end, those favoring double hulls prevailed and the amendment was passed.¹⁷²

Subtitle B of Title IV pertains to removal.¹⁷³ Response capabilities were improved by the bill so that damages could be kept to a minimum.¹⁷⁴ This section provides for the President to ensure an effective and prompt removal of a discharge of oil in conformity with the National Contingency Plan.¹⁷⁵ The President is mandated to remove or arrange for removal of a discharge, to direct all actions to remove a discharge and to monitor all removal activities.¹⁷⁶

The bill provides for various contingency plans in addition to the National Contingency Plan.¹⁷⁷ Local contingency plans and contingency plans for tank vessels and facilities are required, which must include descriptions of the responsibilities of the affected parties and lists of equipment and personnel available for effective and immediate removal of a discharge.¹⁷⁸ H.R. 1465 also estab-

¹⁶⁸ 135 CONG. REC. H8262 (daily ed. Nov. 9, 1989) (statement of Rep. Gallo) *See also Hearings on Oil Transportation and Cleanup Technology, supra* note 93, at 7 (statement of Sarah Chasis).

¹⁶⁹ 135 CONG. REC. H8263 (daily ed. Nov. 9, 1989) (statement of Rep. Brennan).

¹⁷⁰ 135 CONG. REC. H8271 (daily ed. Nov. 9, 1989) (statement of Rep. Tauzin). Representative Tauzin stated that the nature of the construction of a double hulled vessel requires a deeper draft, which could impose navigational hazards in shallow waters. *Id.* "Draft" refers to the depth of water the vessel draws. Alcock, *supra* note 148, at 104.

¹⁷¹ 135 CONG. REC. H8265 (daily ed. Nov. 9, 1989) (statement of Rep. Davis).

¹⁷² *Id.* at H8273.

¹⁷³ H.R. 1465 tit. IV (B).

¹⁷⁴ *Id.*

¹⁷⁵ H.R. 1465 § 4201(a).

¹⁷⁶ *Id.* The extent of the direction of the cleanup efforts depends on the circumstances of the spill, including its potential for causing damage, its size and the types of actions necessary to respond to the spill. H.R. REP. NO. 242, pt. 1, *supra* note 1, at 39.

¹⁷⁷ H.R. 1465 § 4202. 33 U.S.C.A. § 1321 (c) (1982) provides for the National Contingency Plan. *See supra* note 17.

¹⁷⁸ H.R. 1465 § 4202. Local plans will be prepared for areas designated by the President in consideration of "the likelihood of a discharge; the likelihood that the discharge would result in severe economic and environmental damage; and the ade-

lishes and maintains a federal strike force of at least seven regional strike teams with members who are trained, equipped and available to provide necessary services to execute any of the contingency plans.¹⁷⁹

C. Title VII - Research and Development

A final concern of representatives covered in Title VII is research and development.¹⁸⁰ The cleanup technology in existence at the time of the *Valdez* spill was clearly inadequate to control a spill of that magnitude.¹⁸¹ Oil spill technology was sorely neglected in the late 1980s.¹⁸² To respond to this outdated and deficient technology, Title VII establishes the Interagency Coordinating Committee on Oil Pollution Research.¹⁸³ The committee is responsible for devising a research plan to assess the current status of oil pollution technology and to identify significant research gaps and priorities.¹⁸⁴ The committee is also responsible for coordinat-

quacy of any existing local contingency plans." *Id.* The plan should include a general description of the area subject to a plan, a detailed description of the responsibilities the parties removing the spill, and lists of equipment and personnel available to the responsible party. *Id.* Tank vessel and facility contingency plans shall have provisions that include a description of specific actions that will be taken to immediately remove a spill, identify the available equipment and personnel necessary to implement the removal action, a program of equipment testing, personnel training, a description of the use of dispersants, and provisions for safe disposal of oil recovered during the removal. *Id.*

¹⁷⁹ *Id.* § 4203.

¹⁸⁰ *Id.* tit. VII.

¹⁸¹ H.R. REP. 241, *supra* note 78, at 10. "The *Exxon Valdez* incident emphasized the need for greatly improved public and private research and development capabilities. Current response equipment is still inadequate in less than ideal conditions. Better mechanical, chemical and biological strategies for cleanup are needed. The incident revealed how little we know about cold water oil spill responses." *Id.* (quoting THE NATIONAL RESPONSE TEAM, THE EXXON VALDEZ OIL SPILL: A REPORT TO THE PRESIDENT (1989)).

¹⁸² H.R. REP. 242, pt. 1, *supra* note 1, at 29. Most of the technology used in *Valdez* was developed in the 1970s. H.R. REP. 241, *supra* note 78, at 16. There had been almost no funding for oil spill research in the last few years. *Id.*

¹⁸³ H.R. 1465 § 7001(a). The members include representatives from the Department of Energy, the Department of the Interior (including the Minerals Management Service and the United States Fish and Wildlife Service), the Department of Defense (including the Army Corps of Engineers and the Navy), the Department of Commerce (including the National Oceanic and Atmospheric Administration and the National Institute of Standards and Technology), the Department of Transportation (including the United States Coast Guard and the Maritime Administration), the EPA and the National Aeronautics and Space Administration. *Id.* § 7001(a)(3).

¹⁸⁴ *Id.* § 7001(a)(4).

ing a program for conducting oil pollution research and development, including research and development of new or improved technologies for preventing, mitigating and removing oil discharges, development of technologies to protect the public health and safety from discharges and development of methods to rehabilitate and restore natural resources damaged by oil discharges.¹⁸⁵

After a final vote on November 9, 1989, H.R. 1465 was passed by the House of Representatives.¹⁸⁶

VII. *The Oil Pollution Liability and Compensation Act of 1989 - S. 686*

On April 4, 1989, less than two weeks after the *Exxon Valdez* spill, S. 686, Oil Pollution Liability and Compensation Act of 1989 was introduced in the Senate by Senator George J. Mitchell (D-Me).¹⁸⁷ S. 686 somewhat paralleled H.R. 1465, both containing similar provisions for liability and compensation.¹⁸⁸ The chief difference between these bills is that, unlike H.R. 1465, the limits of liability in S. 686 are \$500 per gross ton for a tanker carrying oil.¹⁸⁹

S. 686 also provided for a single fund to pay for the removal of and damages from oil pollution.¹⁹⁰ Unlike the open ended fund of H.R. 1465, the fund established under S.686 is available up to a limit of \$1 billion per incident.¹⁹¹

S. 686 explicitly preserves a state's authority to impose its own requirements or standards regarding oil spills occurring in its own domain.¹⁹² The Senate chose to affirm the rights of states to estab-

¹⁸⁵ *Id.* § 7001(b)(2)(C)(E), (G).

¹⁸⁶ 135 CONG. REC. H8288 (daily ed. Nov. 9, 1989). The vote was 375 yeas, 5 nays and 53 abstentions. *Id.*

¹⁸⁷ 135 CONG. REC. S5403 (daily ed. Apr. 4, 1989) (statement of Sen. Mitchell).

¹⁸⁸ See S. REP. 94, *supra* note 7, at 12-16; H.R. REP. 242, pt. 1, *supra* note 1, at 30-34.

¹⁸⁹ S. REP. 94, *supra* note 7, at 13. Limits of liability in H.R. 1465 were \$1200 per gross ton. H.R. 1465 § 1004(a)(1)(A).

¹⁹⁰ S. REP. 94, *supra* note 7, at 9. The fund would be available: for cleanup costs or damages which exceed the limits of liability of the discharge; where the discharger cannot be identified; all removal costs incurred under the National Contingency Plan; costs of federal and state efforts in restoring, rehabilitating or replacing natural resources; and establishing strike force and response teams. *Id.*

¹⁹¹ *Id.* It would be financed by a three cent per barrel fee on all domestic or imported oil. See 135 CONG. REC. S9691 (daily ed. Aug. 3, 1989) (statement of Sen. Chafee).

¹⁹² S. REP. 94, *supra* note 7, at 17.

lish their own standards to protect their resources and not to constrain them with the federal regime.¹⁹³

In dealing with issues of prevention and removal, S. 686 expands the National Contingency Plan to include various provisions to prevent and more adequately handle oil discharges.¹⁹⁴ Owners and operators of vessels and facilities are also required to prepare a contingency plan to prevent, contain and clean up spills from their vessels or facilities.¹⁹⁵

The Senate provisions regarding double hulls allow the Secretary of Transportation to require double hulls only if they were found to have significant beneficial effects.¹⁹⁶ An amendment to require double hulls on new tankers operating in United States waters was offered by Senator Brockman Adams (D-Wash.).¹⁹⁷ However, unlike the similar amendment to H.R. 1465, this amendment was tabled after very little debate.¹⁹⁸

On August 4, 1989, S. 686 was passed by a vote of ninety-nine to zero.¹⁹⁹

VIII. Committee of Conference

In light of the two similar bills passed by the Senate and the House of Representatives, a conference committee was convened to coordinate their efforts and enact oil spill legislation.²⁰⁰ However, prior to appointment of House conferees, a motion to instruct was offered by Representative Dean A. Gallo (D-N.J.).²⁰¹ The

¹⁹³ *Id.* at 6.

¹⁹⁴ *Id.* at 19. These provisions include procedures to provide cleanup equipment adequate to minimize damage, to require that all equipment is certified by the Coast Guard, to guarantee that the OSC assures control of a spill and promptly implements approved procedures, to develop inventory of personnel and equipment to remove discharges, and to establish criteria and procedures to ensure swift and accurate identification of and response to marine disasters that threaten the public health or welfare. *Id.*

¹⁹⁵ *Id.* at 20.

¹⁹⁶ George Hager, *Tough Oil-Spill Measure Rides Atop Environmental Wave*, 47 CONG. Q. 3044 (Nov. 11, 1989) [hereinafter *Tough Oil Spill Measure*].

¹⁹⁷ 135 CONG. REC. S9704 (daily ed. Aug. 3, 1989).

¹⁹⁸ *Id.* at S9713.

¹⁹⁹ *Id.* at S10,090.

²⁰⁰ 136 CONG. REC. H332 (daily ed. Feb. 7, 1990). The Senate agreed to a conference on November 19, 1989. See 135 CONG. REC. S16,192 (daily ed. Nov. 19, 1989). The House agreed to a conference and appointed its conferees on February 7, 1990. See 135 CONG. REC. at H332 (daily ed. Feb. 7, 1990).

²⁰¹ 136 CONG. REC. H332 (daily ed. Feb. 7, 1990).

motion declared that the House conferees be instructed to insist upon inclusion in the conference report of a requirement for equipping new and existing tank vessels with double bottoms or double hulls.²⁰² The motion was passed and the conferees appointed.²⁰³ The Committee of Conference reported the compromise bill on August 1, 1990.²⁰⁴

IX. *The Oil Pollution Act of 1990*²⁰⁵

A. *Title I - Oil Pollution Liability and Compensation*

Section 1002 establishes liability and creates a cause of action for removal costs and damages, whereby the responsible party for a vessel or facility from which oil is discharged is liable for those damages.²⁰⁶

Section 1003 establishes defenses to liability, whereby the responsible party is exonerated from liability provided that they can prove by a preponderance of the evidence that the incident was caused solely "by (1) an act of God; (2) an act of war; or (3) an act or omission of a third party, other than an employee or agent of the responsible party or one whose act or omission occurs in con-

²⁰² *Id.*

²⁰³ *Id.* at H337-38. The vote passing the motion was 376 yeas, 37 nays and 18 not voting. *Id.*

²⁰⁴ H.R. REP. NO. 653, 101st Cong., 2d Sess. 1 (1990) [hereinafter H.R. REP. 653].

²⁰⁵ Pub. L. No. 101-380, 104 Stat. 484, 33 U.S.C. §§ 2701-2761 (1990) [hereinafter Act].

²⁰⁶ Act § 1002. *See also* H.R. REP. 653, *supra* note 204, at 103. Removal costs are covered if they are incurred by the United States, a state, or Indian tribe under 33 U.S.C. § 1321(c),(d),(e) or (l), *see supra* notes 15-18, or incurred by a person acting in a manner consistent with the National Contingency Plan. *Id.* § 1002(b)(1). Six categories of damages are compensable under the substitute bill. They are:

injury to, destruction of, loss of, or loss of use of natural resources, including the reasonable costs of assessing the damage. . . , injury to, or economic loss resulting from destruction, of real or personal property which shall be recoverable by a claimant who owns or leases that property. . . . [L]oss of subsistence use of natural resources. . . without regard to the ownership or management of those resources, damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources which shall be recoverable by the United States, a State or a political subdivision thereof, . . . loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property or natural resources. . . , damages for net costs of providing increased or additional public services during or after removal activities . . .

Id.

nection with a contractual relationship with the responsible party. . ." or any combination of those three.²⁰⁷ Section 1004 establishes limits on liability, retaining the dollar limits in the House bill of \$1200 per gross ton or \$10 million for tank vessels greater than 3000 gross tons, or \$2 million for tank vessels of 3000 gross tons or less.²⁰⁸ Evidence of financial responsibility is required in section 1016.²⁰⁹

The Oil Spill Liability Trust Fund is established by section 1012 and is available to the President for five purposes: (1) payment of removal costs consistent with the National Contingency Plan by federal authorities or by a governor; (2) the costs incurred by the federal, state or Indian tribe in carrying out their functions as trustees of natural resources; (3) payment of removal costs and damages resulting from a discharge from a foreign offshore unit; (4) payment of uncompensated removal costs or damages due to defenses to liability or limits to liability of the responsible party, or (5) the payment of federal operational, administrative and personnel costs and expenses reasonably necessary for and incidental to the implementation, administration and enforcement of the Act.²¹⁰ The conference substitute restricts the total amount available from the fund to \$1 billion per incident and within that overall limit, limits damages for injury to natural resources to \$500 million per incident, as the Senate bill did.²¹¹

²⁰⁷ *Id.* § 1003(a)(1)-(4). These defenses do not apply if the responsible party fails to report the incident as required by law. *Id.* § 1003(c)(1).

²⁰⁸ *Id.* § 1004(a)(1)(A). Liability for offshore facilities is the total of removal costs plus \$75 million and liability for onshore facilities and deepwater ports is \$350 million. *Id.* § 1004(a)(3)-(4). Liability is unlimited if the incident was proximately caused by gross negligence, willful misconduct or the violation of an applicable federal safety, construction or operating regulation, or by the failure or refusal of the responsible party to report the incident, cooperate with a responsible official in the removal action or to comply with an order under 33 U.S.C. § 1321. *Id.* § 1004 (c)(1)-(2).

²⁰⁹ *Id.* § 1016.

²¹⁰ *Id.* § 1012(a)(1)-(5). *See also* § 1013. Additionally, specific authorizations are included for three categories of expenditures: not more than \$25 million in any fiscal year for Coast Guard operating expenses necessary to implement the act; not more than an additional \$30 million in each of the next two fiscal years to establish the National Response System as amended in the Federal Water Pollution Control Act; and not more than \$27.25 million in any fiscal year to carry out the research and development program authorized in Title VII. *Id.* § 1012 (a)(5).

²¹¹ I.R.C. § 9509. *See also* H.R. REP. 653, *supra* note 204, at 113.

Both the Senate and the House bills contained similar provisions regarding maintaining the authority of any state to impose its own requirements regarding oil spills within that state.²¹² The conference substitute blends these two provisions and provides that nothing in the Act shall be "construed or interpreted as preempting, the authority of a State or political subdivision thereof from imposing any additional liability or other requirements with respect to (A) the discharge of oil or other pollution by oil within such State; or (B) any removal activities in connection with such a discharge. . . ." ²¹³ The conference also added a new section stating that nothing in the Act shall authorize or create a cause of action against a federal officer or employee in that person's individual capacity for any act or omission while the person is acting within the scope of the person's office or employment.²¹⁴

B. *Title IV - Prevention and Removal*

Many of the House provisions regarding prevention were adopted by the conference committee as the Senate bill did not contain similar stipulations in many cases.²¹⁵ The conference substitute adopts the House provisions of prohibiting the Coast Guard from issuing a license, certificate of registry and merchant mariners' documents unless the individual makes available all information in the National Driver Register regarding the driving record of that individual.²¹⁶ This section also allows the Secretary of Transportation to conduct a review of the criminal record of an applicant for a license.²¹⁷ Section 4103 incorporates the House

²¹² H.R. REP. 653, *supra* note 204, at 121. *See supra* note 137 and 192.

²¹³ Act § 1018(a)(1)(A)-(B). *See also* H.R. REP. 653, *supra* note 204, at 121.

²¹⁴ *Id.* § 1018(d). This section was added by the Conference to clarify 28 U.S.C.A. § 2679(b)(2)(B) regarding tort claims procedures. H.R. REP. 653, *supra* note 204, at 122.

²¹⁵ *See* H.R. REP. 653, *supra* note 204, at 129, 131, 135.

²¹⁶ Act § 4101(g). This section is intended to give the Secretary of Transportation additional information on the background of applicants. H.R. REP. 653, *supra* note 204, at 128. Because alcohol impairment may have played a role in the *Exxon Valdez* accident, *see supra* note 65 and accompanying text, the purpose of this section is to enable the Coast Guard to identify vessel personnel with motor vehicle offenses related to the drugs and alcohol. H.R. REP. 653, *supra* note 204, at 128. This is intended to facilitate the effort to promote a drug and alcohol free environment in the maritime industry. *Id.*

²¹⁷ Act § 4101(h). This section codifies the existing procedure of the Coast Guard in checking Federal Bureau of Investigation records of applicants. H.R. REP. 653, *supra* note 204, at 129.

provisions of establishing programs for testing persons holding a license, certificate or document for use of alcohol or dangerous drugs.²¹⁸ Such licenses will be temporarily suspended when a holder, acting under authority of that license, performs a safety sensitive function and there is probable cause to believe that the individual performed that function in violation of the law regarding the use of alcohol or dangerous drugs, has been convicted of an offense that would prevent the renewal or issuance of a license, or within the three year period preceding the initiation of suspension, has been convicted of operating a motor vehicle while under the influence of alcohol or a controlled substance or was involved in a traffic violation arising in connection with a fatal traffic accident, reckless driving or racing on the highways.²¹⁹ The conference substitute also adopts the House provisions providing a procedure by which the two next most senior licensed officers may temporarily relieve the master or individual in charge of a vessel when those officers reasonably believe that the individual is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel.²²⁰

Section 4107 pertains to Vessel Traffic Service Systems²²¹ and requires the Secretary of Transportation to mandate that certain appropriate vessels participate in VTS systems and to conduct a study to determine and prioritize which ports and channels are in need of those systems.²²²

²¹⁸ Act § 4103. Programs include preemployment (for dangerous drugs only), random, periodic, reasonable cause and post-accident testing as provided in H.R. 1465. See also H.R. REP. 653, *supra* note 204, at 129.

²¹⁹ Act § 4103(d)(1)(A)-(B).

²²⁰ *Id.* § 4104(i). "Once the individual in charge of a vessel is relieved, the next most senior officer shall take command of the vessel." H.R. REP. 653, *supra* note 204, at 131. "Next most senior officers" do not include engineers, as they are not qualified to command a vessel. *Id.*

²²¹ Act § 4107(b)(1)(A)-(B) (amending 33 U.S.C.A. § 1223 (1986)). A vessel traffic system incorporates measures for controlling or supervising vessel traffic, including routing systems, specifying times of entry, movement or departure and establishing vessel speed and operating conditions. 33 U.S.C.A. § 1223 (1986).

²²² Act § 4107. The study should evaluate "(i) the nature, volume, and frequency of vessel traffic; (ii) the risks of collisions, spills, and damages associated with that traffic; (iii) the impact of installation, expansion or improvement of a vessel traffic service system; (iv) all other relevant costs and data." *Id.* § 4107(b)(1)(B)(i)-(iv). Prior to the Oil Pollution Act, participation in such systems was not mandatory for all ships. *Oil Transportation and Cleanup Technology Hearings*, *supra* note 93, at 13 (statement of Sarah Chasis, Senior Attorney, NRDC). Now the Secretary is able to mandate that cer-

The conference substitute adopted other House measures pertaining to prevention of spills, including regulations establishing minimum standards for plating thickness of vessels transporting oil in bulk and programs requiring periodic gauging of vessels thirty years or older,²²³ regulations requiring warning devices to be installed on tank vessels and barges to prevent overfilling of oil tanks,²²⁴ and limiting crew working hours to fifteen hours per twenty-four-hour period and no more than thirty-six hours per seventy-two-hour period.²²⁵ The Senate bill did not contain any similar provisions.²²⁶

The major issue of contention for the conference committee was that of double hulls.²²⁷ Provisions regarding double hulls were among the last major differences between the two bills.²²⁸ Just as the *Exxon Valdez* compelled passage of comprehensive oil spill legislation, another major spill forced the hands of conferees who were reluctant to mandate double hulls.²²⁹ On February 7, 1990, a major spill occurred off Huntington Beach, California involving the tanker *American Trader*.²³⁰ Representative Glenn M. Anderson (D-Cal.) visited the area and was told that the accident would not have occurred had the vessel been equipped with a double hull.²³¹ Finally, the tide was turning in favor of the double hull. Unfortunately, it took another major spill to elicit Congressional action.

As a result, section 4115 of the conference substitute requires that all newly constructed tank vessels be equipped with double hulls, with the exception of vessels used only to respond to a dis-

tain appropriate vessels participate. *Id.* § 4107. This is intended to include vessels that pose a significant threat of oil pollution. H.R. REP. 653, *supra* note 204, at 134.

²²³ Act § 4109(1)-(2).

²²⁴ *Id.* § 4110(a).

²²⁵ *Id.* § 4114(n). See also H.R. REP. 653, *supra* note 204, at 138-39.

²²⁶ H.R. REP. 653, *supra* note 204, at 138-49.

²²⁷ *Oil Spill Liability, Prevention Bill Enacted*, 48 CONG. Q. ALMANAC, 284 (1990).

²²⁸ *Tough Oil Spill*, *supra* note 196, at 3043. The House required double hulls while the Senate allowed the Secretary of Transportation to require them only if beneficial. See *supra* note 172 and 196 and accompanying text.

²²⁹ Phil Kuntz, *Recent Oil Spill Adds Force to Calls for Double Hulls*, 48 CONG. Q. 655 (Mar. 3, 1990).

²³⁰ *Id.*

²³¹ *Id.* Anderson was an ally of the oil and shipping industries, but the *American Trader* incident helped change his position in favor of double hulls. *Id.* Shipping industry lobbyists also began to concede on the issue due to the *American Trader* spill. *Id.*

charge of oil.²³² Newly constructed tank vessels less than 5000 gross tons are not required to have double hulls if they are equipped with apparatus that is just as effective as double hulls in preventing oils spills.²³³

The conference substitute replaces section 311(c) of FWPCA.²³⁴ Section 4201(a), replacing section 311(c), now *requires* the President to ensure the effective and immediate removal of oil, where under FWPCA the President was *authorized* to act.²³⁵ Section 4201(b) now provides for the preparation of the National Contingency Plan.²³⁶ The plan shall provide for effective, efficient and coordinated action to minimize the damage from oil discharges, including dispersal, containment and removal.²³⁷

²³² Act § 4115(a)-(b)(1). Phase out of existing non-double hulled vessels will begin in 1995. "By the year 2010, all vessels over 5000 gross tons with single hulls would be prohibited from operating without double hulls, and by the year 2015 all vessels over 5000 gross tons with double bottoms or double sides would be prohibited from operating without double hulls." H.R. REP. 653, *supra* note 204, at 140.

²³³ Act § 4115(b)(2). In determining if the system will be as effective as the double hull, the Secretary may consider vessel size and the environment in which the vessel operates. H.R. REP. 653, *supra* note 204, at 139. "The Secretary may find that flexible bladders, double sides, or other combinations of technologies are of equal effectiveness to double hulls for vessels under 5000 gross tons operating in specified environments." *Id.*

²³⁴ Randle, *supra* note 56, at 10,128. Those sections dealt with the National Contingency Plan. See *supra* notes 17-18 and accompanying text.

²³⁵ Compare § 4201 with 33 U.S.C. § 1321(c). See also Randle *supra* note 56, at 10,128.

²³⁶ Act § 4201(b). The National Contingency Plan was found in § (c)(2) of the Federal Water Pollution Control Act prior to enactment of the Oil Pollution Act. 33 U.S.C. § 1321(c)(2) (1982). See also *supra* note 17 and accompanying text.

²³⁷ Act § 4201(b). The amended section contains the same provisions for the National Contingency Plan as did § 311(c), in addition to establishment of procedures and standards for handling a worst case discharge of oil, 33 U.S.C. § 1321(d)(2)(J) (codified as amended § 4201(b)), defined as the discharge of the vessel's entire cargo in adverse weather conditions, H.R. REP. 653, *supra* note 204, at 147, establishment of fish and wildlife response plans for rescue and rehabilitation of affected fish and wildlife, *id.* at (d)(2)(M), and establishment of procedures to coordinate the OSC, strike forces, District Response Groups and Area Committees established under § 4202(j), 33 U.S.C. § 1321(d)(2)(L) (codified as amended § 4202(j)).

The requirement of a worst case discharge scenario was partially due to an accident in the Gulf of Mexico off the coast of Texas involving an explosion on the tanker *Mega Borg*. Jerry Adler, et. al, *More Oil on the Waters*, NEWSWEEK, June 25, 1990, at 60. The vessel spilled over 4.5 million gallons of oil due to the explosion and ensuing fire; however, officials feared that the tanker would break apart and sink, releasing its entire cargo of 38 million gallons. *Id.* This possibility would have been the type of worst case discharge that Congress intended under The Oil Pollution Act. RODGERS, *supra* note 2, at 104.

Subsection J of FWPCA is completely replaced by a new national planning and response system consisting of the National Response Unit, Coast Guard District Response Groups, Area Committees and area contingency plans and tank vessel and facility response plans.²³⁸ The National Response Unit is established to compile a list of oil spill removal resources, equipment and personnel worldwide; to coordinate the use of private and public resources to remove a worst case discharge; to administer the Coast Guard strike teams; and to review the area contingency plans.²³⁹ The Coast Guard District Response Groups consist of available trained personnel to assist the OSC and maintain Coast Guard response equipment.²⁴⁰

C. Title VII - Oil Pollution Research & Development Program

The provisions of Title VII of the House bill were accepted by the conference in establishing a national research and development program to create an Interagency Committee on Oil Pollution Research.²⁴¹ The committee is to "coordinate Federal agency oil pollution research activities; evaluate oil pollution prevention and mitigation technologies, and the long term environmental effects of oil pollution. . . ." ²⁴² The conference also established priorities to direct the federal research program: "(1) prevention of oil discharges; (2) rapid and effective response and cleanup of oil discharges; and (3) increased understanding of the environmental effects of oil discharges. . . ." ²⁴³ The Senate agreed to the conference report on August 2, 1990, by a vote of ninety-nine to zero.²⁴⁴ The House agreed to it on August 3, 1990, by a vote of 360 to 0.²⁴⁵ On August 18, 1990, almost a year and a half after the *Exxon Valdez* spill in Prince William Sound, President Bush signed The Oil Pollution Act of 1990 into law.²⁴⁶

²³⁸ Act § 4202(a). See generally, H.R. REP. 653, *supra* note 204, at 147-51. See *supra* notes 24-26 regarding § 311(j) of FWPCA.

²³⁹ 33 U.S.C. § 1321(j)(2) (1982).

²⁴⁰ *Id.* § 1321(j)(3).

²⁴¹ Act § 7001. See H.R. REP. 653, *supra* note 204, at 165.

²⁴² H.R. REP. 653, *supra* note 204, at 165.

²⁴³ *Id.*

²⁴⁴ 136 CONG. REC. S11,547 (daily ed. Aug. 2, 1990).

²⁴⁵ 136 CONG. REC. H6949 (daily ed. Aug. 3, 1990). There were 72 abstentions. *Id.*

²⁴⁶ Statement on Signing the Oil Pollution Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1265 (Aug. 18, 1990).

X. Conclusion

Three years after the *Exxon Valdez* oilspill, Prince William Sound is still feeling the effects of oil pollution. A study reported in April 1992 by state and federal officials who are overseeing the spill restoration effort states that the spill is affecting the environment much more extensively than previously believed.²⁴⁷ There remains extensive damage to marine life as a result of the spill's immediate effects and due to the fact that there is still oil in the Sound.²⁴⁸ As marine biologists feared, the worst damage materializes years later, as the effects of the oil work their way through fish spawning and animal breeding cycles.²⁴⁹

It is very unfortunate that it took an environmental disaster to force change.²⁵⁰ While the strong provisions of the Oil Pollution Act of 1990 are a step in the right direction, its full implementation has yet to be realized.²⁵¹ For example, although tank vessels were to have submitted their response plans for catastrophic spills in August 1993, most oil companies were not prepared to do so due to insurance disputes.²⁵² Only time will tell if the Act has met its goal of preventing future spills. It will be years before all tank vessels have double hulls and before all contingency plans are formulated and put in place. It will be years before new technology will be developed to combat oil discharges. Yet at least action has been taken. Never again will nature be left so foolishly to chance.²⁵³

²⁴⁷ *Valdez Spill Toll Is Now Called Far Worse*, N.Y. TIMES, Apr. 18, 1992, at A6.

²⁴⁸ *Id.* "[T]he spill has affected migration of salmon fry, major migrations of birds and the primary reproductive periods for most birds, mammals, fish and marine invertebrate species." *Id.* Significant numbers of killer whales are missing from a pod that is well known in the Sound. *Id.* "[T]he social structures of the pods appears to be breaking down, with some mothers even abandoning their calves." *Id.* See also *A (Killer) Whale of a Mystery*, SCI. NEWS, Feb. 20, 1993, at 126. Among the fatalities are approximately 20,000 sea otters, 350,000 to 390,000 sea birds, 200 harbor seals, and 22 killer whales. RODGERS, *supra* note 2, at 109 (citing STATE & FEDERAL TRUSTEES, SUMMARY OF EFFECTS OF THE EXXON VALDEZ OIL SPILL ON NATURAL RESOURCES AND ARCHEOLOGICAL RESOURCES (Mar. 1991)).

²⁴⁹ *Valdez Spill Toll*, *supra* note 247, at A6.

²⁵⁰ Alcock, *supra* note 148, at 100.

²⁵¹ *Lack of Full Implementation of Spill Act Leaves U.S. Waters Still Vulnerable*, NRDC SAYS, ENV'T. REP. 2041 (Dec. 11, 1992).

²⁵² Tim Sansbury, *Coverage Flap Hinders Efforts to Meet Spill Law Deadline*, J. OF COM., Aug. 18, 1993, at 1A.

²⁵³ Hodgson, *supra* note 70, at 41.