

Fordham Environmental Law Review

Volume 6, Number 1

2011

Article 5

The Oil Pollution Act of 1990

Jeffery D. Morgan*

*

Copyright ©2011 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

ARTICLES

THE OIL POLLUTION ACT OF 1990: A LOOK AT ITS IMPACT ON THE OIL INDUSTRY

JEFFERY D. MORGAN*

INTRODUCTION

In the environmental frenzy which followed 1989's 10.9 million gallon Exxon Valdez oil spill in Alaska's Prince William Sound, Congress managed to break nearly two decades of legislative gridlock by enacting the United States' first comprehensive oil pollution statute, the Oil Pollution Act of 1990 ("OPA"). Eschewing existing domestic and international oil spill liability schemes, Congress drafted tough new requirements for shippers of oil to the United States, prompting at least one commentator to declare the oil-dependent United States "the first nation in history that has tried to blockade itself."¹

Not surprisingly, the oil industry widely criticized OPA and predicted a variety of disastrous effects, both short and long-term. Most of the predicted short-term effects have not appeared, and those which have appeared have not proven disastrous. The possible long-term effects of OPA, however, do raise some reasons for concern. These concerns warrant congressional attention and should be addressed in amendments to OPA.

First, this Article will review the historical background from which OPA developed, taking into account preexisting domestic oil spill legislation.² Second, this Article will examine the actual provisions of OPA. Third, this Article will discuss both the oil industry's response to OPA and the short-term effects of OPA. Fourth, this Article will consider the potentially adverse long-term effects of OPA. Finally, this Article will suggest possible reforms which should be enacted in amendments to OPA.

* Teaching Fellow, Stanford Law School. B.A. 1987, McNeese State University; J.D. 1991, Tulane Law School. The author gratefully acknowledges the helpful comments and criticisms of Professor Hank Greely of Stanford Law School.

1. *Tanker Industry Spokesman Warns of Faults in U.S. Oil Pollution Law*, OIL & GAS J., July 27, 1992, at 41.

2. Two international conventions address oil spill liability. See International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, reprinted in 9 I.L.M. 45 (1970); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 11 I.L.M. 284 (1972). However, since the United States has refused to ratify either agreement, this Article does not discuss their provisions.

I. BACKGROUND TO OPA

A. *History of Federal Oil Spill Legislation*

A review of the fragmented body of law governing oil spills is essential to a proper understanding of OPA's historical significance. In 1851, motivated by a desire to protect the U.S. shipping industry, Congress enacted the Limitation of Liability Act.³ This statute limited the liability of vessel owners to the post-casualty value of the vessel. The extreme consequences of this statute became apparent in 1967 with the wreck of the Torrey Canyon, which spilled over 100,000 tons of crude oil into the English Channel, fouling 100 miles of British and French coasts.⁴ Although by that time Congress had enacted the Oil Pollution Act of 1924, the statute merely placed limitations on the *de-liberate* discharge of oil into coastal waters.⁵ Thus, under the Limitation of Liability Act, compensation for the \$8 million cleanup costs occasioned by the Torrey Canyon spill was limited to \$50 — the value of the sole surviving lifeboat.⁶

In 1969, just two years after the Torrey Canyon spill, an oil platform blow-out sent oil spewing into the picturesque Santa Barbara Channel. Images of oil-soaked shores and sea birds were broadcast into living rooms across the United States, energizing the budding American environmental movement.⁷ Congress quickly recognized that oil pollution had become a serious problem, inadequately addressed by its previous legislation. Accordingly, in 1970, Congress brought oil pollution within the scope of the Federal Water Pollution Control Act ("FWPCA"),⁸ which had previously applied only to sewage and industrial discharge. For the first time, Congress had authorized actions for oil spill cleanup costs.

Under the FWPCA, as subsequently amended, the party responsible for discharging oil into U.S. waters was also responsible for its cleanup. If the responsible party was unable to properly clean up the affected area, the federal government was authorized to do so and hold the responsible party strictly liable for cleanup costs.⁹ However,

3. 46 U.S.C. § 183 (1988).

4. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 135 (1992); Michael P. Donaldson, *The Oil Pollution Act of 1990: Reaction And Response*, 3 VILL. ENVTL. L.J. 283, 284-85 (1992).

5. 43 Stat. 604 (1924) (codified at 33 U.S.C. §§ 431-37 (1988), later repealed at Pub. L. 91-224, 84 Stat. 113, Title 1, § 108 (1970)).

6. PERCIVAL ET AL., *supra* note 4, at 135.

7. *Id.* at 2, 4.

8. 33 U.S.C. §§ 1251-1376 (1988), amended by 33 U.S.C.A. §§ 1251-52, 1268-70, 1319, 1321, 1324 (Supp. 1991).

9. The only defenses available to a responsible party under the FWPCA were when discharge was caused solely by:

- (1) Act of God,
- (2) Act of war,
- (3) Negligence of the United States Government,
- (4) Act or omission of a third party, or

the statute provided specific liability limits. In the case of vessels carrying oil cargo, liability was limited to \$250,000 or \$150 per gross ton, whichever was greater.¹⁰ Even though the FWPCA permitted unlimited liability in the case of willful negligence or willful misconduct, the statute's liability limits proved to be excessively lenient and provided incomplete coverage for oil pollution damages.¹¹

Additionally, liability for oil pollution was also limited under state law. Although the FWPCA did not preempt state laws providing for unlimited recovery of actual cleanup costs,¹² state claims were subject to the Limitation of Liability Act. Thus, where the source of oil discharge was a vessel, even under state law recovery was limited to the post-accident value of the vessel. Moreover, federal maritime law preempted the recovery of damages by individual claimants unless the person seeking recovery had suffered physical damage to a proprietary interest.¹³

In the 1970s, in addition to the more general provisions of the FWPCA, Congress enacted a number of laws addressing oil spills resulting from specific activities or occurring in specific locations. The Trans-Alaska Pipeline Authorization Act ("TAPAA")¹⁴ dealt with oil spills from vessels transporting oil from the Trans-Alaska Pipeline to U.S. ports. The Outer Continental Shelf Lands Act Amendments of 1978 ("OCSLA")¹⁵ focused on the discharge of oil both from offshore facilities located on the Outer Continental Shelf and from vessels

(5) Any combination of the above.

33 U.S.C. § 1321(f)(3).

10. 33 U.S.C. § 1321(f)(1).

11. Donaldson, *supra* note 4, at 284-85.

12. 33 U.S.C. § 1321(o)(2) (1988).

13. State of Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc), *cert. denied*, 477 U.S. 903 (1986); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50 (1st Cir. 1985).

Examples of nonrecoverable economic losses that do not constitute physical damage to a proprietary interest include:

(1) Shipping and/or other shipping type interests unable to traverse the [oil spill] area. This includes claims with respect to vessels actually in the area at the time or rerouted around the area at the time.

(2) Marina and boat rental operators.

(3) Wholesale and retail seafood enterprises not actually engaged in fishing, shrimping, crabbing or oystering in the mandated area.

(4) Seafood restaurants.

(5) Tackle and bait shops.

(6) Fishermen, oystermen, shrimpers and crabbers who engaged in these activities for recreational purposes only.

State of Louisiana ex rel. Guste v. M/V Testbank, 524 F. Supp. 1170 (E.D. La. 1981), *aff'd on other grounds*, 728 F.2d 748 (5th Cir. 1984), *aff'd en banc*, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986). *But see* Kinsman Transit Co. v. City of Buffalo, 388 F.2d 821 (2d Cir. 1968) (permitting recovery of damages notwithstanding the absence of physical damage to a proprietary interest). *See also* Donaldson, *supra* note 4, at 284-85.

14. 43 U.S.C. §§ 1651-55 (1988).

15. 43 U.S.C. §§ 1801-66 (1988).

transporting oil from such offshore facilities. Finally, the Deepwater Port Act ("DPA")¹⁶ applied to oil handling facilities located beyond the U.S. territorial sea and used for the trans-shipment of oil from tankers to pipelines.¹⁷

TAPAA, OCSLA, and the DPA each imposed strict liability on parties responsible for the discharge of oil. Each statute established its own scheme of liability limits. Furthermore, each statute set up a separate fund to cover cleanup costs exceeding liability limits.

Proposals to streamline this patchwork of oil spill laws remained bogged down in Congress throughout the 1980s. Then, on March 24, 1989, the Exxon Valdez went aground in Prince William Sound, Alaska. Television crews swarmed to the site, and Americans witnessed the damage caused by approximately 11 million gallons of spilled oil. As thick black sludge washed onto the formerly pristine coast, wildlife activists scurried around heaping piles of animal carcasses in an effort to rescue marine mammals and sea birds. Even those individuals who previously had not considered themselves part of the now well-organized American environmental movement, were outraged by the daily images. The nation gasped, and Congress responded in a rare act of unanimity, enacting the final draft of OPA without a single dissenting vote.¹⁸

B. *The Provisions of OPA*

1. Liability and Damages

OPA places strict liability on the "responsible party," which it defines in the case of vessels as "any person owning, operating, or demise chartering the vessel."¹⁹ Notably, this definition does not include the owner of the oil cargo aboard the vessel. With respect to offshore oil facilities, OPA defines "responsible party" as the "lessee or permittee of the area in which the facility is located or the holder of a right of use and easement" granted under state law or OCSLA.²⁰ A responsible party may establish a defense to liability only if he or she can show, by a preponderance of evidence, that the sole cause of the discharge was an act of God, an act of war, or an act or omission of a third party.²¹

16. 33 U.S.C. §§ 1501-24 (1988).

17. Only one such facility currently exists, the Louisiana Offshore Oil Port (hereinafter LOOP).

18. 136 CONG. REC. S11,547 (daily ed. Aug. 2, 1990); 136 CONG. REC. H6,949 (daily ed. Aug. 3, 1990).

19. 33 U.S.C. § 2701(32)(A) (1988).

20. 33 U.S.C. § 2701(32)(C). For onshore facilities and pipelines, the responsible party is the owner or operator of the facility or pipeline, respectively. 33 U.S.C. § 2701(32)(B), (E).

21. 33 U.S.C. § 2703(a). The third party defense does not apply if the third party is an employee, agent, or someone in a contractual relationship with the responsible party. *Id.*

OPA expands damages for oil spills beyond those previously available under federal law. Individual claimants may recover damages for several types of injury. Most notably, OPA recognizes, as recoverable damages, loss of profits or impairment of earning capacity due to injury of natural resources.²² Therefore, hotel owners, pleasure craft lessors, and coastside restaurateurs may recover under the statute. OPA also recognizes a right of recovery for economic losses stemming from the destruction of real or personal property, whether the claimant owns or leases the property.²³ As such, for the first time, even when the claimant has no claim for physical loss, as in the case of a lessee, he or she may still recover. The statute further permits recovery by individual claimants who rely upon natural resources for subsistence.²⁴

Further, a federal, state, foreign government, or Indian tribe trustee may recover damages for injury to natural resources, including the reasonable cost of assessing the damage.²⁵ Federal and state governments may also recover damages for the loss of taxes, royalties, rents, fees, or profits brought about by injury to property or natural resources.²⁶ Moreover, states may claim damages for the costs of providing additional public services necessitated by an oil spill. Such services include those designed to protect the public from fire, safety, or health hazards.²⁷ Finally, consistent with previous oil spill legislation, OPA provides for the recovery of cleanup and removal costs.²⁸

2. Limitations on Liability

The expansive damages recognized under OPA are seemingly balanced by liability limits. For tank vessels greater than 3000 gross tons, the limit on liability is the greater of \$1200 per gross ton or \$10 million. For tank vessels between 300 and 3000 gross tons, the limit is the greater of \$1200 per gross ton or \$2 million. For all other vessels, the limit is the greater of \$600 per gross ton or \$500,000. The liability limit for offshore facilities is \$75 million plus the cost of cleanup.²⁹ After liability limits are reached, damages are to be paid from the Oil Spill Liability Trust Fund, which has the authority to spend up to \$1 billion per incident.³⁰

22. 33 U.S.C. § 2702(b)(2)(E).

23. 33 U.S.C. § 2702(b)(2)(B).

24. 33 U.S.C. § 2702(b)(2)(C).

25. 33 U.S.C. § 2702(b)(2)(A).

26. 33 U.S.C. § 2702(b)(2)(D).

27. 33 U.S.C. § 2702(b)(2)(F).

28. 33 U.S.C. § 2702(a), (b)(1).

29. 33 U.S.C. § 2704. The liability limit for onshore facilities and deepwater ports is \$350 million. *Id.*

30. 33 U.S.C. §§ 2701(11), 2712; 26 U.S.C. § 9509. The Fund receives five cents for each barrel of oil, imported and domestic, transported in U.S. waters.

Owners of vessels weighing more than 300 gross tons must maintain proof of financial responsibility in an amount equal to the maximum amount of liability to which they might be exposed.³¹ Owners of off-shore facilities must maintain evidence of financial responsibility equaling \$150 million.³² If financial responsibility is maintained through insurance, the insurer becomes a "guarantor" and is subject to direct suit.³³

Notwithstanding OPA's liability limits, potentially responsible parties may not rest assured that they will be entitled to invoke the liability limits. The statute provides for unlimited liability in the event of gross negligence, willful misconduct, failure to report a spill, failure to cooperate in connection with cleanup, or violation of an applicable federal safety, construction, or operating regulation.³⁴

Moreover, OPA does not preempt the authority of individual states to impose unlimited liability on parties responsible for discharging oil. Indeed, OPA specifically provides that the preexisting Limitation of Liability Act similarly does not preempt state law.³⁵ Thus, OPA's liability limits provide no protection for responsible parties sued under state law.

Furthermore, under OPA's subrogation provision, even the Oil Spill Fund may proceed against the responsible party based on state unlimited liability laws. That is, once a responsible party has paid damages up to OPA's liability limits, the Fund will take over and pay further cleanup costs up to \$1 billion. The Fund then becomes "subrogated to all rights, claims and causes of action that the claimant has under any other law."³⁶ Thus, if the Fund has paid the cleanup costs of an individual state, it becomes subrogated to that state's rights. In this way, the responsible party's liability limit under OPA effectively becomes \$1 billion.³⁷

3. Regulatory Changes

OPA mandates that all new vessels built for oil transportation be equipped with a double hull when operating in U.S. waters or the U.S. exclusive economic zone.³⁸ For existing vessels, the double hull requirement is phased in over several years, depending upon the size

31. 33 U.S.C. § 2716.

32. *Id.*

33. *Id.*

34. 33 U.S.C. § 2704(c)(1), (2).

35. 33 U.S.C. § 2718. By August 1991, no fewer than 36 states, among them California, Connecticut, Louisiana, and Maine, had imposed unlimited liability on petroleum carriers. Janet Plume, *1990 Law Transforms Oil Barge Industry*, J. OF COM., Feb. 21, 1991, at 9A [hereinafter Plume I]; A.F. Bessemer Clark, *The U.S. Oil Pollution Act of 1990*, LLOYD'S MAR. & COMM. L. Q., May 1991, at 247, 250 n.11.

36. 33 U.S.C. § 2715(a) (1988).

37. See Clark, *supra* note 35.

38. 46 U.S.C. § 3703(a) (1988 & Supp. IV 1992).

and age of the vessel. This retrofit requirement begins in 1995 and proceeds in successive stages until 2010, when all vessels over 5000 gross tons must be equipped with double hulls.³⁹ An exception to this rule exists for vessels that currently have either only double bottoms or double sides and for vessels offloading more than sixty miles from the coast. These vessels must have double hulls by 2015.⁴⁰

OPA also contains prevention and early response provisions. Among these many provisions, the statute authorizes the federal government to examine records for alcohol and drug offenses of mariners seeking licenses or various other documents.⁴¹ It also establishes a national planning and response system,⁴² and requires owners and operators of tank vessels and facilities to prepare and submit individual response plans.⁴³

II. THE SHORT-TERM EFFECTS OF OPA

Faced with OPA's expansive damages provisions, deceptive liability limits, and expensive double hull requirements, there is little wonder that much of the petroleum shipping industry responded to the legislation with outrage. The industry warned that the new law would threaten imported oil supplies to the United States. It predicted that the possibility of open-ended claims would scare away legitimate companies unwilling to risk their assets each time they ship a load of oil to the United States. Instead, "rust bucket" tanker owners without the resources to cover cleanup costs or satisfy damage claims would be attracted to U.S. waters as they would have little to lose. The result, it warned, would be higher oil prices and more oil spills.⁴⁴ The industry further cautioned that large companies would restructure operations in an effort to shield assets. In a final act of desperation, some shipping companies threatened to boycott the United States.⁴⁵ However, these industry pronouncements, made while OPA was still being considered by legislative committees, were widely viewed as an attempt to influence legislators.⁴⁶

A. *Transportation of Imported Oil to the United States*

Presently, three-and-a-half years after OPA was signed into law, it is possible to preliminarily examine its real impact. In short, most vessel

39. 46 U.S.C. § 3703a(c)(3).

40. 46 U.S.C. § 3703a(b)(3), (c)(4).

41. 46 U.S.C. § 7101.

42. 33 U.S.C. § 1321(j).

43. 33 U.S.C. § 1321(j)(5).

44. Allanna Sullivan, *Oil Firms, Shippers Seek to Circumvent Laws Setting No Liability Limit for Spills*, WALL ST. J., July 26, 1990, at B1.

45. Robin Buckner Price, *U.S. Oil Spill Law to Cause Growing Tanker Problem*, OIL & GAS J., Sept. 30, 1991, at 21.

46. Brewer, *Boycott Threat Seen as Lobbying Tactic*, LLOYD'S LIST, July 4, 1990, at 10.

owners have not refused to carry oil to the United States. However, the industry's prediction that the Act would prompt responsible shippers to cease operations in U.S. waters has not proven totally invalid. Shell immediately withdrew its fleet from U.S. trade waters, opting instead to use chartered vessels for the transport of its oil to the U.S. mainland.⁴⁷

Shell has also started to decrease the size of its tanker fleet from ninety to fifty vessels and to phase out its third-party transportation business.⁴⁸ Following Shell's lead, a number of international shipping companies have barred their tankers from calling at U.S. ports, including Teekay Shipping, Elf Aquitaine, A.P. Moller, Petrofina, and Maersk.⁴⁹ Amoco has trimmed its chartering business that carries oil owned by third parties, but continues to ship its own oil to its four U.S. refineries.⁵⁰ Chevron has significantly reduced its deliveries in U.S. waters.⁵¹ Furthermore, a number of tanker owners, including Shell, have refused to carry heavy crude and other "dirty oils" to the United States. Such crudes and other heavy fuels are considered "dirty" because they are difficult and costly to clean up in the event of a spill.⁵²

Hawaii has become all too familiar with shippers' fears of heavy fuel oil. In April 1992, Pacific Resources Inc., the leading supplier of oil to the Hawaiian islands, stopped shipping industrial fuel oil to the islands and warned that it might pull out of the tanker trade altogether. Chevron also ceased shipments to Kauai and attempted to convince the island's local utility to buy diesel oil. While diesel oil is costlier than industrial-grade fuel, it carries less liability risk since it is lighter and easier to clean up in the event of a spill along the islands' sensitive coasts.⁵³

Faced with the prospect of an estimated thirty percent increase in electricity costs, Hawaii's state legislature quickly passed legislation temporarily limiting oil spill liability under state law to \$700 million.⁵⁴

47. Derek Bamber, *Oil Tanker Market Never Up Long*, PETROLEUM ECONOMIST, Aug. 1991, at 15.

48. Price, *supra* note 45, at 21.

49. These companies, like Shell, do permit their vessels to call at the Louisiana Offshore Oil Port. LOOP is the United States's only deepwater port that is located a sufficient distance from oil sensitive coastlines to ease shipper's concerns. Amy Feldman, *Aloha*, FORBES, May 11, 1992, at 20. Price, *supra* note 45, at 21.

50. *Amoco Trims Charters*, PLATT'S OILGRAM NEWS, Feb. 3, 1993, at 3.

51. Price, *supra* note 45, at 21.

52. Aviva Freudmann, *Oil Tanker Owners Adjust to Risks Under Pollution Law*, J. OF COM., Feb. 21, 1991, at A9.

53. Feldman, *supra* note 49, at 20; Jim Mulrenan, *Hawaiian Concern Over Oil Pollution Act May Lead to Amendment of Legislation*, LLOYD'S LIST, June 8, 1992; Harold Morse & Rod Thompson, *Big Isle, Maui Oil Shipments Will Resume*, HONOLULU STAR-BULL., Apr. 15, 1992, at 1. See also *Hawaiian Electric Unit Shedding Fuel Barge Due to Liability Risks*, ELECTRIC UTIL. WEEK, June 29, 1992, at 18.

54. 1992 Haw. Sess. Laws 130.

This legislative action was sufficient to convince oil suppliers to temporarily resume shipments. Industry groups, however, suggest that a long-term solution must come at the federal level. Indeed, Hawaii's Department of Business, Economic Development, and Tourism has suggested to the state's congressional delegation the possibility of amending OPA. The congressional delegation, however, has not yet developed a position on possible amendments.⁵⁵ Meanwhile, Hawaii Electric Light Company, which produces about fifty-eight percent of its power from fuel oil, continues contingency planning to convert to costly diesel fuel.⁵⁶

B. *Corporate Restructuring and Changes in Vessel Ownership*

As industry experts had further predicted, many tanker operators have reorganized their corporate structures in an effort to protect their parent companies from the reaches of OPA and its potential for unlimited liability. This restructuring has taken place notwithstanding the advice of maritime safety experts urging closer links between owners and ship operations to raise industry safety standards. Indeed, the chairman of the International Association of Independent Tanker Owners ("Intertanko") has labeled restructuring counterproductive and suggested that shipowning companies should be wholly integrated to ensure that top executives are directly involved in ship management.⁵⁷

Typical of the restructurings is Leif Hoegh & Company, one of Norway's largest shipowners, which has transferred its tankers to a new subsidiary, Bona Shipping. The company readily admits that it began restructuring following an assessment of the OPA. While the new subsidiary is wholly owned by Leif Hoegh, the parent company's long-term goal is to turn the subsidiary into a publicly traded company, attracting outside investors and enabling Leif Hoegh to reduce its sharehold to less than fifty percent.⁵⁸

In a more subtle move, Exxon Corporation has reorganized its shipping subsidiary, Exxon Shipping Company. The subsidiary received a new name, as did each of its U.S.-flagged tankers. Additionally, the subsidiary's board of directors was reshuffled and, for the first time, includes directors from outside the parent corporation. While Exxon Corporation conceded that the move was due, in part, to the impact of

55. Mulrenan, *supra* note 53, at 2; *Argument for Liability Limits in Hawaii Goes Federal*, OIL SPILL U.S. L. REP., July 1992; *Hawaii Studying OPA 90's Impact on Shipping*, OIL SPILL INTELLIGENCE REP., June 25, 1992.

56. Morse & Thompson, *supra* note 53, at 1.

57. Janet Porter, *Tanker Industry Divided on Restructuring*, J. OF COM., Oct. 21, 1992, at 1B.

58. *Id.* In a similar move to avoid liability for future spills, I.M. Skaugen, another of Norway's large shipping groups, spun its U.S. oil transfer shipping activities into a separate company. Janet Plume, *1990 Law Transforms Oil Barge Industry*, J. OF COM., Aug. 19, 1991, at 10B [hereinafter Plume II].

OPA, it expressly denied that it was a legal maneuver designed to shield itself from the future liabilities of its subsidiary. Rather, the corporation asserted that, even before the reorganization, its shipping subsidiary was liable for its own actions separate and apart from the parent corporation.⁵⁹ However, it cannot be denied that the reorganization places further distance between the two companies and their respective assets.

OPA's impact, however, has not been limited to large seafaring crude tankers. Domestic parent corporations, unwilling to risk the increased liability under OPA, have been selling off tanker barge companies. Inland tanker barge fleets, which transport an estimated thirty percent of all the petroleum consumed in the United States, frequently traverse the waters of numerous states and, as a result, are especially vulnerable to state unlimited liability schemes.⁶⁰

Of course, given the "greener than thou" climate of corporate America, parent corporations are not always forthright about the motive for selling tanker barge subsidiaries. When New York-based Sequa Corporation sold its tanker barge company, Sabine Towing and Transportation Company, the official reason given for the transaction was that petroleum products no longer fit into the parent company's identity as a manufacturer of aerospace components. However, the company announced no similar divestiture of another of its barge subsidiaries which transports steel and grain. Indeed, executives at Sabine admitted that the parent company's decision to sell was influenced by the unlimited liability imposed on petroleum carriers by state legislatures.⁶¹

Industry experts hope that the trend toward divestiture of inland barge fleets will result in the consolidation of the tanker barge industry into a few strong companies able to spend time and money maintaining equipment and safety procedures. Yet, they fear that the actual result will be an increased entry into the marketplace by undercapitalized, substandard operators who will simply walk away from spills.⁶²

Considering the aforementioned examples, one must acknowledge that the oil industry's early warnings were not totally without merit.

59. Joel Glass, *Exxon Plans U.S. Shipping Unit Shake-Up*, LLOYD'S LIST, Mar. 3, 1993. Other shipowners have chosen to maintain their present corporate structure, conceding that restructuring would not "outsmart" lawyers. Porter, *supra* note 57, at 1B.

60. Plume II, *supra* note 58, at 1A. See also *Barge Industry Spokesman Calls for Changes in Oil Pollution Act*, BC Cycle, Sept. 15, 1992, available in LEXIS, Nexis Library, UPI File.

61. Plume II, *supra* note 58, at 1A. Similarly, Ashland Oil Company has sold its Great Lakes tanker barge operation. The company explained that the sale was precipitated by the unlimited liability provisions of several states along the Great Lakes. *Id.*

62. *Id.*

When major oil companies cut back on transporting their own oil in favor of third-party charter vessels, the abundant assets of those companies become unavailable under OPA should a spill occur. Likewise, unless litigants are able to "pierce the corporate veil," the strategic restructuring of corporate entities will place assets out of reach from potential plaintiffs. In both situations, the end result is an increased likelihood that cleanup costs and damages will be borne by the tax-funded Oil Spill Liability Trust Fund.

However, the industry's doomsday predictions have not proven accurate. The United State's flow of imported oil has not been reduced, nor have U.S. oil spills increased. A study commissioned by the U.S. Department of Energy ("DOE") concluded that most tanker owners have continued trading to the United States at the same rate as they were prior to the enactment of OPA.⁶³ Moreover, many of these companies have established closer links with independent shipowners and have fashioned thorough inspection programs for chartered vessels. These programs seem to have effected a small but noticeable improvement in the safety of chartered tankers.⁶⁴ According to the DOE-commissioned study, the most perceptible effect of the Act, thus far, has been the change in operational procedures, safety provisions, and inspection routines implemented in the oil trades.⁶⁵ The study noted that "the early signs of a flight to quality provides a stark contrast to the fears of many OPA critics who forecast that U.S. oil imports would be carried in inferior ships by uncaring owners for unscrupulous charterers. The exact opposite is occurring."⁶⁶

C. Spill Prevention and Response

Significantly, reports show a marked reduction in the number and size of oil spills in U.S. waters since the enactment of OPA.⁶⁷ While many observers attribute this trend to sheer luck, others credit OPA's liability provisions for generating fear among shipowners and creating an atmosphere of increased vigilance in the oil industry.⁶⁸

63. Office of Domestic & Int'l Energy Policy, United States Dep't of Energy, *Transporting U.S. Oil Imports: The Impact of Oil Spill Legislation on the Tanker Market*, prepared by the Petroleum Industry Research Foundation, June 1992 [hereinafter PIRF Study].

64. The Tanker Advisory Center, which annually rates the condition of the world's tankers on a scale from 1 to 5, noted that tankers in U.S. waters averaged 3.6 by March 1992. Immediately prior to the Alaskan spill, that average had been 3.4. Michael Parrish, *Drop in U.S. Oil Spills Tied to Tough Laws*, L.A. TIMES, Aug. 22, 1992, at A1.

65. See PIRF Study, *supra* note 63.

66. *Id.*

67. *Decline Listed For Spills Off the U.S.*, OIL & GAS J., Oct. 5, 1992, at 30; *Tanker Spill Study Charts Recent Gains*, PLATT'S OILGRAM NEWS, Aug. 28, 1992.

68. Rep. W.J. "Billy" Tauzin, Chairman of the House Coast Guard and Navigation Subcommittee, described the lack of spills as "extraordinary," noting that "[s]omebody's scared to death out there." Penny Bender, *Lawmakers Question Coast*

When spills have occurred, OPA's spill response provisions generally have been credited with quick and effective cleanup. In the largest spill since the Valdez disaster, the Morris J. Berman discharged 750,000 gallons of heavy oil off the coast of Puerto Rico on January 7, 1994. Within twenty hours of the spill, tons of equipment had been delivered to the site and response crews commenced containment of operations. In the end, most of the damage was restricted to a one-mile stretch of the coastline. Industry experts agree that such a feat would not have been possible without OPA's rapid mobilization provisions that require that emergency spill supplies be prepositioned around the United States.⁶⁹

Moreover, given that occasional spills are inevitable regardless of safety precautions, OPA's stiff liability provisions have prompted some shippers to rethink traditional shipping routes. This is most evident off the coast of California. California is particularly sensitive to oil spills as its scenic coastline attracts millions of tourists each year. Thus, it is widely considered by tanker owners to be the worst place to spill oil in U.S. waters. As a result, Arco, Exxon, British Petroleum and seven other oil shipping companies, all of which carry Alaskan crude to California, have voluntarily agreed among themselves to operate at least fifty miles off the California coast. The shippers will only breach the fifty-mile limit when coming into port. This strategy reflects expert predictions that a major oil spill fifty miles offshore would break up before reaching the California coast.⁷⁰ Therefore, on the whole, the statute's short-term impact generally appears to be positive, notwithstanding OPA's tendency to encourage asset cloaking behavior.

III. THE LONG-TERM EFFECTS OF OPA

Although the industry's incendiary warnings have not proven accurate, the possible long-term effects of OPA do raise some reasons for concern. The potential for unlimited liability, coupled with the statute's requirement that insurers serve as guarantors, has resulted in the insurance industry's refusal to issue proof of financial responsibility to vessel owners. Without proof of financial responsibility, vessels cannot enter U.S. waters. Thus far, regulators have avoided this conflict by refraining from enforcing OPA's financial responsibility requirements. Ultimately, however, this conflict must be resolved. Furthermore, OPA's failure to create even a qualified exemption for vessel

Guard On Safety of Oil Tankers, GANNETT NEWS SERV., Feb. 17, 1993; *See also Decline Listed For Spills Off the U.S.*, *supra* note 67, at 30; *Big Drop Found in U.S. Oil Spills*, N.Y. TIMES, Aug. 23, 1992, at A31; Parrish, *supra* note 64, at A1.

69. Tom Kenworthy, *San Juan Spill Tests Oil Pollution Act*, WASH. POST, Jan. 10, 1994, at A4; *Massive Spill Off Puerto Rico*, LLOYD'S LIST, Jan. 8, 1994, at 1.

70. *Alaskan Crude Oil Tankers to Stay 50 Miles Off California*, LLOYD'S LIST, May 28, 1992, at 1.

creditors creates a disincentive for lenders to finance fleet modernization and replacement. Finally, OPA's offshore facility provisions appear unreasonable and may pose a threat to domestic oil production.

A. *Financial Responsibility*

The U.S. Coast Guard, which is responsible for implementing OPA's vessel provisions, admits that "the jury is still out" on the most serious prediction issued by industry analysts.⁷¹ The prediction, known as the "train wreck" scenario, anticipates that all shipping activity in U.S. waters could literally stop unless the currently unimplemented insurance requirements of OPA are changed. Under OPA, owners of vessels weighing more than 300 gross tons are required to maintain evidence of financial responsibility sufficient to meet the maximum amount of liability to which they might be exposed.⁷² Owners must apply to the Coast Guard for a Certificate of Financial Responsibility ("Certificate") evidencing their ability to pay for cleanup and damages under OPA. If a vessel attempts to enter U.S. waters without a Certificate, it "shall be subject to seizure by and forfeiture to the United States."⁷³

This procedure is not new, since shippers were already required to obtain Certificates under preexisting laws, such as the FWPCA⁷⁴ and Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA").⁷⁵ Currently over 23,000 vessels carry Coast Guard Certificates.⁷⁶ In obtaining these Certificates, the maritime industry has always relied upon insurance to provide the requisite evidence of financial responsibility.⁷⁷ Under OPA, as under preexisting law, the insurer occupies the position of guarantor and must agree to be sued directly. However, OPA expands the liability of responsible parties and their guarantors far beyond that recognized under previous law.

Under the FWPCA, responsible parties and their guarantors were only liable for removal costs and damages to natural resources. Damages suffered by private parties were compensable only under state law, and even then, damages were limited to the value of the vessel pursuant to the Limitation of Liability Act. As previously discussed, OPA removes federal limitations on liability under state law and in-

71. Telephone interview with Bruce Novak, OPA 90 Staff, U.S. Coast Guard (Jan. 14, 1994).

72. 33 U.S.C. § 2716.

73. 33 U.S.C. § 2716(b)(3) (Supp. V 1988). The vessel owner is also subject to a civil penalty of \$25,000 per day of violation. 33 U.S.C. § 1321(7)(A) (Supp. V 1988).

74. 33 U.S.C. §§ 1251-1387 (1988).

75. 42 U.S.C. §§ 9601-75 (1988).

76. United States Coast Guard, *Preliminary Regulatory Impact Analysis: Financial Responsibility for Water Pollution (Vessels)*, CGD 91-005, July 12, 1993, at 26 [hereinafter *RIA*].

77. Susan B. Geiger, *Preparing For the Worst*, TEX. LAW., Jan. 11, 1993, at 16.

creases both the number and amount of damages compensable under federal law.

The increased liability under OPA has prompted the Protection and Indemnity Clubs ("P&I Clubs"), which provide indemnification coverage for ninety-five percent of the world's oceangoing fleet, to announce that they will refuse to issue guaranties for the purpose of complying with the new liability requirements. Under OPA, a guarantor may only assert the same defenses available to responsible parties, with the additional defense of willful misconduct of the responsible party.⁷⁸ Thus, traditional policy defenses and exclusions are unavailable. Most notably, as guarantors, the P&I Clubs would be unable to invoke the pay-to-be-paid rule.⁷⁹

Under preexisting law, the P&I Clubs did not object to being guarantors because liability was strictly limited. Under OPA, however, P&I Clubs fear that, as guarantors, they would be exposing themselves to potentially unlimited liability. In addition, even when OPA's liability limits are not breached, under its direct action and expanded claims provisions, the P&I Clubs still would be forced to respond to a multitude of claims, incurring enormous litigation costs.⁸⁰

Although the P&I Clubs have refused to provide proof of financial responsibility, they continue to provide indemnity coverage to shippers, albeit at a substantial increase in rates.⁸¹ A warranty provision in the current policies specifically provides that the policies may not be used as proof of financial responsibility under OPA.⁸²

78. 33 U.S.C. § 2716(f) (Supp. V 1988).

79. P&I Clubs provide indemnity insurance, not straight insurance, to their members. Under the basic principles of indemnity insurance, a P&I Club is only obligated to pay one of its members if the member first pays the claim out of its own pocket. Thus, if the liable member is unable to pay the claim, the P&I Club is under no obligation to pay the claim. *RIA, supra* note 76, at 75.

80. The numerous claims filed in connection with the August 17, 1993 Tampa Bay spill are indicative of the diverse claims potentially recognized under OPA's liberal damages provisions. Claims included those filed by commercial fishermen, marinas, boaters, hotels, and businesses ranging from an ice cream shop to a water-scooter renter. One claimant complained that she had to give her dog a bad haircut after a wave lapped over the side of her boat and spotted the dog with tar. Laura Griffin, *Businesses, Residents File Claims For Damages*, ST. PETERSBURG TIMES, Aug. 18, 1993, at 1A.

In addition to removal costs, the Act recognizes as compensable: natural resources damages, loss of subsistence use of natural resources, real or personal property damages, damages for increased costs of public services, loss of profits and earning capacity, and loss of revenues including taxes. 33 U.S.C. § 2702.

81. Less than two years after the enactment of OPA, the rates on a typical \$700 million liability insurance policy for tankers making U.S. deliveries had increased from 49 cents per gross ton to \$7.12 per ton. Feldman, *supra* note 49, at 20. While these costs ultimately have been passed on to consumers, their impact has been mitigated by the low price of imported oil. See *DOE Unveils Oil and Gas Plan; Industry Finds Little to Praise*, OIL & GAS J., Dec. 20, 1993, at 21.

82. Price, *supra* note 45, at 21.

While the Coast Guard has indicated that it will accept alternative evidence of financial responsibility in the form of self-insurance, surety bonds, or financial guaranties, these alternatives do not appear to be viable options for most shipowners.⁸³ The self-insurance option, for example, is of little use to the industry because the Coast Guard's proposed rule would permit only U.S. assets to be counted in establishing a company's net worth but requires the balance sheet to include worldwide liabilities.⁸⁴ The American Petroleum Institute has indicated that not one of its member companies could meet the proposed net worth test for self-insurance.⁸⁵ Nonetheless, the Coast Guard, bound by congressional intent, has rejected industry suggestions for making the self-insurance option a viable alternative.

Initially, the industry suggested that vessel owners' participation in the P&I Clubs be accepted as a \$500 million asset for the purpose of satisfying the self-insurance option. This would enable the P&I Clubs to avoid direct action and use their policy defenses, since they would not be providing direct evidence of financial responsibility. The Coast Guard dismissed this suggestion, asserting that it was contrary to congressional intent to assure claimants that vessel owners will have sufficient funds to pay costs and damages under OPA. Since the P&I Club could raise a number of policy defenses, including insolvency of the vessel owner, the vessel owner might not have the right to demand payment to the claimant by the Club.⁸⁶

Furthermore, the industry suggested that the Coast Guard eliminate the requirement to maintain assets in the United States by allowing worldwide assets to be measured against worldwide liabilities. In response to this suggestion, the Coast Guard noted that even under this "modified assets" formulation of the rule, most U.S. and foreign independent tanker operators would not be able to self-insure. Moreover, such a rule would pose problems for claimants who would be forced to pursue assets abroad. Under such circumstances, legal expenses might often exceed recoveries.⁸⁷

As of Spring 1992, less than two percent of all Certificates issued by the Coast Guard were supported by self-insurance.⁸⁸ Essentially, the Coast Guard does not want vessel owners to increase their reliance

83. 56 Fed. Reg. 49,006 (1991) (to be codified at 33 C.F.R. §§ 130-32, 1371) (proposed Sept. 26, 1991).

84. The same method of calculation is applied to those attempting to evidence financial responsibility with a financial guaranty. 56 Fed. Reg. 49,006 (1991). See also Patrick Crow, *Insuring Tankers*, OIL & GAS J., Nov. 11, 1991, at 27 [hereinafter Crow I].

85. Crow I, *supra* note 84, at 27.

86. RIA, *supra* note 76, at 71-76. See also *Preliminary RIA Considers Four Options for COFR Regulations*, OIL SPILL U.S. L. REP., Aug. 1993.

87. RIA, *supra* note 76, at 78-81. In support of this proposition, the Coast Guard noted that Greece has legislation prohibiting enforcement of U.S. court judgments for damages under OPA 90. *Id.* at 81.

88. *Id.* at 77.

upon this option.⁸⁹ Importantly, the Coast Guard has indicated that it “does not consider self-insurance and financial guaranties to be iron-clad methods of evidencing financial responsibility; assets can be dissipated without the Coast Guard’s knowledge, and continuous monitoring of self-insured entities’ asset bases is not feasible. Nevertheless, because OPA 90 allows these methods to be used, they are included in the [proposed rule].”⁹⁰

Since most vessel owners are no more capable of obtaining a sufficient surety bond than they are of obtaining a financial guaranty or establishing self-insurance,⁹¹ the only remaining alternative is to obtain insurance. However, the P&I Clubs have steadfastly maintained that they will not issue coverage guaranties under OPA. This stalemate between the Coast Guard and the P&I Clubs has prompted some industry analysts to declare the advent of “Armageddon” in the oil industry. Indeed, the prospect of an OPA-induced energy crisis has led the very congressional committees that drafted the law to become concerned about its severity and to begin pressuring the Coast Guard to “somehow make the new law work.”⁹²

The Coast Guard’s response has been to delay implementation of the new Certificate provisions, accepting in the interim Certificates issued under previous laws. In an effort to predict the likely effects of its proposed regulations under OPA, the Coast Guard has conducted a regulatory impact analysis.⁹³ As a result of this analysis, the Coast Guard concluded that if the P&I Clubs continue to refuse to provide adequate guaranties of liability coverage to shipowners, the U.S. economy could be severely disrupted and a severe recession could ensue. Then, not only the U.S. economy, but also worldwide economic markets would be disrupted. In the “train wreck” scenario, as much as twenty-five percent of the oil supply to the United States would be cut because oil tankers could not enter U.S. waters without a Certificate. Furthermore, since OPA does not distinguish between vessels transporting oil cargo and those propelled by fuel oil, dry bulk vessels could not enter U.S. ports either. Thus, imported goods would have to be shipped to Canadian or Mexican ports, increasing their transportation costs to the United States.⁹⁴ By the same token, U.S. exports

89. Stacy Shapiro, *Oil Spill Liability Crisis*, BUS. INS., Aug. 2, 1993, at 2; see also *Preliminary RIA Considers Four Options for COFR Regulations*, *supra* note 86.

90. *RIA*, *supra* note 76, at 85.

91. *Preliminary RIA Considers Four Options for COFR Regulations*, *supra* note 86.

92. Crow I, *supra* note 84, at 27.

93. *RIA*, *supra* note 76, at 26. Pursuant to Executive Order 12291, before issuing major rules, federal agencies must prepare a regulatory impact analysis examining the potential economic consequences of proposed rules. Although the Coast Guard’s proposed rule on Certificates of Financial Responsibility is not a major rule, the Coast Guard prepared a regulatory impact analysis due to “widespread concern about the possible economic effects of noncompliance with the rule.” *Id.* at 4.

94. *Id.*; Shapiro, *supra* note 89, at 2.

would become less competitive due to the increased transportation costs of buyers.⁹⁵

Despite these findings, the Coast Guard did not modify its original proposed regulations, stating that these regulations "closely achieve" the objective of the OPA.⁹⁶ Moreover, the Coast Guard hinted that it believes the P&I Clubs are bluffing: "[w]hether the reader [of the regulatory impact analysis] believes these dire consequences would occur depends upon whether the reader also believes that the P&I Clubs will, in fact, not provide or will be prevented by their reinsurance contract from providing the guaranties, and that no alternatives will be available."⁹⁷ More recently, the Clinton Administration has urged that the Coast Guard's proposed regulations be implemented "with due haste" regardless of the P&I Clubs' stance.⁹⁸ For now, the stand-off continues.

B. *Disincentives For Fleet Replacement and Modernization*

OPA's financial responsibility provisions are not the only aspects of the statute which pose a potential threat to future U.S. oil supplies. The Act's imposition of liability solely on the vessel owner, not only has created a disincentive for oil companies to carry crude oil in their own vessels, but also has reduced incentives for charterers to choose the best ship for oil transport. Although high profile oil companies have begun to pay more attention to the quality of ships that move their cargoes, when it comes down to the bottom line, many companies are still opting for the cheaper and older vessels. Most charterers are simply not willing to pay more for better ships, even though there are now serious worries about the environmental safety of older vessels.⁹⁹

New, environmentally preferred double hull tankers are fifteen to twenty percent more expensive to operate.¹⁰⁰ The end result is that the newer and safer ships, which must charge higher transport rates to break even, are often the least favored. Tanker owners complain that, while major oil companies publicly claim they prefer first-class tankers, they refuse to enter into long-term charter agreements that would provide the kind of security needed to justify owners' investment in new tankers. Rather, the major oil companies insist on operating in

95. *RIA*, *supra* note 76, at 85. Tim Sansbury, *Coal, Grain Shippers Fear Backlash of Spill Law*, J. OF COM., Jan. 28, 1992, at 1A.

96. *RIA*, *supra* note 76, at 86.

97. *Id.*

98. Joel Glass, *Clinton Urges Full Ahead On OPA*, LLOYD'S LIST, Oct. 13, 1993.

99. Janet Porter, *Oil Pollution Act Pushes Up Rates to the U.S.*, *Tanker Owners Say*, J. OF COM., Nov. 13, 1991, at 5B.

100. Because environmentally preferred tankers weigh more, they must pay as much as \$60,000 more to transit the Suez Canal or use the Port of Rotterdam. Patrick Crow, *Owners' View of Tankers*, OIL & GAS J., Mar. 8, 1993, at 23 [hereinafter Crow II].

the spot market. In the spot market, it is the cheap rustbucket tanker that is the market leader and sets the rate.¹⁰¹ Consequently, there is little incentive for owners to replace or modernize their fleets.

The pace of ordering new ships began to decline in the second half of 1990. By mid-1992, sixty percent of the world's tanker tonnage was fifteen years old or older.¹⁰² Moreover, recent orders for new tankers have not been sufficient to correct this trend.¹⁰³

Notwithstanding these statistics, the world tanker industry continues to be dogged by overcapacity, which keeps transport rates low. As a result, owners of new tankers, forced to compete with the older vessels, are unable to get rates sufficient to amortize the cost of the vessel over its life. Thus, it makes little sense to order new vessels. Oil companies argue that the tanker industry is responsible for the overcapacity and consequent dearth of new vessel orders. They assert that it is the responsibility of the tanker owners to scrap old vessels, which would drive transport rates up and make new vessels profitable. However, the old amortized vessels, built in the 1970s, are the only vessels capable of making money in the current market. Therefore, individual tanker owners are keeping them as long as possible.

The gradual phase-in of OPA's double hull requirement has created a further incentive for owners to market their old tankers aggressively. With the progressive deadlines looming, owners are induced to make the most of the remaining economic lives of such tankers. Eventually, however, these vessels will have to be scrapped in large numbers. The result will be a possible shortage of crude carriers.

This is not to suggest that new tankers are not being built. However, new building has been slow. Despite the impending mandatory retirement of single hull vessels, the major oil companies have largely chosen to delay fleet replacement.¹⁰⁴ In contrast to their public embrace of the double hull requirement following OPA's enactment, these companies have, in practice, been far less than enthusiastic about securing such vessels. Exxon and Texaco, for instance, have yet to order any double hulled ships.¹⁰⁵ Although Amoco ordered a double hull tanker during the media frenzy surrounding OPA's enactment, it demonstrated its lack of resolve for fleet replacement by sell-

101. *Dangerous Waters*, ENERGY ECON., Nov. 1992; *Tanker Industry Spokesman Warns of Faults in U.S. Oil Pollution Law*, supra note 1, at 41; Derek Bamber, *Oil Tankers Market Never Up For Long*, PETROLEUM ECONOMIST, Aug. 15, 1991, at 15.

102. *Tanker Industry Spokesman Warns of Faults in U.S. Oil Pollution Law*, supra note 1, at 41.

103. As might be expected, given OPA's liability provisions, only four percent of the new tanker orders are for the oil majors, reflecting their increased reliance upon independent vessel owners. *Id.*

104. *Lloyd's: U.S. Firms Delay Tanker Replacements*, OIL & GAS J., Nov. 29, 1993, at 31.

105. *Id.*

ing the tanker to the Greeks even before construction was complete.¹⁰⁶

In contrast, Chevron has ordered two new tankers, and Mobil has ordered one double hull tanker with an option for a second.¹⁰⁷ Of course, these majors are not the only owners to invest in new tankers; independent shipping companies have similarly invested. However, the number of new orders does not appear sufficient to meet the future needs of the industry. Indeed, industry analysts warn that, as OPA's progressive double hull requirements take effect, a serious shortage of suitable tonnage is likely to occur.¹⁰⁸ Over the next decade, to meet the expected need for new ships, the industry would have to invest an estimated \$200 to \$350 billion.¹⁰⁹ Undoubtedly, this is a significant sum even for the world oil industry.

Of course, free market principles suggest that a shortage of modern tankers will be met with an increase in tanker rates that, in turn, will spur new tanker construction. To obtain sufficient capital for such an investment, owners will necessarily turn to banks. However, serious questions exist concerning whether sufficient financing will be available to fund the needed tonnage. Here again, OPA introduces difficulties. Lenders occupy a precarious position under the new law, which has made them more circumspect about shipping loans.

Lenders fear that they will be held liable under OPA. Given the threat of unlimited liability under OPA, the potential for enormous loss is very real. The law does not specifically exclude vessel mortgagees from the list of potential defendants, it merely defines a responsible party as "any person owning, operating, or demise chartering the vessel."¹¹⁰

The question on lenders' minds is whether U.S. courts will interpret "ownership" or "operation" to encompass their security interest and the correlative rights that accompany that interest. Some insight into this question is provided by an examination of similar environmental legislation and the jurisprudence arising thereunder. Like OPA, CERCLA, which addresses marine pollution claims arising from hazardous substances other than oil, places liability on "any person who . . . owned or operated" a polluting vessel or facility.¹¹¹ Unlike OPA, however, CERCLA excludes from the definition of "owner or operator" any "person, who, without participating in the management of a . . . vessel or facility, holds indicia of ownership primarily to protect his

106. *Dangerous Waters*, *supra* note 101.

107. *Id.*

108. Janet Porter, *Operators Fear Rush to Replace Old Ships*, J. OF COM., Aug. 26, 1993, at 6A; Crow II, *supra* note 100, at 23. *Tanker Industry Spokesman Warns of Faults in U.S. Oil Pollution Laws*, *supra*, note 1, at 41.

109. Joseph Bonney, *Money For Ships? 'Yes, But . . .'* *Financial Sources of Shipping Lines*, AM. SHIPPER, May 1993, at 36.

110. 33 U.S.C. § 2701(32)(A).

111. 42 U.S.C. § 9607(a)(2).

security interest in the vessel or facility.”¹¹² Notwithstanding this exclusionary provision, the Eleventh Circuit, in *United States v. Fleet Factors Corp.*, seized upon CERCLA’s “overwhelmingly remedial” goal to justify a broad imposition of lender liability.¹¹³

In *Fleet Factors*, the court held that a secured lender could be liable for pollution damage merely because it had the “capacity to influence” the borrower. Specifically, the court declared that:

[A] secured creditor may incur . . . liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.¹¹⁴

Following the *Fleet Factors* decision, the Environmental Protection Agency (“EPA”), under pressure from the lending industry, issued an interpretive ruling specifying that a lender’s “mere capacity to influence” could not form the basis for liability under CERCLA. Rather, for lender liability to attach, the lender must participate in the day-to-day management of the facility or undertake responsibility for the borrower’s handling of hazardous substances.¹¹⁵ While lower courts have treated EPA’s interpretive ruling as authoritative,¹¹⁶ *Fleet Factors* has yet to be overruled, legislatively or otherwise.

Given the development of the law under CERCLA, lenders are understandably concerned about their potential liability under OPA, which fails to provide even CERCLA’s limited exemption for creditors. Although it has been suggested that Congress left the creditor exemption out of OPA precisely because the *Fleet Factors* court had interpreted it so broadly,¹¹⁷ there is nothing in OPA’s legislative history to support such an assertion. Indeed, given the high profile na-

112. 42 U.S.C. § 9601(20)(A).

113. 901 F.2d 1550, 1557 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991).

114. *Id.* (emphasis added).

115. 40 C.F.R. § 300.1100, as amended, 57 Fed. Reg. 18,344 (Apr. 29, 1992). This ruling comports with the Ninth Circuit’s earlier interpretation of CERCLA’s lender liability provisions. See *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990) (expressly declining to follow *Fleet Factors*).

EPA’s original rule, issued prior to the *Fleet Factors* decision, permits the lender to foreclose on a vessel and hold the vessel for up to a year afterwards without losing its liability exemption, provided the vessel is placed for sale. 40 C.F.R. § 300.

116. *Ashland Oil, Inc. v. Sonford Prods. Corp.*, 810 F. Supp. 1057 (D. Minn. 1993); *Kelley v. Tiscornia*, 810 F. Supp. 901 (W.D. Mich. 1993).

117. *U.S. OPA Penalty Threat May be Easing For Shipping Banks*, LLOYD’S LIST, Mar. 1, 1993.

ture of the lender liability controversy under CERCLA, it may be equally argued that congressional silence on the matter in OPA evinces congressional satisfaction with the *Fleet Factors* standard.¹¹⁸ In any case, such inconclusive arguments do little to assuage the fears of lenders.

The threat of lender liability, however, is consistent with OPA's goal of insuring that ship owners have sufficient funds to pay for pollution cleanup and damages. To protect themselves, lenders have imposed increased collateral requirements upon borrowers that will make it increasingly difficult for small shipping companies to finance modern tonnage. The eventual result will likely be consolidation of shipping concerns and a trend toward large, better capitalized companies, better capable of compensating for pollution.¹¹⁹

A more immediate result, however, may be a shortage of acceptable tonnage as the chilled lending market struggles to accommodate the impending rush for ship replacement. The prospect of a modern tanker shortage is particularly daunting given the United States's current dependence on imported oil. As of the second quarter of 1993, net oil imports accounted for forty-five percent of U.S. consumption.¹²⁰ This statistic takes on added significance when one considers that as recently as 1985, net imports accounted for only twenty-five percent of consumption.¹²¹ A reversal of this trend appears nowhere in sight. The Energy Information Administration, for instance, has projected net imports to reach fifty-two to seventy-two percent by 2010.¹²²

C. Domestic Production

Given the threat to oil imports posed by OPA, one might hope that the law would have a positive, or even neutral, impact upon domestic production. Unfortunately, the law as currently interpreted seems to pose an even greater threat to domestic production.

While the U.S. Coast Guard oversees OPA's application to vessels, the Department of Interior's Mineral Management Service ("MMS") is responsible for implementing OPA's provisions regulating offshore oil facilities.¹²³ OPA requires the responsible party to establish and maintain evidence of financial responsibility in the amount of \$150 million.¹²⁴ Any party who fails to provide such evidence will be sub-

118. In this regard, it is important to note that OPA was enacted after the *Fleet Factors* decision yet before the EPA's interpretive ruling.

119. Bonney, *supra* note 109, at 36.

120. *DOE Unveils Oil And Gas Plan; Industry Finds Little To Praise*, OIL & GAS J., Dec. 20, 1993, at 21.

121. *Id.*

122. *Id.*

123. Exec. Order No. 12,777, 3 C.F.R. § 351 (1992).

124. 33 U.S.C. § 2716(c) (1992).

ject to a maximum penalty of \$25,000 per day of violation and a possible judicial order terminating operations.¹²⁵

Prior to the enactment of OPA, offshore facilities, at least those located on the outer continental shelf, were required to demonstrate evidence of financial responsibility in the amount of \$35 million.¹²⁶ Thus, for these facilities, OPA represents a more than four-fold increase in the amount of capital required to demonstrate financial responsibility. Furthermore, in a shock to the oil industry, MMS has indicated, in an advance notice of proposed rulemaking, that OPA's financial responsibility requirement also applies to facilities located in state waters.¹²⁷ This interpretation of OPA means that pipelines, marina fuel docks, tanks, and oil production facilities located in, on, or under coastal waters, inland channels, lakes, and even wetlands would be subject to the \$150 million requirement.¹²⁸ Some commentators suggest that the requirement would even extend to a tanker truck crossing a bridge.¹²⁹

While MMS's advance notice of proposed rulemaking caught much of the industry by surprise, its content was largely dictated by OPA itself. Congress left little leeway to MMS when it expressly defined the law's terms. OPA defines "facility" as "any structure, . . . equipment, or device (other than a vessel) which is used for . . . : exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes[.]"¹³⁰ More specifically, an "offshore facility" is defined as "any facility of any kind located in, on, or under any of the *navigable waters* of the United States, and any facility of any kind which is subject to jurisdiction of the United States and is located in, on, or under *any other waters*" ¹³¹ Further, OPA defines "navigable waters" as "the waters of the United States, including the territorial sea[.]"¹³²

While it is evident that the effects of OPA, as provisionally interpreted, will be felt throughout the United States, the greatest impact will be upon producers in the Gulf of Mexico and abutting states. The vast majority of the operators affected by OPA's offshore facility pro-

125. 33 U.S.C. § 2716a (1992).

126. See *supra* note 15 and accompanying text.

127. 57 Fed. Reg. 36,032 (1992).

128. See Lynn Hartley, *Independents Seen Hit By MMS Spill Proposal*, PLATT'S OILGRAM NEWS, Aug. 30, 1993, at 3 (comments of MMS Deputy Associate Director Henry Bartholomew) [hereinafter Hartley I].

129. *MMS Seeks OPA Damage Control*, OIL & GAS J., Nov. 15, 1993, at 26.

130. 33 U.S.C. § 2701(9).

131. 33 U.S.C. § 2701(22) (emphasis added).

132. 33 U.S.C. § 2701(21).

visions are located in the Gulf and in Louisiana's marshes and wetlands.¹³³

Although major producers would have little difficulty meeting OPA's financial responsibility requirement, in recent years, the major oil companies have increasingly pulled out of the Gulf. Environmental pressures, restrictive governmental regulations, and a drilling moratorium on promising federal lands in the eastern Gulf have led the majors to withdraw a large portion of their exploration and production budgets from the United States in favor of international pursuits.¹³⁴ In response to this exodus, small independent producers have rushed in to fill the void. By October 1993, independents had made ninety-three percent of all oil and natural gas discoveries and drilled approximately eighty-five percent of all wells on Gulf tracts leased since 1988.¹³⁵ Indeed, these independents produce approximately forty percent of U.S. crude and sixty percent of domestic natural gas.¹³⁶ Unfortunately, OPA threatens to bring this production to a halt.

While MMS has yet to specify what forms of certification it will accept as evidence of financial responsibility, it is clear that very few independent producers have sufficient assets to self-insure at the \$150 million level. Thus, the vast majority of independents will have to prove financial responsibility through alternative means, such as insurance, surety bonds, or letters of credit. However, none of these alternatives appear to be readily available.

Insurance companies have already stated that, while they will continue to provide simple pollution coverage, they will not write coverage for the financial responsibility of offshore facilities. As is the case in the vessel industry, offshore facility insurers fear OPA's potential for unlimited liability. More specifically, insurers object to the fact that the law makes them guarantors for oil companies in the event the companies should fail.¹³⁷ They further suggest that there is simply not

133. Louisiana officials are especially concerned about OPA as 17-18% of all state revenues are derived from the energy sector. An estimated 82% of Louisiana offshore crude oil and 77% of natural gas would be affected by the current interpretation of the law. Lynn Hartley, *Regulation & The Environment*, PLATT'S OILGRAM NEWS, Nov. 29, 1993, at 3 [hereinafter Hartley II].

134. Sheryl Morris, *IPAA Official Urges Review Of Liability Terms In Oil Pollution Act*, INSIDE ENERGY/WITH FEDERAL LANDS, Sept. 6, 1993, at 11; *Drillers Expand Service Capabilities But Eye Costs In Restless World*, OFFSHORE, Dec. 1992, at 22.

135. Bruce A. Wells, *Implementing the Oil Pollution Act of 1990 Could Lead to Sinking Independents Offshore and Onshore*, PETROLEUM INDEPENDENT, Oct. 1993, at 17.

136. John Yoder, *Independents Too Might Walk The Plank If Oil Spill Liability Is Increased*, ENERGY REPORT, Nov. 8, 1993, at 3 (citing remarks of Robert Stone, Jr., senior vice president of First National Bank of Commerce).

137. Daniel Kaplan, *Oil Industry Sees Catastrophe In MMS Proposal*, THE ENERGY DAILY, Dec. 13, 1993, at 2; William Mullins, *Insurers On OPA Law: We Can't Do It*, PLATT'S OILGRAM NEWS, Nov. 5, 1993, at 3; Wells, *supra* note 135, at 17.

enough insurance available in the world market to insure every offshore facility at the \$150 million level.¹³⁸ Yet, even if such coverage eventually is available, the vast majority of independents will not be able to afford the increased policy rates.¹³⁹

Similarly, independent oil companies are unlikely to obtain sufficient surety bonds or letters of credit. Bonding companies generally demand five percent of the bond per year. Therefore, a \$150 million bond would amount to \$7.5 million a year, an amount which exceeds the entire yearly income of most independents.¹⁴⁰ Likewise letters of credit are out of reach for most independents since banks have already indicated that they will not extend such credit to companies that face potential unlimited liability under OPA.¹⁴¹ Accordingly, independents, unable to satisfy OPA's financial responsibility requirement, will be forced out of the market.

In a study commissioned by the Department of Energy, the National Petroleum Council concluded that the current interpretation of OPA would radically undercut domestic production.¹⁴² As much as one-third of the oil and gas industry in the Gulf would be wiped out. Those companies able to continue production will have to contend with expensive insurance rates that will shorten the economic lives of individual wells, inducing producers to leave otherwise recoverable crude in the ground. The result will be a significantly increased dependence on imported oil. In turn, tanker traffic and concomitant risks of serious environmental damage will also increase. Thus, OPA's offshore facility provisions seem to offend sound policy in both the environmental and energy fields.

While MMS is aware of the dire predictions associated with its interpretation of OPA, it does not believe any other interpretation would withstand legal scrutiny. To the oil industry's great disappointment, the agency has been unable to locate any evidence of clear congressional intent contrary to the literal language of the law.¹⁴³ MMS

138. See Yoder, *supra* note 136, at 3; Lynn Hartley, *MMS Hears Angry Words Over \$150-Mil*, PLATT'S OILGRAM NEWS, Nov. 4, 1993, at 3 [hereinafter Hartley III].

139. Michael Crowden, *Will OPA 1990 Bring Closure?*, OFFSHORE, Dec. 1993, at 15; Hartley I, *supra* note 128, at 3. According to Louisiana's Deputy Oil Spill Coordinator, Tim Hebert, of Louisiana's 2000 oil and gas operators, only between 70 and 122 would be able to afford insurance under OPA. *MMS Seeks OPA Damage Control*, OIL & GAS J., Nov. 15, 1993, at 26.

140. Crowden, *supra* note 139, at 15.

141. Hartley III, *supra* note 138, at 3. Furthermore, the inability to demonstrate financial responsibility will result in the devaluation of independents' assets, causing lenders to reevaluate their use as collateral. Thus, as one banker has stated, "the source of capital from banks will dry up." Sheryl Morris, *Opponents' Unanimous Message To MMS: Revise The Oil Pollution Act*, INSIDE ENERGY/WITH FEDERAL LANDS, Nov. 8, 1993, at 9.

142. National Petroleum Council, Dec. 10, 1993 [hereinafter NPC Study].

143. *U.S. Congress Hears Complaints on MMS Financial Responsibility Regulations*, OIL SPILL INTELLIGENCE REP., Nov. 4, 1993, at 5; *MMS Oil Spill Liability Proposal Starts Congressional Review*, ENERGY REP., Nov. 1, 1993.

officials are convinced that the only way to soften OPA is for Congress to make technical amendments to the law. To this end, the agency has held numerous public hearings and has shared industry comments with the appropriate congressional subcommittees. Congress, however, seems content to await the promulgation of the MMS's final rule, which is not expected until 1996.

IV. PROPOSED REFORMS

Given the unusual specificity of OPA's provisions, regulatory agencies such as the Coast Guard and MMS, are ill-positioned to adapt the law to market realities. Although final rulings on the law's most problematic provisions have yet to be promulgated by either agency, it is extremely doubtful that the final rules will vary significantly from the proposed rules. Therefore, with the exception of lender liability, if the problems mentioned in the foregoing discussion are to be averted, Congress must act to do so.

A. *Lender Liability*

Since Congress did not address in OPA the status of entities holding a security interest in vessels or offshore facilities, the respective agencies have discretion to draft regulations on this matter. The agencies should make clear that those entities will not be considered owners, and therefore responsible parties, merely by virtue of their security interest. Furthermore, the regulations should specify precisely which types of affirmative action will be deemed sufficient to impose liability on lenders. Such regulations would enable lenders to provide needed capital for modern vessels and offshore production without fear of lender liability.

B. *Insurance Guaranty Provisions*

In addressing the insurance stalemate, Congress should reexamine the necessity of characterizing insurers as guarantors who are subject to direct suit rather than indemnification proceedings. Understandably, Congress is concerned that, as indemnitors, insurers would be able to assert various policy defenses against the polluter. If the polluter is unable to pay and the insurer is able to avoid coverage, the argument goes, taxpayers will be forced to foot the bill for cleanup. However, such reasoning ignores the existence, or mischaracterizes the nature, of the Oil Spill Liability Trust Fund.¹⁴⁴ The Fund is supported by a five-cent-per-barrel tax on all imported and domestic oil and is available for the payment of damages and cleanup costs in the event the responsible party or guarantor is unable to satisfy those costs. Hence, when payments from the Fund are made, it is the regu-

144. 33 U.S.C. §§ 2701(11), 2712 (1988). The Fund was established by section 9509 of the Internal Revenue Code.

lated industry, not the taxpayer, who foots the bill. Of course, these costs are eventually passed on to consumers, but the same would be true of expensive insurance premiums should insurers ever arrive at a level of premiums sufficient to warrant their serving as guarantors.

Moreover, oil pollution statutes in a number of states currently do not require P&I Clubs to issue guaranties.¹⁴⁵ In California, Washington, Florida, and Virginia vessel owners may prove financial responsibility by submitting evidence of membership in a P&I Club.¹⁴⁶ These states have determined that a P&I Club guaranty is unnecessary to achieve oil spill deterrence and compensation goals.

Indeed, a study commissioned by the California Department of Fish & Game concluded that an effective compensation system for oil spills can be achieved without making insurers guarantors.¹⁴⁷ The study compared California's Oil Spill Prevention and Response Act, which does not provide for direct action against insurers, to OPA, which does. The study found that there was no evidence to suggest that the behavior of insurers differs in areas with or without direct action. Further the study's authors stated that, to the best of their knowledge, the dreaded hypothetical scenario in which the polluter is unable to pay, thus preventing insurer indemnification from occurring, has never arisen in U.S. history. In the event such a scenario should arise, the Fund would provide an adequate safety net.

Thus, while OPA's direct action and guaranty provisions undoubtedly provide greater assurance that funds will be available for oil spill compensation, the experience of history suggests that such provisions are neither necessary nor essential to a workable oil spill statute. In light of the continuing stalemate between the P&I Clubs and the Coast Guard, Congress should reconsider the exigency of these provisions.

C. *Offshore Facilities*

Even if unlimited insurance were available to offshore oil producers, most independent producers would not be able to afford the coverage required by OPA. Here, again, congressional action is needed. By requiring all owners of offshore facilities to maintain \$150 million in financial security, Congress failed to distinguish between the small producer who has only a few wells and the major oil company who has

145. *RIA*, *supra* note 76, at 72-73; CAL. GOV'T CODE §§ 8670.37.51-8670.37.57 (West 1992); WASH. REV. CODE §§ 88.40.020, 90.56.005-90.56.905 (1992 & Supp. 1993); FLA. STAT. ANN. §§ 376.011-376.319 (West 1988 & Supp. 1994); VA. CODE ANN. §§ 62.1-44.34:14-62.1-44.34:28 (Michie 1992 & Supp. 1993).

146. *Id.*

147. Mercer Management Consulting, *An Analysis of the System of Oil Pollution Control in California Marine Waters*. See also *Mercer Report Contradicts USCG Findings on Impact of Pending COFR Rules*, OIL SPILL INTELLIGENCE REP., Sept. 2, 1993.

ownership interests in hundreds of wells.¹⁴⁸ Whether a facility produces 100 barrels per day or 100,000 barrels per day, OPA's coverage requirement is the same. This is in marked contrast to financial responsibility for vessels where Congress set a sliding scale at \$1200 per gross ton.

Furthermore, the across-the-board \$150 million requirement seems to ignore the vast spill risk differential between offshore oil facilities and tankers. Modern offshore production facilities are equipped with sophisticated shut-off mechanisms that make significant spills unlikely. When 1992's Hurricane Andrew ripped through the middle of Louisiana's offshore operations, not a single reportable spill occurred, even though 170 platforms were damaged or destroyed.¹⁴⁹ Indeed, statistics compiled by the National Petroleum Council show that between 1974 and 1991, tankers spilled more than twenty-five times the amount of oil spilled by offshore producers.¹⁵⁰

Clearly, it is difficult to reconcile congressional rejection of a sliding-scale approach to financial responsibility in regard to offshore facilities with its embrace of such an approach in regard to vessels. Congress should consider this inconsistency and apply the sliding-scale approach to offshore facilities as well as to vessels. This approach might take into account a facility's size, storage capability, oil throughput, proximity to sensitive areas, type of oil handled, and history of spills.¹⁵¹ Such an approach would presumably permit independent producers to secure adequate coverage and continue to operate. In this way, both U.S. energy and environmental interests would be protected.

CONCLUSION

By enacting the Oil Pollution Act of 1990, Congress took a bold step toward protecting the environment. Perhaps, however, the horror of the Exxon Valdez was too fresh in the American mind to permit a calm, rational legislative reaction. Now that time has passed and Prince William Sound is rebounding, it is time for Congress to revisit OPA and make the adjustments necessary to ensure not only a healthy environment, but a healthy economy as well.

148. Morris, *supra* note 141, at 9 (comments of Robert Stewart, president of the National Ocean Industries Association).

149. *Id.* (comments of Patrick Taylor, CEO of Taylor Energy Co.).

150. See NPC Study, *supra* note 142.

151. *U.S. Congress Hears Complaints on MMS Financial Responsibility Regulations*, OIL SPILL INTELLIGENCE REP., Nov. 4, 1993.

