

INTRODUCING THE OIL POLLUTION ACT OF 1990: EFFECTS ON SHIPPERS

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INTRODUCTION

On August 18, 1990, President Bush signed into law the Oil Pollution Act of 1990 ("Oilspill Act" or "Act").¹ Only two weeks before, the Oilspill Act had been passed unanimously by both the House and the Senate.² Although this Act was a compromise between House and Senate versions that contained several hotly debated provisions, its unanimous passage is attributable to the increased public awareness and concern in regard not only to the Exxon Valdez oilspill but also to three other offshore oilspills within a single 24-hour period.³

In a single stroke, the Oilspill Act enormously expanded the potential liability of parties who spill oil into the nation's navigable waters and reduced the chances of successfully defending against such liability. Oil shippers are one of the groups that will be affected significantly by the passage of the Act.

Besides enlarging the federal liability for oilspills, the Act expressly preserved the power of individual states to pass laws that superimpose additional significant liability for the same spills. The Act has been hailed as a much needed measure to prevent future spills by placing oil shippers on guard, but members of the oil industry have indicated that the Act is so onerous that it will reduce the flow of oil into and throughout the United States.⁴

While the bill was evolving, some oil shippers had warned that failure to limit potential state liability would prompt them to avoid serving states that have unlimited liability.⁵ Senate staffers did not accept these warnings, but instead reported that "these claims are totally unfounded.... None of the testimony received by the Committee contained evidence that any shipper or pro-

ducer has avoided [the] 17 States [that have no liability limits] or has chosen to quit the business."⁶ However, even before the Act was passed "at least four barging companies, including units of Texaco Inc. and Am-erada Hess Corp. already [had] stopped sending their vessels carrying heavy grades of oil to Maine, one state with an unlimited liability law."⁷ More significantly, it has been alleged that "Maine [was] being boycotted ... not because of its longstanding law but because it's home to Sen. George Mitchell," the senator who was "spearheading the fight against federal preemption of states' rights."⁸

For all of its potential future impact, the Oilspill Act received surprisingly little public press outside of specialized trade journals. This is in marked contrast to the public attention paid to the recent passage of the Clean Air Act Amendments of 1990. Therefore, we intend for this article to summarize briefly the more salient provisions of the Oilspill Act that will impact the conduct of oil shipping to the United States and through its waters. Section I of this article describes the liability scheme of the Federal Water Pollution Control Act and the changes that were made to that scheme by the Oilspill Act. Section II describes additional provisions in the Oilspill Act that are directed towards influencing the conduct of oil shipping. Table I summarizes the phase-in schedule for oil carrying vessels that must be outfitted with double bot-tomed hulls.

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I. LIABILITY UNDER THE CLEAN WATER ACT AND THE OILSPILL ACT

Before passage of the Oilspill Act, liability for oilspills into navigable waters was provided generally by section 311 ("Section 311") of the Federal Water Pollution Control Act ("FWPCA").⁹ The Oilspill Act replaces and significantly expands the liability provisions of Section 311 and sets forth additional requirements that do not exist under FWPCA.¹⁰

A. Basis for Liability

Both FWPCA and the Oilspill Act provide liability for the discharge or substantial threat of discharge of oil into the navigable waters of the United States, including the territorial seas or onto adjoining shorelines, or into the exclusive economic zone.¹¹ "Discharge" has the same general meaning under both FWPCA and the Oilspill Act, and includes any emission, intentional or unintentional, except for certain permitted or otherwise authorized discharges.¹² "Oil" has the same meaning under both Acts: it means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil.¹³ The term also includes any derivatives of crude oil. For instance, FWPCA case law has treated gasoline as oil,¹⁴ and the Coast Guard has apparently regarded naphtha as oil.¹⁵ Moreover, the Oilspill Act clarifies that oil, for purposes of the Act, does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").¹⁶ Thus, CERCLA applies to a subset of petroleum to which the Oilspill Act does not apply.

The Oilspill Act also provides liability for discharges or threats of discharges that are both: (1) into the territorial sea, internal waters, or adjacent shoreline of a foreign country; and (2) either from an Outer Continental Shelf oil facility or a deepwater port; or a vessel in United States navigable waters; or a vessel carrying oil as cargo between two places in the United States; or a tanker that received the oil at the terminal of the Trans-Alaska Pipeline for transportation to a place in the United States.¹⁷

Liability under the Oilspill Act extends to vessels and offshore and onshore facilities. "Vessel" means any watercraft used, or capable of being used, as a means of transportation on water, except a vessel owned, or bareboat chartered and operated, by the United States, or by a state or political subdivision thereof, or by a foreign nation, except when such a government related vessel is engaged in commerce.¹⁸ "Offshore facility" means any facility of any kind, other than a vessel, that is located in, on, or under the navigable waters of the U.S. or waters subject to U.S. jurisdiction.¹⁹ "Onshore facility" means any facility (including motor vehicles and rolling stock) of any kind that is located in, on, or under, any land within the United States, other than submerged land.²⁰

Liability under FWPCA extends to owners or operators of vessels and facilities. However FWPCA does not define "owner" or "operator." The Oilspill Act imposes liability for oilspills on a "responsible party,"²¹ which in the case of a vessel is defined as any person owning, operating or demise chartering the vessel.²² In turn, the Oilspill Act uses that same definition for "owners or operators" of a vessel.²³

The Oilspill Act, as passed by the House and Senate, eliminated the so-called "secured creditor exemption" which, in earlier versions²⁴ of the bill, provided that the term "owner or operator" did not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect her security interest in the vessel or facility. This exemption is contained in CERCLA.²⁵ This elimination apparently was prompted by the decision in *United States v. Fleet Factors Corp.*,²⁶ which has greatly increased the potential exposure of financing institutions by narrowing the scope of the exemption. We note, however, that Congress is presently considering at least five bills proposed to amend CERCLA or related banking laws to reinstate, clarify and/or strengthen the secured creditor exemption.²⁷

B. Costs and Damages

FWPCA provides liability for costs of removal. "Costs of removal" include costs of removing and minimizing or mitigating oilspills or threats of oilspills, and costs of restoring or replacing damaged or destroyed

natural resources.²⁸ Under FWPCA, it is unclear whether natural resources costs include the costs of assessing the amount of natural resources costs. It is also unclear whether natural resources costs include the costs of lost use value of the resources.

The Oilspill Act provides liability for costs and damages, including natural resources damages.²⁹ The Oilspill Act also provides for the recovery of new types or categories of damages. The expanded potential for liability is enormous, and includes:

- a. Real or personal property damages for injury to or economic loss resulting from destruction of real or personal property, recoverable by any claimant who owns or leases the property;
- b. Subsistence use damages to any claimant who uses natural resources, even if the claimant neither owns nor manages them, can be recovered for loss of subsistence use of the damaged resources;
- c. Revenue damages to federal, state or local governments for net loss of taxes, royalties, rents, fees or profit shares due to the injury or loss of real or personal property or natural resources;
- d. Profits and earning capacity damages to any claimant for lost profits or impairment of earning capacity due to the injury or loss of real or personal property or natural resources. The Conference Report states that the claimant need not be the owner of the property or resources. As an example, a fisherman may recover for lost income due to damaged fisheries resources;
- e. Public service damages to state and local governments for net costs of providing increased or additional public services due to an oil spill. This includes protection from fire, safety or health hazards.³⁰

Under the Oilspill Act, "costs" include costs of removing and minimizing or mitigating oilspills or threats of oilspills.³¹ "Damages" include, among other things, natural resources damages.³² Natural resources damages expressly include damages to

foreign natural resources³³ and costs of assessing the damages.³⁴

Damage assessments can involve costly scientific and economic studies. Under existing natural resources damages assessment ("NRDA") regulations, these costs are capped by the actual amount of damages to the natural resources.³⁵ However, the existing regulations would not apply to the Oilspill Act, which mandates that new regulations be developed.³⁶

The existing NRDA regulations were promulgated to implement both FWPCA and CERCLA.³⁷ The Oilspill Act requires a new set of NRDA regulations reportedly because Congress desired they "adopt advanced techniques to assess damages."³⁸ Congress apparently was alluding to the slow development of clear and quick procedures for assessing damages under the existing regulations. Moreover, it seems that Congress intended to incorporate recent decisions in *Ohio v. United States Dep't of Interior*³⁹ and *Colorado v. United States Dep't of Interior*,⁴⁰ reversing several provisions in the existing regulations.⁴¹

The existing regulations provide that the appropriate measure of NRDA damages shall be the lesser of: (1) restoration or replacement costs; or (2) the diminution of use values.⁴² In *Ohio v. U.S. D.O.I.*, the Ohio court found that "restoration is the basic measure of damages"⁴³ and "must normally be preferred over use value ... except in unusual situations where the disadvantages or expenses were extreme."⁴⁴ The Oilspill Act implicitly incorporates this ruling by providing a formula for costs that includes restoration or replacement but does not mention diminution of use as an alternative.⁴⁵

Presumably, however, diminution of use value would still be allowable in special cases as an alternative to restoration. After indicating its intent to be consistent with Ohio, the report on the Senate version of the Oilspill bill stated "[t]he bill makes it clear that forests are more than board feet of lumber, and that seals and sea otters are more than just commodities traded on the market. It would clarify that ... all reasonable demonstrable natural resource damages caused by a spill are paid by the responsible part[y]."⁴⁶

The Oilspill Act also expressly requires that costs include the diminution in value of

natural resources pending restoration.⁴⁷ In contrast, the existing regulations only provide that damages *may* include loss of use values occurring during the recovery period.⁴⁸

C. Defenses to Liability

FWPCA defenses of a responsible party can be raised if the discharge of oil was caused solely by an act of God, an act of war, negligence on the part of the United States government, or an act or omission of a third party without regard to whether such act was negligent.⁴⁹

The Oilspill Act sets forth complete defenses of a responsible party, modifying in part the existing FWPCA defenses. The complete defenses must be established by the responsible party by a preponderance of the evidence to show that the discharge or substantial threat of discharge of oil and the resulting damages or removal costs were caused solely by: an act of God, an act of war, or an act or omission of a third party

other than an employee or agent of the responsible party or a third party whose act or omission occurs in connection with any contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail), if the responsible party establishes, by a preponderance of the evidence, that the responsible party—

(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

(B) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions.⁵⁰

In language and substance, the Oilspill Act third party defense is similar to that of CERCLA,⁵¹ which has proven to be difficult, if not impossible, for defendants to establish. However, it is notable that several bills recently have been introduced in Congress

to make more accessible CERCLA's "innocent landowner" defense.⁵² Thus, it is conceivable that Congress or the courts may also clarify and make more accessible the third party defense under the Oilspill Act.

Under the Oilspill Act, another defense of a responsible party is that it is not liable to a claimant to the extent that the discharge is caused by the gross negligence or willful misconduct of such claimant.⁵³

Additionally, the Oilspill Act provides that, in every case in which a responsible party establishes that a discharge and the resulting removal costs and damages were caused solely by a third party, the third party is to be treated as the responsible party for purposes of liability. However, if a responsible party alleges that the discharge was so caused by a third party, the responsible party shall pay removal costs and damages to any claimant, and shall be entitled by subrogation to all rights of the United States government and the claimant to recover removal costs or damages from either the third party or the Oil Spill Liability Trust Fund⁵⁴ ("Trust Fund").⁵⁵ Thus, even when asserting a third party defense, an owner or operator still bears the burden of paying costs and damages, subject to later recovery from the responsible party.

D. Limits on Liability

FWPCA provides a maximum liability amount or "cap" for the combined costs of oilspill removal, mitigation and natural resources restoration. Liability is capped by the actual costs, not to exceed the following amounts: (1) in the case of an inland oil barge, the greater of \$125 per gross ton or \$125,000; (2) in the case of any other vessel carrying oil as cargo, the greater of \$150 per gross ton or \$250,000; (3) in the case of any other vessel, \$150 per gross ton.⁵⁶

The Oilspill Act increases the FWPCA caps significantly. These caps apply to the combined liability for costs and damages. Total liability is not to exceed the following amounts: (1) in the case of a tank vessel⁵⁷ greater than 3,000 gross tons, the greater of \$10,000,000 or \$1,200 per gross ton; (2) in the case of a tank vessel of less than or equal to 3,000 gross tons, the greater of \$2,000,000 or \$1,200 per gross ton; (3) in the case of any other vessel, the greater of

\$500,000 or \$600 per gross ton; (4) in the case of offshore facilities, except deepwater ports, the total of all oil removal costs plus \$75,000,000; (5) in the case of deepwater ports, \$350,000,000;⁵⁸ (6) in the case of mobile offshore drilling units ("MODUs"), if a MODU is being used as an offshore facility and discharges oil on or above the water surface, it will have the liability of a tank vessel; to the extent that costs and damages exceed the liability under tank vessel rules, the excess will have the liability of an offshore facility.⁵⁹ Caps must be adjusted at least every three years to reflect significant increases in the Consumer Price Index.⁶⁰

Double recovery for natural resources damages and assessments by two claimants is prohibited under the Oilspill Act.⁶¹ Natural resources double recovery is not expressly prohibited by FWPCA, but is prohibited by CERCLA⁶² and by the natural resources damages regulations that apply to FWPCA as well as to CERCLA.⁶³

E. Exceptions to Limits on Liability

Under FWPCA, the limits on liability will not apply if the discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner or operator.⁶⁴ The burden is on the United States government to prove the negligence or misconduct.⁶⁵ In contrast, the Oilspill Act does not specify who has the burden to prove whether or not the limits on liability are applicable, nor does it articulate the degree of the burden.

Under the Oilspill Act, the limits on liability will not apply if the discharge incident was proximately caused by gross negligence, willful misconduct, or the violation of an applicable federal safety, construction, or operating regulation, by the responsible party, an agent or employee, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail).⁶⁶ Also, the liability limits will not apply if the responsible party fails or refuses to: report the incident as required by law when the party has reason to know of the incident; or provide all reasonable cooperation and assistance requested by a responsible official in connection with oil removal activities; or comply with certain oil spill response orders,

without sufficient cause.⁶⁷ Regardless of defenses and liability caps, Outer Continental Shelf facilities, and vessels carrying oil from such facilities, are liable for all oil removal costs incurred by the United States, state, or local governments.⁶⁸

F. Preemption of the Limitation of Shipowners' Liability Act

The Limitation of Shipowners' Liability Act of 1851⁶⁹ ("LSLA") limits the liability of a vessel's owner to the present value of the vessel and to its freight pending in certain situations.⁷⁰ Twenty-four states have oil spill liability and compensation laws and seventeen of them provide no limits to liability.⁷¹ Drafters of the Oilspill Act were concerned that the LSLA could be construed to preempt such state laws, stating, "[i]n two Federal cases where the owner of a vessel has invoked the provisions of [LSLA], courts have held that this law, where applicable, has the effect of limiting recoveries under State law, including provisions allowing unlimited liability."⁷²

The Oilspill Act expressly provides that neither it nor the LSLA preempts other federal, state and local laws regarding oilspill liability.⁷³ Thus, under the Oilspill Act, no LSLA limits will apply in oil spill cases. States will continue to have authority to impose civil and criminal liability for oilspills and to require contributions to state oilspill funds.⁷⁴

Besides stating that it shall not preempt other laws, section 1018 of the Oilspill Act also states that nothing in it or in the LSLA shall "in any way affect, or be construed to affect" other laws. Thus, section 1018 cannot be construed as a savings clause where other federal laws preempt state laws. For instance, the Conference Report stated that the Oilspill Act "does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield Company*, 435 U.S. 151 (1978) [(holding that a state law regulating the design, size, and movement of oil tankers in state waters was preempted by federal laws to the extent that it directly conflicted with the purposes of the federal law)]."⁷⁵

G. International Oil Pollution Prevention and Removal

The House version of the proposed Oil-spill Act had contemplated the United States' participation in the International Convention on Civil Liability for Oil Pollution Damage ("ICCLOPD"), 1984,⁷⁶ and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1984.^{77,78} "The Conventions provide for ... a global oil spill liability and compensation regime [for vessels carrying oil as bulk cargo, which] allows coverage of up to approximately \$280 million per incident from the International Fund in addition to coverage provided by domestic law."⁷⁹ The ICCLOPD also provides for strict liability for pollution damage and sets liability limits for tanker owners who establish a fund equal to the amount of the liability cap. However, the Senate version, which omitted this provision, prevailed entirely on this issue and, as a result, the Oilspill Act provides only that:

It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents.⁸⁰

H. Penalties

FWPCA provides for specific oil spill penalties⁸¹ and also provides for general water pollution penalties⁸² that can be assessed as alternatives to the oil spill penalties. For instance, a vessel operator could be penalized specifically for discharging oil or generally for discharging a pollutant without a permit. The Oilspill Act amends this existing penalty framework.

In this article, we use the term "administrative fine/penalty" to mean a penalty that a federal agency can levy by its own authority; "civil fine/penalty" to mean a penalty that the agency must request a court to impose; and "criminal fine/penalty" to mean a penalty which a court can impose through the criminal legal process.

Presented below are categories of violations with their associated penalties. Changes or additions made by the Oilspill Act⁸³ are shown in brackets below the FWPCA provisions.⁸⁴

A. Failure to immediately report releases of reportable quantities of oil or hazardous substances to the National Response Center:

1. Imprisonment:
 - a. up to 1 year.
[up to 5 years]
2. Criminal fine:
 - a. up to \$10,000.
[in accordance with federal sentencing guidelines, 18 U.S.C. § 3551 et seq.]
[in addition, certain immunities from prosecution that are accrued by making proper notification, have been reduced.]

B. Discharge of reportable quantities of oil or hazardous substances:

1. Administrative fines:
 - a. up to \$5,000 for each offense.
[Class I or Class II penalties. These classes are self-defining; that is, the amounts of the fines that can be imposed define the class. Class I penalties are not to exceed \$10,000 per violation, with a total fine not to exceed \$25,000. Class II penalties are not to exceed \$10,000 per day that the violation continues, with a total fine not to exceed \$125,000.]
2. Alternative civil fines:
 - a. up to \$50,000.
[or up to \$1,000 for each barrel of oil or unit of reportable quantity of hazardous substance that was discharged, or up to \$25,000 per day of violation.]

- b. up to \$250,000 (if willful negligence or willful misconduct).
[if gross negligence or willful misconduct, up to \$3,000 for each barrel of oil or unit of hazardous substance, and not less than \$100,000.]
- C. Failure to comply with regulations pursuant to § 311(j) (33 U.S.C. § 1321(j)) of FWPCA (oil and hazardous substances removal methods, removal contingency plans, discharge prevention methods, and government inspection of vessels carrying cargoes of oil and hazardous substances):
1. Civil fines:
 - a. up to \$5,000 for each offense.
[Class I or Class II administrative fines; or civil fines up to \$25,000 per day of violation.]
- [D. Failure to provide removal action upon direction or order of the President:
1. Civil punitive damages:
 - a. up to 3 times the amount of costs incurred by the Trust Fund; or up to \$25,000 per day of violation.]
- E. Alternative general penalties for violations of the FWPCA (for example discharging pollutants without a permit) [to impose criminal penalties, now expressly including discharge of reportable quantities of oil or hazardous substances]. The Oilspill Act has not changed the amounts or types of these penalties. The FWPCA penalties are presented for informational purposes, since they can still apply.
1. General criminal penalties: (first convictions)
 - a. Fines: per day of violation:
\$2,500 to \$25,000 (negligence).
\$5,000 to \$50,000 (knowingly).
 - b. Imprisonment:
up to 1 year (negligence).
up to 3 years (knowingly).
2. Criminal: knowingly placing another person in imminent danger of death or serious bodily injury:
(first convictions)
 - a. Corporate fine:
up to \$1,000,000.
 - b. Individuals:
up to \$250,000 and/or imprisonment up to 15 years.
 3. Civil fines:
 - a. up to \$25,000 per day of violation.
 4. Alternative administrative penalties:
 - a. Class I or Class II fines (same amounts as defined above under the Oilspill Act).

II. ADDITIONAL PROVISIONS IN THE OILSPILL ACT DIRECTED TOWARDS INFLUENCING THE CONDUCT OF OIL SHIPPING

Besides expanding liability provisions of FWPCA, the Oilspill Act also expands or adds completely new provisions that will affect how oil shippers conduct their activities. Three important provisions address alcohol and drug abuse, manning standards for foreign tank vessels, and double hull requirements.⁸⁵

A. Alcohol and Drug Abuse

The Oilspill Act adds significant new provisions to the existing laws concerning licensing and conduct of maritime personnel. Most importantly, it adds to regulation of licenses, certificates of registry, and merchant mariners' documents issued pursuant to 46 U.S.C. Subtitle II (Vessels and Seamen), and it provides for removal of a ship's master when he or she is intoxicated.

When issuing a license, certificate or document, the Secretary of Transportation must have available information on the applicant relating to the following driving offenses recorded in the National Driver Register: driving under the influence or impairment of alcohol or controlled substances, reckless driving, racing on the highways, or involvement in a fatal traffic accident. The Secretary also may review the applicant's criminal record and shall require drug testing of the applicant.⁸⁶

The Oilspill Act amends existing laws so that licenses, certificates and documents are valid for five year periods, and are renewable for additional five year periods. It also amends the existing laws for license and certificate renewal so that the Secretary may review the applicant's criminal record.⁸⁷

For the purposes of possible suspension and revocation of a holder's license, certificate or document, the Secretary shall require drug testing of a holder. The Secretary may temporarily suspend a holder who performs a safety sensitive function on a vessel if there is probable cause to believe that the holder: has violated an alcohol or drug abuse law while performing the safety function; has been convicted of an offense that would prevent issuing or renewing the license, certificate or document; or has been convicted of the driving offenses specified above within three years before the suspension proceeding.⁸⁸

The Oilspill Act amends existing law so that the Secretary may suspend or revoke a license, certificate or document for, among other reasons, conviction of the driving offenses specified above within three years before the proceeding.⁸⁹

The Oilspill Act also provides for the removal of a ship's master or individual in charge:

When the 2 next most senior licensed officers on a vessel reasonably believe that the master or individual in charge of the vessel is under the influence of alcohol or a dangerous drug and is incapable of commanding the vessel, the next most senior [licensed] master, mate, or operator ... shall—(1) temporarily relieve the master or individual in

charge; (2) temporarily take command of the vessel; (3) in the case of a vessel required to have a log under chapter 113 of [Title 46 of the U.S. Code], immediately enter the details of the incident in the log; and (4) report those details to the Secretary [of Transportation].⁹⁰

B. Manning Standards for Foreign Tank Vessels

The Oilspill Act requires the Secretary to evaluate the manning, training, qualification and watchkeeping standards for tank vessels of foreign countries on a periodic basis, and after a casualty involving a foreign tank vessel, to ensure that those standards are equivalent to those of the United States or international standards accepted by the United States. The Secretary must deny entry to the United States to any foreign tank vessel that does not meet the equivalency and enforcement requirement, except that provisional entry is permitted in limited circumstances.⁹¹ The Conference Report on the Oilspill Act states that, although the United States has not ratified the International Convention on Manning, Training, Certification, and Watchkeeping for Seafarers, the standard of equivalency may be considered to include such Convention.⁹²

The Conference Report also states that, according to a study recently completed for the Coast Guard, the number of foreign tankers calling at United States ports has increased by more than 50 percent in the last three years and that, as the United States grows more dependent on foreign sources of oil and petroleum products, increased scrutiny of the growing foreign tank vessel traffic is necessary to protect the safety and the environment of United States ports.⁹³

C. Double Hull Requirements for Tank Vessels

With certain exceptions, the Oilspill Act requires that by January 1, 2015, all tank vessels operating in U.S. waters, including the exclusive economic zone, must be equipped with double hulls.⁹⁴ To minimize the impact on the maritime, oil and shipbuilding industries, the double hull requirement will be phased in, generally in accordance

with a schedule based on vessel age and tonnage.

The double hull requirement applies to vessels that are constructed, or adapted to carry, or carry, oil in bulk as cargo or cargo residue, and that are operating in waters subject to the jurisdiction of the United States, including the exclusive economic zone.⁹⁵ The requirement does not apply to vessels used only to respond to oil or hazardous substance spills, or vessels of less than 5,000 gross tons, as long as they are equipped with a double containment system determined to be as effective as a double hull for the prevention of a discharge of oil.⁹⁶

The following classes of tank vessels need not meet the requirement until January 2, 2015, rather than being phased in: (1) vessels unloading oil in bulk at deepwater ports licensed under the Deepwater Port Act of 1974;⁹⁷ (2) delivering vessels that are offloading in lightering activities, if they are within an authorized lightering zone, and are more than 60 miles from the baseline from which the territorial sea is measured;⁹⁸ (3) existing⁹⁹ vessels of less than 5,000 gross tons.¹⁰⁰

After January 1, 2015, existing vessels of less than 5,000 gross tons must have either double hulls or double containment systems determined to be as effective as a double hull.¹⁰¹ The remaining classes of existing tank vessels, which are at least 5,000 gross tons, must have double hulls in accordance with a phase in time schedule as summarized on Table I of this article, Time Schedule to Phase in Double Hulls for Vessels of At Least 5,000 Gross Tons.¹⁰² New, that is presently non-existing, tank vessels, which are at least 5,000 gross tons, must be built with double hulls.¹⁰³

The Oilspill Act also provides that the Secretary shall, within one year after the date of enactment, "complete a rulemaking proceeding and issue a final rule to require that tank vessels over 5,000 gross tons," affected by the new statutory provisions, "comply until January 1, 2015, with structural and operational requirements that the Secretary determines will provide as substantial protection to the environment as is economically and technologically feasible."¹⁰⁴

The Oilspill Act provides for loan guarantees under Title XI of the Merchant Marine Act of 1936 for the construction or reconstruction of replacement vessels, if the loan applicant is presently engaged in transporting cargoes in vessels of the type and class to be replaced, and if the capacity of the replacement vessel will not increase the cargo carrying capacity of the vessel being replaced. This section of the Oilspill Act also requires a determination by the Secretary that the market demand for the vessel over its useful life will not diminish so as to make the granting of the guarantee imprudent. The section also requires the applicant to provide adequate security against default as is customary for Title XI financings.¹⁰⁵

CONCLUSION

The Oil Pollution Act of 1990 has greatly expanded the potential penalties and liability for costs associated with oilspills, including damages for real and personal property, economic losses, and damages to foreign natural resources. At the same time, the third party defense has been made much more difficult to establish. Liability limits have been raised, and there are more ways to lose the protection of those limits. Moreover, Congress has expressly preempted the limits under the Limitation of Shipowners' Liability Act and has preserved the power of states to promulgate unlimited liability laws.

Shippers will face additional expenses to meet the phased-in requirements for double hulls. They also must be aware of significant changes in foreign vessel manning requirements. New alcohol and drug abuse provisions aim at screening out unreliable persons who perform shipboard safety-related functions.

1. Oil Pollution Act of 1990, Pub L No 101-380, 104 Stat 484 (HR 1465), in Conference Report, Oil Pollution Act of 1990, H Rep No 653, 101st Cong, 2d Sess ("Conference Report").

2. Washington Post A18 col 1 (August 15, 1990) (stating that the bill was passed by the Senate 99 to 0 and by the House 360 to 0).

3. See Senate Committee on Environment and Public Works, *Oil Pollution Liability and Compensation Act of 1989*, S Rep No 94, 101st Cong, 1st Sess 2-3 ("Senate Committee Report").
4. See, for example, Mulrenan, *Varied Reactions to the Oil Pollution Act*, Lloyd's List 11 (October 16, 1990) (stating that "[t]he impossible issue for insurers is in covering unlimited liability for oil pollution").
5. See Lippman, *Oil Spill Bill: Mitchell Prevails Over Shippers*, Washington Post A4 col 3 (July 24, 1990).
6. See Senate Committee Report, at 7 (cited in note 3).
7. Sullivan, *Oil Firms, Shippers Seek to Circumvent Laws Setting No Liability Limit for Spills*, Wall Street J B1, B4 col 2 (July 26, 1990).
8. *Id.*
9. Federal Water Pollution Control Act, 33 USC §§ 1251-1387 ("FWPCA").
10. While most oilspills will be subject to the Oilspill Act as supplemented by FWPCA, oilspills involving certain hazardous substances will still be regulated by the Comprehensive Environmental Response Compensation and Liability Act, 42 USC §§ 9601-9675 ("CERCLA").
11. The exclusive economic zone is the "zone established by Presidential Proclamation Numbered 5030, dated March 10, 1983, including the ocean waters of the area referred to as 'eastern special areas' in Article 3(1) of the Agreement Between the United States ... and the [USSR] on the Maritime Boundry, signed June 1, 1990." Oilspill Act § 1001(8).
12. See FWPCA § 1321(a)(2); Oilspill Act § 1001(7). The definition in the Oilspill Act does not expressly exclude authorized discharges; however, the Conference Report states that certain definitions, including that of "discharge," "shall have the same meaning in this legislation as they do under the FWPCA and shall be interpreted accordingly." Conference Report at 102 (cited in note 1).
13. See FWPCA § 1321(a)(1); Oilspill Act § 1001(23).
14. See *US v Coastal States Crude Gathering Co.*, 643 F Supp 1125 (5th Cir 1981).
15. See US Coast Guard, G-LMI Letter 16460/1, Coast Guard Law Bulletin No 433 (October 14, 1982).
16. Oilspill Act § 1001(23).
17. *Id.* at § 1007.
18. *Id.* at § 1001(37).
19. *Id.* at § 1001(22).
20. *Id.* at Act § 1001(24).
21. *Id.* at Act § 1002(a).
22. *Id.* at § 1001(32)(A). The Act also defines "responsible party" for onshore facilities and offshore facilities, deepwater ports, pipelines and for abandonment in §§ 1001(32)(A)-(F).
23. *Id.* at § 1001(26)(A).
24. See, for example, HR 1465 as received in the Senate, after passage in the House (November 15, 1989).
25. 42 USC § 9601(20)(A).
26. *US v Fleet Factors Corp.*, 901 F2d 1550 (11th Cir 1990).
27. See § 2319, 101st Cong, 2d Sess; S 2827, 101st Cong, 2d Sess; HR 2787, 101st Cong, 2d Sess; HR 4494, 101st Cong, 2d Sess; HR 5927, 101st Cong, 2d Sess.
28. FWPCA § 1321(a)(8), (f)(4). "Natural resources" is not defined in FWPCA, but presumably has the same meaning as that term is defined in CERCLA. One set of Natural Resource Damage Assessment regulations has been promulgated for both Acts. The CERCLA definition of "natural resources" is similar to that provided by the Oilspill Act. See below note 29.
29. See Oilspill Act § 1002(b)(2).
30. *Id.*
31. *Id.* at § 1001(30), (31).
32. *Id.* at § 1002(b)(2). "Natural resources" is defined by the Oilspill Act to include land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such water resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.
33. *Id.* at § 1006(a)(4).

34. *Id* at § 1002(b)(2)(A).
35. See 43 CFR § 11.14(ee).
36. Oilspill Act § 1006(e).
37. 43 CFR § 11.10.
38. Senate Committee Report at 15 (cited in note 3).
39. *Ohio v US Dept. of Interior*, 880 F Supp 432 (DC Cir 1989).
40. *Colorado v US Dept of Interior*, 880 F Supp 481 (DC Cir 1989).
41. See Senate Committee Report at 15 (cited in note 3).
42. 43 CFR § 11.35, 11.80.
43. *Ohio*, 880 F Supp at 450.
44. *Id* at 444.
45. Oilspill Act § 1006(d).
46. Senate Committee Report at 15 (cited in note 3). Accord Conference Report at 108 (stating "[d]iminution of value' refers to the standard for measuring natural resource damages used in [*Ohio*]").
47. Oilspill Act § 1006(d)(1)(B).
48. 43 CFR § 11.84(g)(1).
49. FWPCA § 1321(f).
50. Oilspill Act § 1003(a).
51. See 42 USC § 9607(b)(3).
52. See HR 5927, 101st Cong, 2d Sess; HR 2787, 101st Cong, 2d Sess.
53. Oilspill Act § 1003(b).
54. Oilspill Act sections 2001 through 2004 merge a number of water pollution compensation funds into one revolving fund, the Trust Fund. The Trust Fund was previously established in the Internal Revenue Code; see 26 USC § 9509. For purposes of the Oilspill Act, the Trust Fund is available to pay a number of specified costs such as removal costs, natural resource damages, otherwise uncompensated claims, and federal administrative costs. See Oilspill Act § 1012. With certain exceptions, claims must be presented to the responsible party or his guarantor before presenting such claims to the Trust Fund. See Oilspill Act §§ 1013-14.
55. Oilspill Act § 1002(d)(1)(B).
56. FWPCA § 1321(f)(1).
57. "Tank vessel" is defined to mean a vessel that is constructed or adapted to carry, or that carries, oil or hazardous material in bulk as cargo or cargo residue, and that: (a) is a vessel of the United States; (b) operates on the navigable waters; or (c) transfers oil or hazardous material in a place subject to the jurisdiction of the United States. Oilspill Act § 1001(34).
58. If, as a result of a study that has been mandated, it is determined that the use of deepwater ports involves lower operational or environmental risks compared to the use of other ports for transporting oil, then the liability limits for deepwater ports will be decreased to no lower than \$50,000,000. Oilspill Act § 1004(d)(2)(C).
59. *Id* at § 1004.
60. *Id* at § 1004(d)(4).
61. *Id* at § 1006(d)(3).
62. 42 USC § 9607(f)(1).
63. 43 CFR § 11.15(d).
64. FWPCA § 1321(f)(1).
65. *Id*.
66. Oilspill Act § 1004(c)(1).
67. *Id* at § 1004(c)(2).
68. *Id* at § 1004(c)(3).
69. Limitation of Shipowners' Liability Act of 1851, codified as Limitation of Vessel Owners' Liability Act, 46 USC §§ 181-196.
70. 46 USC § 183.
71. Senate Committee Report at 7 (cited in note 3).
72. *Id* at 4. Accord *The Central States*, 9 F Supp 934 (E D NY 1935); *Complaint of Harbor Towing Corp.*, 335 F Supp 1150 (D MD 1971); *Flink v Paladini*, 279 US 59 (1929).
73. Oilspill Act § 1018. Section 1018(a)(2) also makes it clear that nothing in the Act or in

LSLA shall affect in any way the obligations or liabilities of any person under the Solid Waste Disposal Act, 42 USC §§ 6901 et seq, or state or common law.

74. See also Senate Committee Report at 6 (cited in note 3).

75. Conference Report at 122 (cited in note 1).

76. International Convention on Civil Liability for Oil Pollution Damage (1984) reprinted in 6 Benedict On Admiralty 6-77 (1990).

77. International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1984) reprinted in 6 Benedict On Admiralty 6-116.2(3) (1990).

78. Conference Report at 125 (cited in note 1).

79. *Id.*

80. Oilspill Act § 3001.

81. FWPCA § 1321(b)(5)-(6).

82. *Id.* at § 1319.

83. Oilspill Act § 4301(a)-(c).

84. Changes in penalties associated with financial responsibility requirements are not discussed. See below note 85.

85. Among the changes that we do not discuss in this article are the Oilspill Act's replacement and expansion of FWPCA financial responsibility requirements for vessels and associated penalty provisions.

86. *Id.* at § 4101.

87. *Id.* at § 4102.

88. *Id.* at § 4103.

89. *Id.* at § 4103.

90. *Id.* at § 4104.

91. *Id.* at § 4106.

92. Conference Report at 132 (cited in note 1).

93. *Id.*

94. Oilspill Act § 4115.

95. *Id.* § 4115(a), amending 46 USC § 3703a(a).

96. *Id.*, amending 46 USC § 3703a(b)(1), (2).

97. *Id.*, amending 46 USC § 3703a(b)(3)(A).

98. *Id.*, amending 46 USC § 3703a(b)(3)(B).

99. "Existing" is not a term used in the statute, but that is the apparent intent. The statute describes the following classes of vessels, which in effect are "existing": (1) a vessel for which a building contract or contract for major conversion was placed before June 30, 1990, and that is delivered under that contract before January 1, 1994; or (2) a vessel that had its appraised salvage value determined by the Coast Guard before June 30, 1990, and that qualifies for documentation under 46 USC app §14 (registration of previously wrecked vessels that have been repaired) before January 1, 1994. Oilspill Act § 4115.

100. *Id.* at § 4115(a), amending 46 USC § 3703a(c)(2).

101. *Id.*

102. See *id.*, amending 46 USC §3703a(c)(3), (4).

103. See *id.*, amending 46 USC § 3703a(a).

104. *Id.* at § 4115(b).

105. *Id.* at § 4115(f).