The Oil Pollution Act of 1990: A Long Time Coming

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INTRODUCTION

In March, 1967, the tanker SS Torrey Canyon rammed into the Seven Stones Reef, sending over 800,000 barrels of Kuwaiti crude into international waters sixteen miles west of Lands End off the southwest coast of England.1 The spill, one of the most catastrophic of its time, was followed two years later by a major blowout2 in United States waters. That accident released 230,000 gallons of oil into California’s Santa Barbara Channel.3 The Torrey Canyon incident shocked the national and international community and prompted calls for measures to prevent future disastrous spills.4 There were, unfortunately, other significant oil spills between these two incidents,5 but the Torrey Canyon disaster and the Santa Barbara blowout forced the United States to take a hard look at its own policies toward oil spill disasters in general and those occurring close to home in particular.6

Much legislation has been enacted, and amended, since 1967 to address oil spills and the damages they cause to the marine environment and to public and private property. A review of legislation currently on the books reveals that much of it has been too little, too late. The 1989 Exxon Valdez spill demonstrated the inadequacy of laws enacted prior to 1990 to respond to massive spills on the magnitude of the Valdez in terms of penalties and compensation.

Few would argue that the problem has reached critical proportions. Over 10,000 oil spills were reported each year between 1973 and 1985.7 Some 32 million gallons of oil were discharged into United States waters

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2. A blowout is the uncontrolled eruption of gas or oil from a well. It can result from pressure imbalances caused by drilling mud that is too light in weight or by pulling up the drill pipe too fast. R. EASTON, BLACK TIDE: THE SANTA BARBARA OIL SPILL AND ITS CONSEQUENCES, 8 (1972).
3. The oil flow, lasting from January 28 to February 7, was estimated at a rate of 21,000 gallons per day. See R. EASTON, supra note 2, at 8.
4. The British government expressed its concerns to the Third Extraordinary Session of the Intergovernmental Maritime Consultative Organization (IMCO) and suggested measures to prevent another Torrey Canyon incident from occurring. The concerns were forwarded to the appropriate committees with an eye toward incorporating them into future international agreements. Sweeney, Oil Pollution of the Oceans, 37 FORDHAM L. REV. 155, 193-94 (1968).
5. Between March 18, 1967, the date of the Torrey Canyon grounding and January 28, 1969, when the Santa Barbara spill occurred, there were approximately thirteen major spills worldwide, including the grounding of the R.C. Stoner in September, 1967, off Wake Island; the Pegasos in February, 1968, off Cape Hatteras, N.C.; the Tim, also in February, 1968, near Philadelphia, Pa.; and the General Colocotronis in March, 1968, near Eleuthera Island, Bahamas, which released between 21,000 and 37,700 barrels of Venezuelan crude. See R. EASTON, supra note 2 at 294-95.
by tankers, barges and other vessels between 1984 and 1988. In the twenty-four-hour period following the Valdez spill alone, there were three major oil spills from tankers in United States coastal waters. The questions asked after each disaster are always the same: How could it have been prevented? Why does present legislation fail to adequately address the costs of clean-up, to provide for realistic compensation, or to impose more stringent standards of liability?

Perhaps the Valdez was the last straw, for it galvanized a Congress previously content to quarrel over those questions. Oil spill compensation and liability bills passed both houses of Congress in the fall of 1989. The House version was adopted by the Senate and, after some months of wrangling in conference committee, was signed into law by President Bush on August 18, 1990, as the Oil Pollution Act of 1990. This note reviews previous legislation and examines key provisions of the Oil Pollution Act and whether it will provide a working solution to the nation’s oil spill crisis.

I. PREVIOUS LEGISLATION

It has been said that “the present patchwork of federal and state laws is unwieldy, inconsistent, inefficient and unnecessarily expensive.” Federal statutes alone provide for varying degrees of liability and compensation for various vessels carrying various cargoes in various waters. Determining which statute to apply, and when, can be as confusing as sorting out the conflicts between them.

A. The Rivers and Harbors Appropriation Act of 1899

The Rivers and Harbors Act of 1899 (The Refuse Act) is very nearly a relic among environmental statutes, but it can be useful in a modern

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10. The Senate and House have been unable to agree on comprehensive oil spill legislation for almost fourteen years. Preemption of state law is a major issue of debate. Montana’s Senator Baucus recently remarked, “The majority leader, for 8 years has attempted to pass an oil spill bill. He has had a difficult time in large respect because the other body has a very different view on what should be contained in that bill. The basic difference between this body and that body has been preemption of State law. . . . The other body would like preemption. The other body would like to make it difficult for the States to have their own separate liability laws. It has been a very difficult issue in dealing with the other body.” 135 CONG. REC. S10080 (daily ed. Aug. 4, 1989) (statement of Sen. Baucus).
catastrophe.\textsuperscript{15} Under the Refuse Act it is a misdemeanor to discharge refuse matter of any kind into the navigable waters of the United States.\textsuperscript{16} Violations are punishable by a fine of not more than $2,500.\textsuperscript{17} The Refuse Act addresses only intentional violations and does not mention discharges resulting from negligence.\textsuperscript{18} Though penalties assessed for damages incurred are supposed to be used to “improve” the harbor in which the damage occurred, no criteria are provided for the improvements, and, the penalty amount is outdated. In this day and age, $2,500 would accomplish very little in the way of “improvements” or compensation.\textsuperscript{19}

B. The Intervention on the High Seas Act

The Intervention on the High Seas Act\textsuperscript{20} (High Seas Act) imposes penalties for discharges\textsuperscript{21} of “convention oil”\textsuperscript{22} that present a grave and imminent danger\textsuperscript{23} to the coastline or related interests of the United States. It authorizes the United States to take whatever measures may be necessary to prevent, mitigate, or eliminate the danger (e.g., sinking the ship).\textsuperscript{24} The maximum penalty for violators is a $10,000 fine, one year in prison, or both.\textsuperscript{25} The High Seas Act applies only to spills that occur on the high seas.\textsuperscript{26}

\begin{itemize}
  \item \textsuperscript{15} Violation of the Refuse Act, for example, is one of the charges in the Department of Justice’s criminal suit against Exxon. United States v. Exxon Corp., No. 90-015 (D. Alaska filed Feb. 27, 1990). Recovery under both the Refuse Act and the Clean Water Act has not been permitted by the courts, which concluded that Congress intended the Clean Water Act to “provide the exclusive remedy for the government to recover its oil spill cleanup costs.” United States v. Dixie Carriers, Inc., 627 F.2d 736, 739 (5th Cir. 1980).
  \item \textsuperscript{16} 33 U.S.C. § 407 (1986).
  \item \textsuperscript{17} 33 U.S.C. § 411 (1986).
  \item \textsuperscript{18} 33 U.S.C. § 412 (1986).
  \item \textsuperscript{19} 33 U.S.C. § 412 (1986).
  \item \textsuperscript{20} 33 U.S.C. §§ 1471, 1472 (1986).
  \item \textsuperscript{21} Discharges include, but are not limited to, “any spilling, leaking, pumping, pouring, emitting, emptying, or dumping into the marine environment of quantities of oil determined to be harmful” by the administrator of the Environmental Protection Agency (EPA). 33 U.S.C. § 1517(m)(3) (1986).
  \item \textsuperscript{22} Convention oil is defined as crude oil, fuel oil, diesel oil, and lubricating oil. 33 U.S.C. § 1471(3) (1986).
  \item \textsuperscript{23} “Grave and imminent danger” is determined by the Secretary of the department in which the Coast Guard is operating and is measured by a host of factors, including the effects of the spill on human health, fish, shellfish, and other living marine resources, wildlife, coastal zone and estuarine activities, and public and private shorelines and beaches. 33 U.S.C. § 1473 (1986).
  \item \textsuperscript{24} 33 U.S.C. § 1472 (1986).
  \item \textsuperscript{25} 33 U.S.C. § 1481 (1986).
  \item \textsuperscript{26} The high seas are waters which are open to all states and over which no state has jurisdiction. Art. 87, United Nations Convention on the Law of the Sea, done at Montego Bay, Dec. 10, 1982, 21 I.L.M. 1261 (1982); U.N. Pub. E. 83.V.5 (1983). The Convention is not yet in force. Sixty ratifications are required.
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C. The Deepwater Port Act of 1974

The Deepwater Port Act\textsuperscript{27} prohibits discharges of oil into the marine environment from a vessel \textit{within} any safety zone.\textsuperscript{28} Violators are assessed a civil penalty of not more than $10,000 for each violation.\textsuperscript{29} Clean-up costs are assumed by the government via the Deepwater Port Liability Fund,\textsuperscript{30} unless the Secretary of Transportation determines that the "removal will be done properly and expeditiously by the licensee of the deepwater port or the owner or operator of the vessel from which the discharge occurs."\textsuperscript{31} Unless the owner/operator can prove he is not liable through one of the enumerated defenses,\textsuperscript{32} he will be held jointly and severally liable, without regard to fault, for up to $20 million of the clean-up costs and damages resulting from the spill. If the spill resulted from gross negligence or willful misconduct within the privity and knowledge of the owner/operator, the owner/operator can be held jointly and severally liable for the full costs of clean-up and damages.\textsuperscript{33}

D. The Trans-Alaska Pipeline Authorization Act

The Trans-Alaska Pipeline Authorization Act\textsuperscript{34} is arguably one of the strongest acts devised to deal with oil spills. Its application, however, is limited to discharges of oil that has been transported through the trans-Alaska pipeline. A holder of a pipeline right-of-way will be held strictly liable for damages unless the holder can show that the damage resulted from an act of war, negligence of the United States or other government entity, or the damaged party.\textsuperscript{35} Owner/operators of a vessel carrying such oil may be held strictly liable, jointly and severally, for all damages and clean-up costs sustained by any person or entity.\textsuperscript{36} Liability for holders of a pipeline right-of-way for damages is limited to $350 million for any one incident.\textsuperscript{37} The liability cap is $100 million for any one inci-

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  \item \textsuperscript{27} 33 U.S.C. § 1501 (1975)(amended 1984).
  \item \textsuperscript{28} Safety zone is defined as a "zone of appropriate size around and including any deepwater port for the purpose of navigational safety." 33 U.S.C. § 1509(d)(1) (1975). The zone is designated by the Secretary of Transportation. 33 U.S.C. §§ 1502(16), 1509(d) (1975).
  \item \textsuperscript{29} 33 U.S.C. § 1517(a)(2) (1975).
  \item \textsuperscript{30} Monies for the fund are obtained from the owner of any oil loaded or unloaded at the deepwater port through a surcharge of two cents per barrel. Bunker or fuel oil and oil transported through the trans-Alaska pipeline are exempt. 33 U.S.C. § 1517(f)(3) (1975).
  \item \textsuperscript{31} 33 U.S.C. § 1517(e) (1975).
  \item \textsuperscript{32} Defenses cited by the statute are (1) an act of war, (2) negligence of the federal government in establishing and maintaining aids to navigation, or (3) negligence of the claimant. 33 U.S.C. § 1517(g) (1975).
  \item \textsuperscript{33} 33 U.S.C. § 1517(d) (1975).
  \item \textsuperscript{34} 43 U.S.C. § 1651 (1973).
  \item \textsuperscript{35} 43 U.S.C. § 1653(a)(1), (a)(2) (1973).
  \item \textsuperscript{36} 43 U.S.C. § 1653(c)(1) (1973).
\end{itemize}
dent for the owner/operator of a vessel. The owner/operator must pay the first $14 million of allowable claims; the Trans-Alaska Pipeline Fund assumes the balance.

E. The Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act prohibits discharges of oil from any offshore facility or vessel in quantities which the President finds harmful, as defined under the Clean Water Act. Owner/operators of vessels other than public vessels and owner/operators of offshore facilities can be held jointly, severally, and strictly liable for removal costs and damages, including injury, destruction, or loss of use of real or personal property and natural resources, as well as for lost profits and tax revenues. The liability cap is $250,000 or $300 per gross ton, whichever is greater, for vessels, and $35 million in the case of an offshore facility. The Offshore Oil Pollution Compensation Fund is available to handle removal costs and may not exceed $200 million.


Better known as the Clean Water Act (CWA), the much-amended Federal Water Pollution Control Act (FWPCA) has been the best overall solution for dealing with those responsible for polluting the nation’s waters with oil and other hazardous substances.

Section 1321 of the CWA prohibits harmful discharges of oil into the navigable waters of the United States, adjoining shorelines, the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act or the Deepwater Port Act. What constitutes a harmful discharge is determined by the President and his decision is based on the effect of the spill on the public health or welfare, fish

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39. Id. A fee of five cents per barrel is collected from the owner of the oil at the time it is loaded on the vessel. Monies in the fund cannot exceed $100 million. 43 U.S.C. § 1653(c)(5) (1973).
43. The monies for the fund are obtained through a fee not to exceed three cents per barrel on oil obtained from the Outer Continental Shelf. The fee is imposed on the owner of the oil. 43 U.S.C. § 1812(d)(1), repealed by Oil Pollution Act of 1990, Pub. L. No. 101-380, § 2004, 104 Stat. 484, 507 (1990).
45. These activities include exploration, development, and production of the minerals of the outer Continental Shelf, which means “all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.” 43 U.S.C. § 1331 (1978).
and shellfish, wildlife, and public and private property. The President is authorized to remove or arrange for the removal of the oil, unless he determines that the clean-up will be properly done by the owner/operator of the vessel. Critics of the statute charge that the power given to the President is too discretionary, and that the statute should more forcefully direct the President to initiate clean-up of oil spills, unless he specifically determines it will be done properly and promptly by the owner/operator of the vessel.

Liability for civil penalties extends to the owner, operator, or any person in charge of a vessel. Civil penalties of up to $25,000 per day of violation or an amount up to $1,000 per barrel of oil may be imposed on owner/operators or persons in charge of the vessel. Persons who fail to carry out removal of the oil may be subject to civil penalties of up to $25,000 per day of violation or an amount up to three times the costs incurred by the Oil Spill Liability Trust Fund. Criminal penalties of fines in accordance with Title 18, United States Code, 5 years in prison, or both, can be imposed for failure to notify the government of a discharge.

Violators also may be liable for actual costs of clean-up undertaken by the United States government in the amount of $125 per gross ton for an inland oil barge, or $125,000, whichever is greater, and $150 per gross ton for vessels carrying oil as cargo, or $250,000, whichever is greater. When the spill is the result of gross negligence or willful misconduct, civil penalties of not less than $100,000 and not more than $3,000 per barrel of oil may be assessed. Clean-up by the government is paid for through a revolving fund established in the Treasury.

Because the FWPCA does not preempt state tort law for damage compensation, individual states are free to impose their own requirements or liabilities with respect to the discharge of oil. The problem with the imposition of state liabilities or of maritime tort penalties under federal admiralty law, however, is that these liabilities are subject to the limitation of shipowners’ liability. Twenty-four states currently have laws to

58. 46 U.S.C. app. §§ 183-89. But see U.S. v. M/V Big Sam, 681 F.2d 432 (5th Cir.
deal with oil and hazardous substance pollution, and nineteen of these states have statutes that place no limits on liability.

The FWPCA also provides guidelines for the establishment of a National Contingency Plan for removal of oil and hazardous substances.

II. THE EXXON VALDEZ

A. "The Largest Single Tanker Oil Spill in U.S. History"

In 1977 the Coast Guard estimated that roughly 85 percent of tanker accidents occur as the result of human error or misjudgment. The Valdez accident is attributed to both.

Just after midnight on the morning of Friday, March 24, 1989, the supertanker Exxon Valdez left the port of Valdez, bound for Long Beach, California. To avoid ice encountered on the inbound voyage to Port Valdez, the tanker, with an uncertified third mate at its helm and with the permission of the Coast Guard, veered from the standard outbound shipping lanes of Alaska's Prince William Sound to the inbound lanes. The third mate failed to return the tanker to the outbound lanes in

1982), where the court held that the United States could seek recovery of clean-up expenses under the Clean Water Act but did not have a cause of action for recovery of clean-up expenses based on maritime tort or on the Refuse Act.


60. N.Y. Times, Nov. 9, 1989, at A32, col. 1. At least 14 coastal states have no limit on liability in the event of an oil spill, according to a 1983 survey of state oil spill laws. Both Alaska and Maine, for example, have an unlimited, strict joint and several liability standard. U.S. COAST GUARD, OIL SPILL LIABILITY AND COMPENSATION LEGISLATIVE PRE-EMPTION CONSIDERATIONS, APP. A. (Mar. 1, 1985).


63. Coast Guard Efforts to Prevent Oil Pollution Caused By Tanker Accidents: Hearings Before a Subcomm. of the Comm. on Government Operations, House of Representatives, 95th Cong., 1st Sess., 35 (1977) (statement of Rear Admiral William M. Benkert, Chief, Office of Merchant Marine Safety, U.S. Coast Guard) [hereinafter "Coast Guard Efforts"].
time to avoid running aground on Bligh Reef.  

The Valdez was carrying a load of 1,260,000 barrels of North Slope crude oil. The grounding ruptured eleven of the Valdez' sixteen tanks spilling about 258,000 barrels of crude, or approximately 11 million gallons, into Alaska's Prince William Sound, one of the nation's most biologically productive waters. By the evening of the 24th, the spill, called the largest in United States history, was approximately five miles long and 500 feet wide. Time is of the essence when an oil spill occurs, for oil spreads rapidly and drifts with the wind, surface currents, waves, and tides. By Sunday, the 26th, the oil had spread over 100 square miles; by Wednesday, 500 square miles. By Friday, one week after the accident, the oil had traveled 90 miles from its origin, covered 850 square miles, and threatened fisheries off the Kenai Peninsula.

B. Clean-Up

Six contingency plans are in place specifically to respond to oil spills in Prince William Sound. The first line of defense was to come from the Alyeska Pipeline Service Company. Charged by the state of Alaska with preparing and implementing the initial response to oil spills, Alyeska incorporated federal requirements into their plan regarding terminal and tanker operations.

According to the plan, Alyeska “will direct clean-up operations of spills from tankers carrying trans-Alaska Pipeline System oil through

64. A report by the National Safety Transportation Board found that the decision of the vessel's master to leave the third mate in charge of navigation was improper, “given the course of the vessel, the uncertain extent of the ice conditions, and the proximity of a dangerous reef.” The report also determined that the third mate did not have the required piloting endorsement and that his performance was probably hampered by fatigue. In addition, the report concluded that partial responsibility for the accident rested on the shoulders of the U.S. Coast Guard for inadequately tracking the vessel through Prince William Sound. National Transportation Board, Conclusions, at 285, 289 (July 31, 1990).
69. These plans are: the National Contingency Plan created by the Clean Water Act, the Alaska Regional Oil and Hazardous Substances Pollution Contingency Plan, the Alaska State Oil and Hazardous Substances Pollution Contingency Plan, the Coast Guard Marine Safety Office plan for the Port of Valdez, the oil industry's Alyeska Contingency Plan for Prince William Sound, and the Exxon Plan. THE NATIONAL RESPONSE TEAM, THE EXXON VALDEZ OIL SPILL, A REPORT TO THE PRESIDENT, at 5-8.
70. The Alyeska Pipeline Service Company is a consortium formed in 1970 by a group of oil companies to build and maintain the trans-Alaska pipeline. "Valdez Winter Update," Exxon Corporation (Oct. 25, 1989) (videotape).
Prince William Sound in such a way as to make federal or state intervention or takeovers unnecessary." But the much-heralded contingency plans failed. Emergency crews were to be deployed within five hours of any spill occurring within a thirty- to forty-mile radius of the Port of Valdez; however, the crews did not arrive until fourteen hours after the spill, which occurred twenty-five miles from the Port. Booms were not deployed to surround the crippled Valdez for another twenty-one hours. Even though the National Safety Transportation Board found that "there was no evidence that the Federal Government (U.S. Coast Guard) or any other organization would have been capable of increasing the efforts underway during the first twenty-four hours after the spill," the fact that proper procedures were not followed is distressing.

The Exxon Corporation immediately accepted full responsibility for the spill. They later assumed responsibility for the clean-up from Alyeska and promised to pay the cost of what would almost certainly turn out to be a monumental effort. As Richard Golub, publisher of Golub's Oil Pollution Bulletin, pointed out,

As a result of the size and immediate environment of this incident [the spill occurred in a sheltered body of water containing islands, bays and fjords] it will likely turn into a cleanup nightmare. The initial effort to contain the spill entails the use of floating booms to keep oil in a limited area. Then ropes or disks, treated with chemicals that attract oil, are swept through the spill, wrung out and then redeployed. If this proves ineffective, chemical dispersers can be used to break up the oil into small particles, enabling it to mix with the water.

Exxon began its removal operation on Sunday, the 26th, but its efforts were hampered by the remote location of the spill, inclement weather, and clean-up methods that are more than a decade old. The inadequacy of methods used by the oil industry has been commented on in the recent and not so recent past. For example, Senator Alan Cranston remarked in 1969 that

[t]he oil industry in the United States is one of the most advanced industries in the world. It is able to find and produce oil at incredible depths undersea or underland, but this industry has not until now turned its immense skills to dealing with the mess that afflicts us when a spill occurs in the ocean. The most primitive measures are presently available . . . . They have consisted of throwing straw on the surface of the sea . . . . Another method was to float a boom around the oil to surround it or to prevent it from coming into a harbor. When heavy weather came, the boom was upset and shortly looked like spaghetti.

71. The National Response Team, supra note 69, at 6 (May 1989).
74. Remarks by L.R. Raymond, President of Exxon Corporation, to the University Club, New York (Oct. 24, 1989).
75. The National Response Team, supra note 69, at 13 (May 1989).
Of course the oil and debris went in every direction.\textsuperscript{77}

Twenty years later Senator John H. Chafee echoed Senator Cranston's words, pointing out that

[on]e of the things we have discovered is that we just do not know how to deal with spills. . . . [W]e have booms that go out around the vessel, where the spill is identified to be, but these booms are remarkably ineffective. The oil either goes over them or under them.\textsuperscript{78}

Booms, however, were the cornerstone of Exxon's efforts, and even these were slow to arrive on the scene. Additional equipment that could have proved helpful was not immediately available. Operations to off-load the remaining oil on the Valdez did not begin until 7:36 a.m. on Saturday, March 25th, and, as noted earlier, the Valdez itself was not surrounded by containment booms for another three and a half hours.\textsuperscript{79}

The use of dispersants was considered 30 minutes after the spill was reported, but when the federal on-scene coordinator advised Alyeska to start the dispersant-use request process, Alyeska had fewer than 4,000 gallons of dispersant on hand, no dispersant application equipment, and no aircraft.\textsuperscript{80} At least four trial test applications were approved, but unsatisfactory results prompted abandonment of its use. Heroic efforts were made to salvage wildlife, birds, and marine life affected by the oil, but these efforts proved only moderately successful.\textsuperscript{81}

\section*{C. The Aftermath}

Exxon maintained in July, 1989, that its goal "is to leave the water and shorelines in an environmentally stable condition such that animals, birds, and fish are not harmed and no restrictions on commercial use or subsistence hunting and fishing are necessary."\textsuperscript{82} According to the Alaska Department of Environmental Conservation, 1,245 miles of shoreline were oiled by the spill. At the beginning of 1990 approximately 100 miles of beach remained oiled, 20 miles of which posed a threat to wildlife.\textsuperscript{83} In April 20, 1990, Exxon reported that 574 miles of shoreline had been inspected, 65 percent of which showed no evidence of surface oil. There was very light oiling on 130 miles of shoreline and a narrow to wide band of weathered crude along 72 miles of shoreline.\textsuperscript{84} Exxon, which suspended its initial efforts in mid-September, 1989, totaled the

\begin{thebibliography}{84}
\bibitem{79} Exxon Valdez Oil Spill, Prince William Sound Envtl. Reader 1989, 2-3.
\bibitem{80} \textit{THE NATIONAL RESPONSE TEAM}, \textit{supra} note 69, at 17 (May 1989).
\end{thebibliography}
cost of the unfinished effort at over $2 billion.\textsuperscript{85} The company ended its second clean-up campaign in September, 1990. A preliminary survey of 128 miles of shoreline found "some 61 miles of shores in Prince William Sound and the Kodiak and Kenai regions remain oiled. Less than four of those miles are considered 'heavily' oiled, and most of those are in Prince William Sound."\textsuperscript{86}

The full extent of the damage to Prince William Sound remains to be determined. Losses to the state's marine environment include over 33,000 birds, more than 1,000 marine mammals, and 138 eagles.\textsuperscript{87} The Sound's $12-million herring fishery was closed by the state for the season in April, 1989. Salmon fisheries in the path of the spill were closed for the year in mid-June, 1989.\textsuperscript{88} In June, 1990, two areas in Prince William Sound were closed to commercial salmon fishing because of oil remaining on the beaches.\textsuperscript{89} A study released by the Alaska Department of Conservation indicated that the oil may have long-term chronic effects on intertidal, subtidal, and anadromous fish and, in some cases, may reduce the reproductive potential of the fish.\textsuperscript{90} Exxon cites a record-setting 1990 fishing season in Prince William Sound as evidence of a comeback in the area.\textsuperscript{91} In addition, a scientific report commissioned by Exxon on the environmental recovery in Prince William Sound, notes there are "abundant signs of plant and animal life, and recovery is well under way on even the most severely impacted beaches." Drawing on field observations of the marine animal population in Prince William Sound, the report concludes that "the overall impact of the oil spill on the environment in Prince William Sound and Gulf of Alaska is likely to be short-lived."\textsuperscript{92}

Years of litigation lay in the wake of the Valdez. As of September, 1990, 150 lawsuits had been filed against Exxon by the state of Alaska, the United States Government, Alaskan fishermen, and others affected by the Exxon Valdez spill.\textsuperscript{93} On February 28, 1990, following failure to agree on the terms of a plea bargain with Exxon, the United States Department of Justice announced the indictment of Exxon and its shipping subsidiary on five criminal counts stemming from the Valdez spill.\textsuperscript{94} On
October 1, 1990, Exxon filed claims against the Federal government for costs of the spill, charging that the United States Coast Guard was responsible for the accident.\textsuperscript{95} The inadequacy of Alyeska's contingency plans is the subject of much concern. The plans, approved by Alaska's Department of Environmental Conservation, required Alyeska to keep on hand four small oil skimmers, a barge, and 11,500 feet of boom to contain possible oil spills. Alyeska, having projected that a catastrophic spill would occur only once every 241 years, was prepared for a spill of only about 1,000 to 2,000 barrels. The plan, in retrospect, has been called "the biggest piece of maritime fiction since Moby Dick."\textsuperscript{96} Experts in the oil industry have warned in the Valdez aftermath that the "industry should set in place and keep at ready the clean-up gear that everyone thought was at hand at Valdez—but wasn't. The equipment and its operators should be tested regularly. It should be sufficient to handle the worst possible spill caused by the least probable misstep."\textsuperscript{97}

The spill also underscored the limits of even great sums of money in environmental catastrophe when technology is unavailable or nonexistent. Exxon's most recent tally sheet shows expenditures of over $2 billion. It is an expenditure well removed from any penalties Exxon would have been required to pay under current legislation, short a finding of negligence. The government has estimated that even a doubling of anticipated penalties under the Alternative Fines Act would result in a payment by Exxon of only about $700 million.\textsuperscript{98}

New solutions were necessary, and the Valdez spill, having focused the nation's attention on the calamitous damages resulting from oil spills, has forced a tentative Congress to act on the oil spill legislation it has quarreled over for the past fourteen years.

### III. The Oil Pollution Act of 1990

Every major oil spill has spawned heated congressional debate over comprehensive oil spill legislation. The debate lasts a short time then

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\item ways Safety Act, which requires that a competent person man the wheelhouse; a felony violation of the Dangerous Cargo Act, which prohibits the hiring of physically or mentally impaired crew members; violation of the Refuse Act, which prohibits negligent discharges of foreign substances into the water; and illegally killing migratory birds, a misdemeanor under the Migratory Bird Treaty Act. United States v. Exxon Corp., No. 90-015 (D. Alaska filed Feb. 27, 1990). Captain Joseph Hazelwood, former captain of the Valdez, was convicted of the misdemeanor of negligent discharge of oil on March 22, 1990, and sentenced to 1,000 hours of community service cleaning the beaches of Prince William Sound and ordered to pay $50,000 in restitution to the state of Alaska. Hazelwood was acquitted of three more serious charges of reckless endangerment, criminal mischief, and operating a vessel while intoxicated. State of Alaska v. Hazelwood, 3AN S89-7218 (Super.Ct.), March 22, 1990.
\item 95. N.Y. Times, Oct. 2, 1990, at A19, col. 3.
\item 96. See Satchell & Carpenter, supra note 87 at 60, 68.
\item 97. Oil & Gas J., Apr. 10, 1989, at 11.
\end{itemize}
dies down. Most members of the House and Senate have agreed over the years that such a law is needed. What they could not agree on until this year was what it should contain. The Oil Pollution Act of 1990\(^99\) (OPA) was signed into law on August 18, 1990. Some key details of the OPA follow.

### A. Provisions of the OPA

1. **Prohibited Discharges**

   The OPA imposes liability on each responsible party\(^100\) of a vessel or facility that discharges\(^101\) oil or that poses a substantial threat of oil discharge into or upon navigable waters, adjoining shorelines, or the exclusive economic zone.\(^102\)

2. **Liability**

   The responsible party of a vessel or facility from which oil is discharged is liable for all removal costs\(^103\) incurred by the United States Government, a State, or Indian tribe, and any removal cost incurred by any person, including, but not limited to, any State for all damages for economic loss or loss of natural resources resulting from such a discharge. Removal costs per incident cannot exceed $1,200 per gross ton for a tanker vessel. In the case of a vessel greater than 3,000 gross ton, the cap is $1,200 per gross ton or $10 million, whichever is greater, and in the case of a vessel 3,000 gross ton or less, the cap is $1,200 per gross ton or $2 million, whichever is greater. Other vessels are liable for up to $600 per gross ton or $500,000, whichever is greater.\(^104\)

   There is no cap on liability for discharges that are the result of willful misconduct or gross negligence or of a violation of applicable safety, construction, or operating standards or regulations.\(^105\)

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\(^100\). Responsible party means any person owning or operating a vessel, or demise chartering the vessel; in the case of an onshore facility, any person owning or operating the facility; in offshore facilities, the lessee or permittee of the area in which the facility is located or the holder of a right of use; the licensee in the case of a deepwater port; owner/operator in the case of a pipeline; and in the case of abandonment, those who would have been responsible parties immediately prior to the abandonment of the vessel or facility. *Id.* § 1001(32), 104 Stat. 484, 488-89.

\(^101\). "Discharge is defined as any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying, or dumping." *Id.* § 1001(7), 104 Stat. 484, 486.

\(^102\). *Id.* § 1002(a), 104 Stat. 484, 489.

\(^103\). Removal costs are defined as "costs of removal that are incurred after a discharge of oil has occurred, or in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident." *Id.* § 1001(31), 104 Stat. 484, 488.

\(^104\). *Id.* § 1004(a), 104 Stat. 484, 491-92.

\(^105\). *Id.* § 1004 (c)(1)(A),(B), 104 Stat. 484, 492.
3. Financial Responsibility

Owners or operators of any vessel over 300 gross tons who use any place subject to the jurisdiction of the United States or operate in the waters of the exclusive economic zone must establish and maintain evidence of financial responsibility to meet the maximum amount of liability.106

4. Defenses

Owners or operators of a vessel who can show by a preponderance of the evidence that the spill occurred through an act of God, an act of war, or an act or omission of a third party other than a responsible party, employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, are exempt from liability.107 Interestingly, the OPA does not provide negligence of the United States or other government entity as a defense. In the Valdez litigation, Exxon charges the U.S. Coast Guard with responsibility for the accident. Apparently, under the OPA, this would not relieve Exxon from liability, unless the U.S. Coast Guard could be deemed a third party.

The OPA does, however, provide that the United States government would not be liable for damages resulting from “its actions or omissions relating to any response plan” under the national planning and response system.108

5. The Fund

At least five federal statutes109 address oil spill liability and compensation, and provide for special funds to pay clean-up costs and compensation. The OPA amends the Oil Spill Liability Trust Fund,110 established by the Treasury, which can be used to pay federal removal costs; costs for assessing injury to natural resources resulting from a discharge; costs for restoring, rehabilitating, replacing, or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of a discharge of oil; and costs incurred by any state in responding to a discharge and reimbursement for removal costs or damages. The maximum amount to be used for any single discharge is $1 billion. Through conforming amendments to the OPA the various oil spill liability funds existing

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106. Id. § 1016, 104 Stat. 484, 502.
107. Id. § 1003, 104 Stat. 484, 491.
108. Id. § 4202(H)(8), 104 Stat. 484, 531.
109. Among the statutes that relate to oil spill liability and compensation are: The Rivers and Harbors Appropriation Act of 1899 (The Refuse Act); Intervention on the High Seas Act; Deepwater Port Act of 1974; The Trans-Alaska Pipeline Authorization Act; The Outer Continental Shelf Lands Act; The Clean Water Act.
under other legislation now feed into one.\footnote{111}

6. Preemption of State Law

The longstanding dispute on this issue between the houses of Congress has finally been resolved. States will not be preempted from imposing additional liability or requirements with regard to oil pollution or discharge within the state or to removal costs.\footnote{112} The House and Senate hearings discussed this point and reasoned that states should not be limited by constraints in federal legislation and are entitled to choose a federal remedy or to provide a greater degree of protection for their own resources and citizens than that provided for by federal statutes.\footnote{113}

7. The Contingency Plan

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP),\footnote{114} created under the CWA and amended under the Comprehensive Environmental Response Compensation and Liability Act, amended by the Superfund Amendment and Reauthorization Act of 1986 (CERCLA or Superfund), was again amended under the OPA to provide for an effective and coordinated response to minimize damage from oil and hazardous substance discharges. The amended NCP is far more detailed and explicit than the current NCP, which is little more than outlined in the CWA.\footnote{115} The OPA also sets out a timetable and specific criteria for local contingency plans.\footnote{116}

8. Licensing Restrictions

Under the OPA, the Secretary of Transportation may not issue a license or certificate of registry or merchant mariner’s document unless the person applying for the license makes available information contained in the National Driver Register related to the operation of motor vehicles while under the influence of alcohol and traffic violations involving reckless driving.\footnote{117} The Secretary has the authority to require individuals applying for a license or renewal of a merchant mariner’s document to undergo testing for the presence of dangerous drugs.

\footnote{112}{Id. § 1018(c), 104 Stat. 484, 506.}
\footnote{113}{S. REP. No. 94, 101st Cong., 2nd Sess. 6, reprinted in 1990 U.S. CODE CONG. & ADMIN. NEWS 728.}
\footnote{114}{40 C.F.R. Part 300 (1990).}
\footnote{116}{Id. § 4202, 104 Stat. 484, 527-32.}
9. Improved Tanker Design and Construction

The Coast Guard first proposed mandatory double bottoms on all oil tankers larger than 20,000 deadweight tons operating in United States waters in 1973.¹¹⁸ Like oil spill legislation itself, proposals for mandatory double hulls or bottoms have come and gone many times over the years. President Carter created a six-point program to reduce the risks of transporting oil in 1977. Though the President included among his recommendations double-bottom hulls, the recommendation was not accepted.¹¹⁹

Double bottoms are already required on liquified natural gas carriers. Only 530 tankers are currently in operation, under construction, or under contract with double bottoms.¹²⁰ Critics question the safety of double-bottom hulls, citing the possibility of gas build-up between the layers and consequent explosions, the possibility that double bottoms impair the ship’s buoyancy, making it difficult to salvage and easier to sink when a grounding occurs, and the possibility of impairment of the ship’s navigability. All of these charges have been refuted by experts, who counter that salvage is actually easier with double bottoms because the flooded space between the layers keeps the vessel from going further up on a reef.¹²¹ There have been no explosions among the double-bottom tankers in service.

Under the OPA, any vessel constructed or adapted to carry oil may not operate in waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone, after January 1, 2010, unless it is equipped with a double hull or with a double containment system determined by the Secretary of Transportation to be as effective as a double hull for the prevention of a discharge of oil.¹²²

B. Comment

It is early yet to make practical comparisons between the Oil Pollution Act of 1990 and the various statutes governing oil spills that precede it, but Congress clearly intended to create strong, deliberate, and comprehensive legislation.

The OPA covers oil spills in all waters under United States jurisdiction, including the Exclusive Economic Zone. By doing so, the OPA ensures that regardless of the location of the spill, adequate compensation and strong financial penalties will be imposed.

Financial penalties imposed on responsible parties are potentially sev-

¹¹⁸. Coast Guard Efforts, supra note 63, at 7 (statement of Mr. Greenberg).
¹¹⁹. Coast Guard Efforts, supra note 63, at 6-7.
¹²¹. Id.
eral times the amount levied under the Clean Water Act. Civil penalties under the Oil Pollution Act, for instance, are $25,000 per day, or $1,000 per barrel of oil, for a violation, compared to a limit of $50,000 per violation under the CWA. This provision means that the penalties for environmental damage will more adequately address actual damages, and compensatory penalties may more fairly compensate.

Responsible parties are more broadly defined under the Oil Pollution Act and include shippers of oil as well as the vessel's owners and operators. By widening the net of liability, the OPA may encourage those responsible for oil transport but not previously held liable to undertake a greater measure of care in the transport.

Unlike previous legislation, the Oil Pollution Act clearly provides for a private cause of action to individuals who incur damage to real or personal property from oil spills. More important, the penalties and liabilities are not subject to the overall limitation of shipowners' liability.123

The OPA also recognizes the practical benefits of mandating preventive safety measures on the human level, by requiring drug testing and alcohol screening of individuals seeking mariner's documents, as well as on the larger technical level, by requiring double-hull tankers by the year 2010, by insisting on a more reliable radar tracking system through hazardous waters, and by giving greater shape and substance to the National Contingency Plan, so vaguely provided for in previous statutes.

Finally, in the area of oil recovery, the OPA leaves less to the discretion of the President than does the Clean Water Act. The OPA flatly imposes liability for the threatening discharges of oil rather than prohibiting discharges "in such quantities as may be harmful as determined by the President."124 Under the OPA, the President "shall . . . ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of a discharge of oil . . . that may affect natural resources" in accordance with the National Contingency Plan and any appropriate area contingency plan.125 This is a far more forceful directive than the relatively passive "the President is authorized to remove or arrange for the removal of such oil . . . unless he determines such removal will be done properly by the owner or operator of the vessel."126

IV. OIL INDUSTRY INITIATIVES

Exxon's multi-billion-dollar unfinished clean-up effort proved that even the expenditure of enormous sums of money may not be able to adequately repair environmental damage. Preventing spills from occur-

123. But see sources cited supra note 58.
ring in the first place is certainly a far better objective. Short of that objective, better clean-up methods are imperative.

Recognizing this, the oil industry has begun to take a more active role in mitigating disasters and devising more effective and efficient methods of clean-up. For example, the American Petroleum Institute is leading an oil industry effort to deal more effectively with oil spills. The Marine Spill Response Corporation (MSRC), an independent, privately financed, nonprofit organization, was recently established to equip and train personnel to combat catastrophic spills throughout the tidal and offshore waters of the United States. The MSRC is funded by the Marine Preservation Association, whose members are owners, shippers, and receivers of crude oil and petroleum products.127 The MSRC is also expected to finance research on the chemical and biological effects of spilled oil on the environment, as well as techniques for on-water recovery and treatment. Five regional response centers will be established (New York-New Jersey, Port Everglades in South Florida, Lake Charles in Louisiana, the Port Hueneme area of Southern California, and Seattle, Washington), and each center will be capable of responding to a spill of up to 216,000 barrels.

After the Santa Barbara blowout, the Chief Deputy Attorney General for the State of California remarked

To date, there seems to be only one means of effectively and safely handling an oil spill. Take one man, one rake, one 10-foot punt, and one bale of hay. Are they to be the frontline of defense in an industry which has the technical sophistication required to find oil and drill into earth for 15,000 feet to get it?128

While booms remain an important tool in oil spill cleanups, Exxon experimented in Prince William Sound with bioremediation—a process that encourages indigenous bacteria to consume oil—with positive results.129 The oil industry has continued to explore the uses of bioremediation. COREXIT 9580, a chemical developed by Exxon to aid in oil clean-up, is currently being tested.130

Better guidance through difficult waters will also help. Electronic navigational systems, such as the recently developed Precise Integrated Navigation System, could give mariners the ability to "see" water hazards long before they present a real danger, thus enabling the ship to steer clear. Standards for such systems have yet to be agreed upon by the Coast Guard and the International Maritime Organization.131

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Strong legislation to impose liability on those who cause oil spills and award sufficient compensation to public and private property damaged by these disasters is an important step and has been a long time coming. Stringently and vigorously enforced, the Oil Pollution Act of 1990 has the potential to be a powerful tool for the protection of our environment. The nation’s waters and marine environment will depend on it.

Cynthia Carney Johnson