

The Oil Pollution Act of 1990: A Glance in the Rearview Mirror

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I. INTRODUCTION

It has been nearly twenty-two years since I received that fateful call informing me my assignment at United States Coast Guard Headquarters was about to be changed. As an active duty Lieutenant and a first-year attorney assigned as Appellate Defense Counsel in the winter of 1989, I was confined to a windowless office with clients typically hundreds if not thousands of miles away. One disaster, and one telephone call later, I began a journey as the United States Coast Guard's "point person," or chief negotiator, for what was to become the Oil Pollution Act of 1990 (OPA 90).

This Article recreates the state of oil pollution procedures and processes in 1989 and the mindset that existed among the legislators tasked with fixing a broken system. It will reveal the persons and

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events that shaped the single largest restructuring of pollution response in U.S. history. Finally, the Article will peek into the future and consider the impact of the Deepwater Horizon calamity on future revisions to the oil pollution response and compensation system.

It is noted that this Article is not intended to be a comprehensive review of how OPA 90 was created or the content of its provisions. That review has certainly been done countless times. This Article will consider primarily the aspects of the oil pollution statutory scheme that were broken at the time of the EXXON VALDEZ disaster, the variety of options available to lawmakers to correct those deficiencies, and whether the choices made by Congress accomplished the intended results.

II. THE CLEAN WATER ACT: FALLING SHORT

OPA 90 was born of two imperfect parents—the Clean Water Act of 1977 (CWA) and the Federal Water Pollution Control Act (FWPCA). The FWPCA¹ was enacted in 1972 as part of a reorganization of the Water Quality Improvement Act.² The FWPCA originated the crucial section 311 that embodied the primary authority for responsible party obligations in oil spills in U.S. waters.³ The CWA,⁴ enacted in response to the grounding of the ARGO MERCHANT off Nantucket, Massachusetts, in 1976,⁵ together with the FWPCA, formed the oil pollution containment, response, and liability framework that applied during the EXXON VALDEZ casualty.

An effective oil spill response and liability act must contain several elements: (1) clear delineation of who is responsible to report and respond to a spill; (2) clear guidelines for who will be in charge of oil spill containment and cleanup; (3) details of the types of costs, expenses, and damages for which the responsible party or other entity will be liable; (4) finite circumstances under which the responsible party may avoid liability, limit liability, or shift liability to a third party; and (5) the means of financing not only the containment and removal

1. 33 U.S.C. §§ 1251-1376 (1982).

2. *Id.* §§ 1151-1175 (1970).

3. *Id.* § 1321 (1982).

4. Pub. L. No. 95-217, 91 Stat. 1566 (1977).

5. Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade*, 24 TUL. MAR. L.J. 481, 506 (2000).

of pollution and threats to pollution, but also finance compensation for those persons damaged by the effects of an oil spill.

The FWPCA/CWA was not sufficiently comprehensive or definitive to provide an effective pollution control scheme. Here were some of the deficiencies:

1. Although federal responders were required to prepare a National Contingency Plan outlining federal and state responsibilities and identifying spill response equipment and resources, responsible parties were not required to actually be prepared to respond to oil spills—private response plans were either nonexistent or inadequate to prepare responsible parties for large spills.⁶
2. Limitations of liability were low,⁷ and limitation was only lost if the United States could prove “willful negligence or willful misconduct within the privity and knowledge of the owner.”⁸
3. Responsible parties were not credited for their own removal costs against the limit of liability, only government costs after “federalization.”
4. The federal government was authorized to respond to oil spills but was not required to do so.⁹
5. Federal On-Scene Coordinators funded cleanups from a small pool of appropriated funds (\$35 million) pursuant to section 311(k) of the FWPCA—funds that were often inadequate to support remediation of even a moderate-sized spill.¹⁰
6. Oil spill cleanup, especially larger spill cleanups, were often contained and removed at taxpayer expense.
7. Persons damaged by oil spills were often left to obtain relief through the general maritime law tort regime—a costly and often unsatisfactory option.

These shortcomings were well-known both to the U.S. Coast Guard and Congress in the days preceding the EXXON VALDEZ casualty. In fact, the primary legislative vehicle for OPA 90, “The Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989,” H.R.

6. 33 U.S.C. § 1321(c)(2) (1982).

7. Liability was limited to \$150 per gross ton or \$250,000 for a vessel carrying oil as cargo. *Id.*

8. *Id.*

9. *Id.* § 1321(c)(1), (d).

10. *Id.* § 1321(k).

1465, was introduced in the 101st Congress on March 16, 1989—*before* the EXXON VALDEZ grounded on Bligh Reef. Of specific concern was a better definition of compensable damages for oil spills and a structure to pay for the costs of spill removal, abatement, and damages. The prospects for passage of this bill, however, were no greater than previous attempts until Good Friday, 1989.

III. THE LESSONS OF EXXON VALDEZ

While the EXXON VALDEZ certainly revealed much about the flaws in the oil spill response system and vessel operation procedures, in many ways it was not the spill that everyone was concerned would occur. The flaws in the existing CWA would be most obvious if a major spill occurred and the responsible party was unprepared, unmotivated, and underfinanced. In this case, Exxon Shipping Company proved to be none of these things. Certainly Exxon proved to be a motivated responsible party that was sufficiently financed to pay for what was by all estimates a \$2.5 billion cleanup operation.¹¹ Whether Exxon Shipping Company was prepared for this spill will continue to be debated.

EXXON VALDEZ grounded on Bligh Reef in Prince William Sound, Alaska, on Good Friday, March 24, 1989. The vessel was negligently navigated onto the reef resulting in the breach of the tanker's single hull, ultimately depositing over eleven million gallons of oil into Prince William Sound.¹² Of course, a variety of mistakes and misjudgments have been woven together to identify the cause of the EXXON VALDEZ spill, including the facts that the mate navigating the vessel was not a qualified pilot for the waters in which he was navigating, the vessel was navigated in the improper shipping lane to avoid ice flows, and the Coast Guard was unable to maintain positive contact with EXXON VALDEZ during transit through Prince William Sound.¹³

Despite these operational infractions, Prince William Sound was prepared for the unlikely possibility of a massive oil spill. The U.S. Coast Guard was underfunded for a major response by the existing CWA, and was also understaffed to monitor a major oil spill in Prince William Sound. However, the State of Alaska had the foresight as a

11. Don J. DeBenedictis, *Oil-Spill Settlement Okayed*, A.B.A. J., Dec. 1991, at 31, 31.

12. H.R. REP. No. 101-242, pt. 2, at 31 (1989).

13. Timothy Egan, *Elements of Tanker Disaster: Drinking, Fatigue, Complacency*, N.Y. TIMES, May 22, 1989, at B7.

condition of the Trans-Alaska Pipeline approval to require the oil companies involved with the pipeline to form an oil spill response company, Alyeska Pipeline Service Company, which was then directed to prepare and implement a “first responder” oil spill contingency plan.¹⁴ Alyeska’s contingency plan outlined the equipment and procedures for responding to a 200,000-barrel spill in Prince William Sound.¹⁵

As is the case with many contingency plans of the era, the equipment and the training degraded over the years. By March 1989, the preparedness of the Alyeska contingency plan and equipment had degraded to the point where it was completely unable to respond to the EXXON VALDEZ spill.¹⁶ Fourteen hours elapsed before the first emergency crew arrived at the spill site, and the vessel was not surrounded by containment gear until an astonishing twenty-one hours after the spill.¹⁷ Of course, any containment installed this late after commencement of an eleven-million-gallon spill would be largely ineffective—and it was.¹⁸ Of all the missteps that led to the grounding of the EXXON VALDEZ, it may well have been the inadequate response that prompted the most significant changes in oil pollution legislation. It was clear to Congress that while oil spill cleanup operations would be laid at the feet of industry to prepare for and coordinate, the federal government had to be more proactive in providing both funding and training to the U.S. Coast Guard to ensure the federal response to major oil spills would be prompt and efficient in the future. Although the U.S. Coast Guard and industry executives attempted to posture EXXON VALDEZ as a “one in a million” occurrence to quell a massive congressional response to the Prince William Spill, this posture would be discredited by the “weekend to remember.”

14. *Exxon Oil Spill: Hearing Before the Nat’l Ocean Policy Study & the Subcomm. on Merchant Marine of the Comm. on Commerce, Sci., & Transp.*, 101st Cong., pt. 2, 1st Sess. 160 (1989).

15. *Id.* at 163-64.

16. Andrew H. Malcolm, *How the Oil Spilled and Spread: Delay and Confusion Off Alaska*, N.Y. TIMES, Apr. 16, 1989, at 1.

17. *Id.* at 30.

18. The oil spill spread to cover over 1,000 square miles and over 11,000 workers were needed to recover the uncontained oil. See Bryan Hodgson, *Alaska’s Big Spill: Can the Wilderness Heal?*, NAT’L GEOGRAPHIC, Jan. 1990, at 5, 12.

IV. A WEEKEND TO REMEMBER

By June 23, 1989, Congress was deeply involved in introducing a variety of bills to solve the problems in the oil pollution response and compensation system. Between March 24, 1989, and June 23, 1989, countless bills were introduced in each house addressing everything from bridge breathalyzers to double hulls to regional spill response teams. The Coast Guard position was to deflect and minimize many of these bills as unnecessary, ill conceived, or unworkable. Certain provisions were very important to the Coast Guard's vision of how the pollution system could be improved, and the Coast Guard emphasized these provisions. However, the Coast Guard lost its ability to control the avalanche of ideas during the weekend of June 23-25, 1989.

I remember distinctly preparing Coast Guard position statements on several newly introduced bills for distribution to the Department of Transportation and eventually to Capitol Hill when the first word came of a spill in Narragansett Bay, Rhode Island. It was Friday, June 23, 1989, late in the afternoon, and the spill was caused by the grounding of the Greek tank vessel WORLD PRODIGY.¹⁹ During the process of negotiating a new spill bill, every pollution event or marine casualty created anxiety in Coast Guard Headquarters until it was determined why the spill or casualty occurred. Before the full set of facts of the WORLD PRODIGY spill were known and within a matter of four short hours after the Narragansett spill, word came of yet another spill caused by the collision of the Panamanian chemical tanker RACHEL B and a tank barge under tow in the Houston Shipping Canal.²⁰ As morning broke on Saturday, June 24, 1989, the Coast Guard was still assembling the facts of how these two casualties occurred when yet another spill was reported in the Delaware River. Uruguayan tanker PRESIDENTE RIVERA grounded in the vicinity of Marcus Hook, Pennsylvania, as it was preparing to dock.²¹

The trifecta of marine casualties in that summer weekend of 1989 significantly changed the direction and the intensity of the oil spill

19. NAT'L TRANSP. SAFETY BD., SAFETY RECOMMENDATION 1 (1991). WORLD PRODIGY carried 195,000 barrels of diesel when it grounded on Brenton Reef in Rhode Island Sound. *Id.* The vessel spilled 600,000 gallons when its hull ruptured due to the grounding. Frank Trippett, *Summer of the Spills*, TIME, July 3, 1989, at 18.

20. RACHEL B discharged 250,000 gallons of heavy slurry oil into the Houston Ship Channel. Trippett, *supra* note 19, at 18.

21. PRESIDENTE RIVERA spilled 306,000 gallons of No. 6 fuel oil into the Delaware River. *Presidente Rivera Spill—June 24, 1989*, UNIV. OF DELAWARE SEA GRANT PROGRAM, <http://www.ceoe.udel.edu/oilspill/PresidenteRiveraSpill.html> (last visited Feb. 23, 2011).

debate for a number of reasons. Although the EXXON VALDEZ was a very large spill in a previously pristine Prince William Sound, the effect of the oil-coated coastline was witnessed firsthand by very few people. While images of oil-soaked birds and marine life made a significant impact on citizens of the “lower forty-eight,” the event was still thousands of miles away for most Americans. The “spill weekend” in June 1989 brought the reality of oil spills to the population centers of New England, Philadelphia, and Houston. The odor of petroleum, the natural resource damage, and the uncertainty that comes with a marine oil spill were now not only very apparent to many citizens, it also became a primary issue to legislators of the coastal states.²² In short, major oil spills were now seen not just as rare occurrences, but as a reality that needed to be curtailed.

More importantly, each casualty became a case study regarding the deficiencies of the Coast Guard’s regulation of tankers, waterways, marine personnel, and oil pollution response and compensation. According to the National Transportation Safety Board, WORLD PRODIGY grounded on Brenton Reef because the master was fatigued and there was poor interaction between the master and his crew.²³ Reportedly the master had been on duty for more than thirty-five hours on the bridge of WORLD PRODIGY prior to the grounding and had completely ignored vessel navigation while completing cargo-related paperwork in the minutes prior to the grounding.

Spill containment was more successful with the WORLD PRODIGY, RACHEL B, and PRESIDENTE RIVERA casualties than with the EXXON VALDEZ spill, which did ease some of the concerns regarding the Coast Guard’s ability to respond to major oil spills.²⁴ However, Vice Commandant Vice Admiral Clyde Lusk Jr. was called to appear before the Subcommittee on Water, Power, and Offshore Energy Resources for the House of Representatives Committee on Interior and Insular Affairs on July 28, 1989. In his prepared statement, VADM Lusk revealed that the Coast Guard “federalized” the spill within thirty minutes of the grounding because the vessel’s insurer was unable to obtain authorization from the vessel owner to

22. “As fumes from the spill wafted by the beach-front mansions in Newport, cleanup crews promptly deployed booms to contain as much of the spreading slick as possible.” Trippett, *supra* note 19, at 18.

23. NAT’L TRANSP. SAFETY BD., *supra* note 19, at 1-3.

24. *Id.*

conduct the cleanup.²⁵ Although the vessel owner eventually agreed to assume financial responsibility for the cleanup, the Coast Guard continued to control the spill response.²⁶ This unnecessary measure of control may have been a product of the criticism heaped on the Coast Guard for the slow response in the EXXON VALDEZ spill.

VADM Lusk also testified that although the spill resulting from the collision between tank vessel RACHEL B and a tank barge loaded with heavy slurry oil in the Houston Ship Channel was successfully contained and removed despite the unfavorable weather created by Tropical Storm Allison, the vessel owner chose to abandon the cleanup and turn it over to the Coast Guard on July 7, 1989.²⁷ The cargo remaining aboard the tank barge was off-loaded by the Coast Guard in an effort to minimize the potential damage that may have resulted from a complete release of the heavy slurry oil.²⁸

The vessel owner's conduct in the RACHEL B casualty truly accented one of the larger weaknesses in the existing pollution response scheme under the CWA. The vessel owner apparently determined that the best means of limiting further cleanup liability was to walk away from the spill and allow the Coast Guard to "federalize" the effort—even after two weeks of privately funding the cleanup operations in the Houston Shipping Channel. The drafters of the financial liability provisions of OPA 90 were influenced by the failure of the existing system to make the vessel owner primarily liable for the response regardless of whether the responsible party's limit of liability had been exceeded. Unlike the RACHEL B scenario, however, the owners of PRESIDENTE RIVERA assumed both financial and operational control of the spill and there was no need to federalize this spill.

The spill weekend of June 1989 caused an adjustment in the Coast Guard's legislative priorities, placing a renewed interest in modifying local contingency plans to address the "worst case spill," revisiting the role and extent of national and regional pollution strike/response teams, and placing more emphasis on the crew's qualifications.²⁹ The high-profile casualties also provided the Coast Guard with another opportunity to lobby actively for passage of

25. *Dep't of Transp., United States Coast Guard: Hearing Before the H. Subcomm. on Water, Power, & Offshore Energy, Comm. on Interior & Insular Affairs, 101st Cong. 5 (1989)* (statement of VADM Clyde Lusk, Jr., United States Coast Guard).

26. *Id.*

27. *Id.* at 6-7.

28. *Id.* at 7.

29. *Id.* at 8-14.

comprehensive oil spill liability and compensation legislation and ratification of the 1984 International Protocols to the Civil Liability and Fund Conventions.³⁰

V. ADDRESSING THE CLEAN WATER ACT DEFICIENCIES

Although there were countless issues addressed by the 101st Congress in its attempt to craft a comprehensive oil pollution liability, compensation, and response scheme, there were a limited number of very important issues that required negotiation, compromise, and in some instances, refusal to compromise. The following issues became high profile as the new legislation was being negotiated:

1. Activation and function of the Oil Spill Liability Trust Fund;
2. Whether preemption would be permitted with regard to operational regulations and liability schemes; and
3. Who would be responsible for paying the bill for cleanup and liability?

A. *Oil Spill Liability Trust Fund*

As previously mentioned, the U.S. Coast Guard's oil spill response mission was poorly funded and often made initiating a major response effort very difficult. At the time of the EXXON VALDEZ spill, the 311(k) fund had a balance of \$6.7 million available for the U.S. Coast Guard to fund its own response.³¹ The 311(k) fund was intended to be capitalized at a funding level as high as \$35 million, but Congress never directed anywhere near that amount of money to the fund for U.S. Coast Guard use.³² Due to the limited amount of funds appropriated to the 311(k) fund, the U.S. Coast Guard was required to go to Congress and seek an emergency appropriation for almost every spill of any size. The situation was aggravated by the lack of well-prepared "responsible parties" willing to assume responsibility for large spills or properly trained to assume that responsibility.

Obtaining compensation for damages caused by the spill was also difficult for those experiencing property damage or lost income due to the spill. The best opportunity was filing a lawsuit against the responsible party, but this required time and money and often led to

30. *Id.* at 14.

31. SAMUEL K. SKINNER & WILLIAM K. REILLY, THE EXXON VALDEZ OIL SPILL: A REPORT TO THE PRESIDENT 34-35 (1989).

32. 33 U.S.C. § 1321(k) (1982).

uncertain results. The Trans-Alaska Pipeline Liability Fund³³ and the Outer Continental Lands Act-created Offshore Oil Pollution Fund³⁴ were available to a limited extent to pay for removal costs and damages, but these were specific funds with limited applicability.

Further, responsible parties were eligible to limit their liability under certain circumstances as the law existed at the time of the EXXON VALDEZ spill. For instance, responsible parties were not responsible to pay for removal costs if it was possible to demonstrate that the spill was caused solely by an act of God,³⁵ an act of war, negligence on the part of the U.S. government,³⁶ or the act or omission of a third party.³⁷ In addition, the CWA allowed for limitation of liability, provided that the responsible party did not demonstrate “willful negligence or willful misconduct within the privity or knowledge of the owner.”³⁸

So, in March 1989, responsible parties found it difficult to avoid liability all together, but limitation of liability was certainly promising absent willful misconduct. Practically, this meant that a responsible party might pay for an entire cleanup, but would then make a claim against the government to refund all the response costs if limitation was available—from a fund that had no real money appropriated to it. The result was a request by the U.S. Coast Guard for federal general revenue funds to pay the responsible party’s claim for removal costs.

That the previously created Oil Spill Liability Trust Fund (OSLTF) needed to be activated and put to use as part of the new federal oil spill scheme was without contest in 1989. The issues confronting the negotiators included various items:

1. How should the OSLTF be funded?
2. Should the entire content of the OSLTF be appropriated and available for use?
3. If not, should some portion of the OSLTF be available to the U.S. Coast Guard without appropriation?
4. At what level should funding of the OSLTF cease, if at all?

33. Pub. L. No. 93-153, 87 Stat. 584 (1973) (codified as amended at 43 U.S.C. §§ 1651-1655 (1982)).

34. 43 U.S.C. § 1812.

35. 33 U.S.C. § 1321(a)(12).

36. *See* Gaspar v. United States, 460 F. Supp. 656, 1979 AMC 2232 (D. Mass. 1978).

37. 33 U.S.C. § 1321(f)(1).

38. *Id.* The limitation limit was the larger of \$150 per ton or \$250,000 for vessels carrying oil as cargo.

Congress was only partially successful in addressing the funding issues revealed by the oil spills of 1989. The Fund was activated and funded by a tax of five cents on each barrel of oil initially for the period 1990 to 1994.³⁹ The tax was to be charged in a manner that would maintain the OSLTF at a level of \$1 billion. The outstanding fund balances in other existing oil spill funds, such as the Trans-Alaska Pipeline Fund, the Deepwater Port Liability Fund, and the Offshore Oil Pollution Compensation Fund, amounting to approximately \$370 million, were also folded into the OSLTF to ensure there were funds available from the moment the OSLTF was activated.⁴⁰ It also should be noted that OPA 90 provided \$1 billion in borrowing authority to the fund as well, allowing it to expend up to \$2 billion at any one time if necessary.⁴¹

Congress also addressed the U.S. Coast Guard's lack of funding when the spill emergency occurs. Congress created an "emergency fund" within the OSLTF that was available to the U.S. Coast Guard and the Environmental Protection Agency for removal costs as well as to the natural resource trustees for the costs of initiating natural resource damage assessments under OPA 90.⁴² This emergency fund, initially set at \$50 million per year, was established as a "no-year" fund so that any unexpended amounts rolled over to future years.⁴³

Although an automatic appropriation of \$50 million each year for emergency response certainly improved the frustrating circumstances caused by the 311(k) fund, it was not ideal. First, it was an extreme battle just to convince Congress that the federal response authorities now tasked with responding, monitoring, and supervising every oil spill would require immediate funding. Early versions of the OSLTF legislation did not contain any automatic appropriations, and many legislators were looking to the fund as a setoff against other federal budget expenditures. It was only in the last versions of the legislation that the emergency fund was created. Over time it has become clear this emergency fund was not adequate to meet the emergency needs for which it was intended. As a result, Congress amended the statute authorizing the emergency fund to permit the U.S. Coast Guard to obtain up to a \$100 million advance on the OSLTF, provided the Coast Guard reported back to Congress within thirty days of the advance

39. Pub. L. No. 101-239, § 7505, 103 Stat. 2106, 2363-64 (1989).

40. 26 U.S.C. § 9509(b) (1994).

41. *Id.*

42. 33 U.S.C. § 2752(b) (1994).

43. *Id.*

with details of why the advance was required.⁴⁴ Certainly a potential \$150 million available each year for emergency response by federal responders is a large improvement, but it will not be sufficient for spills of national significance such as the Deepwater Horizon spill.

Two additional points must be made regarding the OSLTF. First, there was much discussion during the OPA 90 negotiations, and even today, about the role cargo owners play in the oil-spill-liability-funding scheme. While at first glance it appears to many that cargo owners avoided liability for the costs of oil spills, this view is not entirely correct. The OSLTF is funded almost entirely by taxes on the oil industry. If the funding limit of the OSLTF is increased beyond \$1 billion, it is very likely this increase will again be funded by a tax on oil. Consequently, the oil industry is in fact the safety net for oil spill liability and response costs.

Second, while the current funding levels of the OSLTF may be inadequate for spills of national significance such as the Deepwater Horizon spill, the system for allocating the cost of oil spills between the responsible party and the oil industry remains valid. The responsible party is denied limitation of liability under the same circumstances as under the old CWA, with some exceptions. Under OPA 90, limitation is not available to a responsible party if the spill was proximately caused by the responsible party's gross negligence or willful misconduct.⁴⁵

In addition to these restrictions, OPA 90 also denies limitation to a responsible party where the spill was proximately caused by the violation of an applicable federal safety, construction, or operating regulation.⁴⁶ This was also a late addition to the limitation provision during the OPA 90 negotiations, and it significantly increased the number of spills that will not be subject to limitation of liability. Limitation was further restricted by the provisions contained in 33 U.S.C. § 2704(c)(2), which denies limitation to any responsible party that fails to report the spill as required by law or fails to provide all reasonable cooperation and assistance requested by a responsible official coordinating the spill response. These expansions to the denial of limitation provide significant leverage to the Federal On-Scene Coordinator as well as an expansive ability to recover removal costs and damages from almost every responsible party.

44. Pub. L. No. 107-295, § 323, 116 Stat. 2104 (2002) (amending 33 U.S.C. § 2752(b)).

45. 33 U.S.C. § 2704(c)(1)(A).

46. *Id.* § 2704(c)(1)(B).

B. Preemption

Our nation's role in the international community, and more specifically in the international maritime community, was a primary focus of the oil spill legislation negotiations. Before OPA 90 was enacted, states could impose removal liabilities against the spiller, but any state law governing collection of damages was preempted by federal law.⁴⁷ Many "states' rights" advocates, including Senator George Mitchell of Maine, insisted that no provision in OPA 90 restrict the ability of states to impose unlimited liability on those responsible for spilling oil in state waters. This position was contested by the President and the U.S. Coast Guard, both advocating adoption of the International Convention on Civil Liability for Oil Pollution Damage (CLC Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention) along with the 1984 Protocols to the Fund Convention.

It was not practically possible to enact legislation such as the Oil Pollution Act of 1990, where the limits of liability exceeded the limits provided for in the CLC Convention or the Fund Convention, and still ratify these international conventions. As it was impossible to pass OPA 90 without assurances that states' rights to enact unlimited liability statutes would not be preempted, ratifying international conventions was impossible. So, was Congress correct in ignoring the international system for establishing liability and providing a fund for catastrophic spills?

The previously identified CLC Convention was replaced by the 1992 CLC and 1992 Fund Convention, which entered into force in 1996.⁴⁸ There are now over 100 nations signatory to the 1992 conventions.⁴⁹ If oil is spilled in the territorial sea or exclusive economic zone of a Member State, a "three tier liability system" is activated. Under the first tier, which is the subject of the 1992 CLC, the shipowner is liable for up to an amount equivalent to approximately \$140 million.⁵⁰ Any vessel carrying more than 2000 tons of oil must also provide insurance, and the standard of care is

47. *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1985 AMC 1521 (5th Cir. 1985) (en banc), *cert. denied*, 477 U.S. 903, 1986 AMC 2704 (1986).

48. MIŠO MUDRIĆ, THE INTERNATIONAL LIABILITY FUNDS IN THE MARITIME FIELD 170 (2009), http://unizg.academia.edu/Mi%C5%A1oMudri%C4%87/Papers/115142/The_International_Liability_Funds_in_the_Maritime_Field.

49. *Id.* at 171.

50. *Id.*

established as strict liability.⁵¹ Thus, protection and indemnity clubs bear the lion's share of this burden.

This first tier, however, is not sufficient to meet the financial demands of larger spills, so a second tier is available. This tier, known as the First International Fund (1992 Fund) is necessary to pay obligations when the shipowner is financially unable to pay, the shipowner is able to limit liability, or the shipowner is exempt from liability.⁵² The 1992 Fund is financed by oil companies that receive more than 150,000 tons of crude or heavy fuel oil by sea in one calendar year.⁵³ Once again, access to the 1992 Fund is capped at the equivalent of approximately \$316 million.⁵⁴

Realizing that even \$450 million was not enough financial protection, the international community ratified the 2003 Supplementary Fund as the third tier of protection.⁵⁵ The Supplementary Fund is also financed by oil companies receiving oil by sea, and the Fund pays all remaining claims up to approximately \$1.2 billion.⁵⁶ So, while OPA 90 provides \$1 billion of protection above and beyond the contribution of the shipowners, with the opportunity to borrow another \$1 billion if required, the international scheme provides another \$1.2 billion of protection including the liability of the individual shipowner. This protection appears to be fairly equivalent for spills that do not qualify as "spills of national significance." However, to participate in the international system, U.S. domestic law and state law must accept the limits of liability provided by that international scheme. Hindsight seems to indicate that Senator George Mitchell and the states' rights advocates were vindicated in their position and their principles.

Preemption arose in another context as the negotiations progressed—the issue known to the negotiators as the "How clean is clean?" provision. In any spill of national significance, a dispute often arises between the Federal On-Scene Coordinator and state and local representatives over whether a sufficient amount of oil has been removed to declare the removal activities complete. This declaration of completion is important not only to the federal agencies monitoring

51. *Id.*

52. *Id.* at 171-72.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 172.

the cleanup operation, it also signifies the end of the responsible party's obligation to fund the cleanup under OPA 90.

Of course, based on state oil pollution liability and removal statutes, the responsible party could be required to continue to clean even after the Federal On-scene Coordinator's decision to end the cleanup. However, the state loses the authority and oversight that the federal response system employs, and there is always the risk that the responsible party will run out of money or otherwise refuse to perform any further cleanup operations. As a result, a battle developed regarding how the federal government would end a particular cleanup operation under OPA 90.

"Consultation on removal actions," 33 U.S.C. § 2711, was the result of the battle over "How clean is clean?" This section contains the following statement: "For the purposes of the National Contingency Plan, removal with respect to any discharge shall be considered completed when so determined by the President *in consultation with the Governor* or Governors of the affected States."⁵⁷ The words "in consultation with the Governor" became the standard after several negotiating sessions discussing the merits of: (a) "with the approval of the Governor"; (b) "with the concurrence of the Governor"; or (c) "without the objection of the Governor." The issue evolved into what might be considered an issue of "reverse preemption." Should the governors of the affected States be given the authority to block the decision of the Federal On-Scene Coordinator to end the cleanup operations? What were the implications of granting this authority in the legislation?

Ultimately, congressional negotiators feared the "veto" provisions would have the effect of granting governors a "blank check" to continue cleanup operations as they saw fit, using the responsible party/OSLTF as the payment source. State objections to ending cleanup operations not only placed additional financial burdens on the responsible party or the OSLTF but also on the federal agencies managing the spill. Granting such authority to governors was at a minimum financially unwise and possibly politically unwise as well. There was significant concern by the negotiators that, in certain spill situations, it would be politically impossible for a Governor to refrain from vetoing a federal decision to end the cleanup operations. Hence, the language was amended to permit "consultation" but not "approval" or "concurrence."

57. 33 U.S.C. § 2711 (1994) (emphasis added).

Fast-forward to 2010 and the Deepwater Horizon spill. Admiral Thad Allen, National Incident Commander, was bombarded by “better ideas” and “demands for actions” that were not necessarily in accordance with the National Contingency Plan or in the best interest of the local environment or ecosystem. OPA 90, while respectful of the states’ fear of preemption, was carefully drafted to protect the National Incident Commander’s right to completely control access to the OSLTF for spill response and jealously guard the limited resources available for spill response so as not to permit funds to be wasted on efforts that were ill-advised or potentially harmful to the environment.

C. Paying for the Costs of Oil Spills

EXXON VALDEZ presented a myriad of issues to the Administration and the Congress, not the least of which was who should be responsible for responding to, managing, and completing the cleanup operations? While almost everyone agreed that vessel operators, cargo owners, or the oil industry should pay for the cost of oil spills, the issue of who would be responsible for removing the oil was a bit more challenging. As previously stated, industry failed to be prepared for the spill in Prince William Sound.

In March 1989, the obligations of the responsible party to remove the spilled oil and pay for it were a bit confusing and ambiguous. For instance, if a responsible party took responsibility for removing an oil spill but it appeared that the cost of removal exceeded the limit of liability for the responsible party or just became too hard and too costly to continue, a responsible party might then abandon the response. In that situation, all the money and effort expended up to that point would not be credited against the limit of liability. In the case of *United States v. Dixie Carriers, Inc.*, for example, the court ruled that a responsible party who abandoned the removal action must pay for all the government spill expenses up to the limit of liability.⁵⁸ Such anomalies often led to responsible parties abandoning the cleanup operation very early so as to begin crediting the government expenses against the limitation of liability.

Despite calls for the entire oil spill response regime to be reworked to put the federal government in charge of removing the oil, the U.S. Coast Guard continued to recommend that the existing “spiller pays and cleans” system be maintained and that the Federal On-Scene

58. 736 F.2d 180, 183-86, 1985 AMC 815, 818-21 (5th Cir. 1984).

Commander be provided with more authority to direct the spill.⁵⁹ As a result, FWPCA section 311(c)(1)(A) was revised to state as follows: “The President shall, in accordance with the National Contingency Plan and any appropriate Area Contingency Plan, ensure effective and immediate removal of a discharge, and mitigation or prevention of a substantial threat of discharge.”⁶⁰

This amendment was important because it not only established that the President was now obligated to “ensure effective and immediate removal” of spilled oil, but it also established that there would be standards applied to the removal action—the National Contingency Plan and the Area Contingency Plan. Prior law only authorized the President to act in these circumstances.

The National Contingency Plan was also enhanced by requiring establishment of procedures and standards for removing a worst case discharge of oil, and for mitigating or preventing a substantial threat of such a discharge.⁶¹ This was a significant step because it required the U.S. Coast Guard to determine exactly how much equipment and resources would be required to respond adequately to major oil spills and where the equipment and resources could be found—or not be found as the case may be. This was an eye-opening experience that revealed significant shortcomings in the pollution response network.

The new response system, however, did not end with the U.S. Coast Guard analysis of resources for a worst-case spill. Revisions to the FWPCA contained in OPA 90 required that tank vessels, nontank vessels, and facilities prepare and submit to the U.S. Coast Guard response plans describing procedures for responding, to the maximum extent practicable, to a worst case discharge.⁶² These vessel/facility response plans were required to contain contracts with pollution-response firms controlling equipment needed to respond to these spills. As a result, OPA 90 generated a private commercial market for pollution-response equipment rather than place the obligation for providing that equipment on the U.S. government.

Of course, the genius of this plan—requiring vessels and facilities to demonstrate through their response plans the ability to respond with sufficient resources to a worst-case discharge—was also a weakness.

59. *Oil Transportation and Cleanup Technology: Hearing Before the Subcomm. on Transp., Aviation & Materials of the House Comm. on Sci., Space & Tech.*, 101st Cong., 2d Sess. 3-4 (1990) (statement of Captain David Whitten, Acting Chief, Office of Marine Safety, Security, and Environmental Protection, United States Coast Guard).

60. 33 U.S.C. § 1321(c)(1)(a) (2006).

61. *Id.* § 1321(d)(2)(J) (1994).

62. *Id.* § 1321(j)(5).

Just as in the Prince William Sound situation, resources that were present in 1990 might be completely obsolete and useless in 2010. To avoid this result, FWPCA section 311 was amended to permit inspection of equipment identified for use in response to a discharge of oil⁶³ and further required the U.S. Coast Guard to conduct drills of removal capabilities within any port area periodically, including the participation of vessel/facility owners.⁶⁴

The OPA 90 scheme was designed to push as much of the cost of spill prevention and response to the oil industry as possible. The result was a network of commercial-spill-response entities such as the Maritime Spill Response Corporation that flourished at obtaining contracts from vessel/facility owners to provide spill-response equipment in an emergency. The drill and exercise requirements contained in OPA 90 provided a means by which the U.S. Coast Guard could ensure the spill resources were in fact available when needed.

The postmortem on the Deepwater Horizon spill will at least in part focus on the availability of the response resources identified in the spill response plans for the mobile offshore drilling rigs. Without a doubt this “worst-case discharge” clearly exceeded any of the planning parameters envisioned by industry or the U.S. Coast Guard. Although a significant amount of resources surfaced in the Gulf of Mexico in a short period of time, it is also clear that not all the equipment needed to respond to the spill was available when the Federal On-Scene Coordinator needed it. The debriefing on the resource issue will do much to inform Congress whether the OPA 90 response preparedness provisions were adequate to the task.

VI. CONCLUSION

OPA 90 in many ways resembled the delivery of a twelve-pound baby: the process was extremely painful, but ultimately rewarding. The nation matured in its view of how best to address the true damages resulting from oil spills—not just the costs of removing the oil. It accepted the truth that the cost of preparing for and responding to oil spills should lie on the parties most able to bear that cost—the transporters and the oil industry. Recent events have certainly taught us that while the scheme is workable and even artful, it cannot be thrown in a drawer like your child’s third grade report card.

63. *Id.* § 1321(j)(6) (2006).

64. *Id.* § 1321(j)(7) (1994).

OPA 90 must be treated as a living document—a statutory and regulatory process that needs to be buffed up and revised to meet the modern circumstances. Limitation levels must be modified with time, just as the ceiling on the OSLTF must be adjusted with time. The credibility of the remaining provisions depends on these types of adjustments being made. Most important, however, is the discipline that must be exercised to continue to abide by the OPA 90 scheme even when a major, high profile, and contentious spill occurs. OPA 90 will be a properly-functioning scheme provided it is enforced and followed in its entirety. Problems will more likely occur when government leaders, industry, and the public attempt to pick and choose the portions of OPA 90 that satisfy them and abandon those that do not. At least that’s how I see it—through the rearview mirror.