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# US OPA – Its History, Development and How It Affects Us

by

**Michael Chalos**



**CHALOS O'CONNOR, LLP**



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# EXXON VALDEZ – March 24, 1989





## US OPA – Its History, Development and How It Affects Us

### Oil Pollution Act (“OPA”) of 1990

*See 33 U.S.C. § § 2701-2761, et seq.*

- Direct Congressional reaction to the EXXON VALDEZ spill
- Signed into law by George H. W. Bush in Aug '90
- Amended the Clean Water Act
- Established to address preventing, responding to, and paying for oil pollution incidents
- Creates a comprehensive prevention, response, liability and compensation regime for oil pollution in U.S. navigable waters
- Significantly increased federal oversight of maritime oil transportation



### OPA 90 established:

- New requirements for vessel construction and crew licensing and manning;
- Mandated contingency planning in case of an oil spill;
- Enhanced federal response capability;
- Broadened enforcement authority;
- Increased potential civil and criminal penalties for oil spills;
- Created new research and development programs;
- Increased existing liability limits; and,
- Significantly broadening financial responsibility requirements for Vessel, Owners, Operators, etc.



## OPA applies to:

- Any discharge by a vessel or facility of oil (e.g. crude oil, bunkers, or refined petroleum products), within the navigable waters of the United States, extending to the outer limit of the Exclusive Economic Zone (“EEZ”), which is 200 nautical miles; and
- Any circumstance that present a substantial threat of the discharge of oil within the navigable waters of the United States, extending to the outer limit of the Exclusive Economic Zone (“EEZ”), which is 200 nautical miles.



## The Responsible Party (“RP”)

- **The Owner or Operator of the vessel or facility that discharges oil, or threatens to discharge oil, are designated by OPA as the Responsible Party (or “RP”)**
  - **There can be more than one RP for a given incident**
  - **The RP’s are joint and severally liable for the resulting clean up expenses and damages**
  - **Under OPA, a bareboat charterer would be considered an Owner/Operator and would be designated an RP**



- An RP may be liable for a wide range of damages under OPA, including:
  - Removal (*i.e.* clean up) costs;
  - Injury to natural resources;
  - Damage to Real Property or personal property;
  - Loss of subsistence use;
  - The federal or states' loss of revenues (taxes, rents, fess, etc.);
  - Loss of profits; and,
  - The cost of increased public services

See 33 U.S.C. § 2702



## OPA Limits of Liability



- Following the ATHOS I oil spill in the Delaware River in 2004, congress enacted the Delaware River Protection Act of 2006.
- The Act increased OPA's limits of liability and authorized the President (through the USCG) to further adjust limits when appropriate
- Limits are generally adjusted every three years
- The current vessel liability limits were effective on July 31, 2009



## Current OPA Liability Limits for Vessels

**\*Depends on the Vessel/Facility Type & Size**

Vessel / Facility Type	The current limits of liability are the 'greater of:'
Single-hull tank vessel > 3,000 gross tons	\$3,200 per gross ton or \$23,496,000
Single-hull tank vessel ≤ to 3,000 gross tons	\$3,200 per gross ton or \$6,408,000, whichever is greater
Double-hull tank vessel > 3,000 gross tons	\$2,000 per gross ton or \$17,088,000
Double-hull tank vessel ≤ 3,000 gross tons	\$2,000 per gross ton or \$4,272,000
Non-Tank vessel	\$1,000 per gross ton or \$854,400.
Offshore Facility	Total of all removal costs + \$75,000,000
Onshore Facility & Deepwater Ports	\$350,000,000 (subject to reduction by the President)



## Putting the Limits in Perspective

- A typical double hull “panamax” tanker is approximately 45,000 gross tons
- The OPA limit would therefore be the greater of \$2,000 per gross ton or \$17.088 million
- OPA limit = \$90 million



## Denial of Limitation of Liability Under OPA

- An RP's ability to Limit its Liability can be lost rather easily
- No Limitation of Liability if:
  - The RP fails to report the spill in a timely fashion (Note: USCG maintains a 1-800 "hot line" for reporting oil spills)
  - The RP Fails to reasonably cooperate during the clean up operations
  - The spill was caused by the RP's gross negligence or willful misconduct
  - The RP fails to comply with an administrative or court order

*See 33 U.S.C. § 2704*



### Denial of Limitation of Liability Under OPA (*Continued*)

- An RP's right to limit liability is also lost if a proximate cause of the spill was a violation of a federal safety, construction or operating regulation by either the RP or its employees, agents, or contractor of the RP (even “compulsory” pilots or assisting tugs)
- It is rare that there is not an *allegation* of a violation of a federal regulation that was at least a contributing proximate cause of the spill
- The burden of proof is on the RP to prove it did not commit a violation or that it was not a proximate cause
- The implementing Federal regulations (CFR) are voluminous



### The “Complete Defense” Under OPA

- OPA also provides an RP with a complete defense, as opposed to a Limitation of Liability
- The burden is very high...
- The RP must prove that the spill was caused solely by:
  - An act of God (i.e. an unforeseen tsunami)
  - An act of War; or
  - An act or omission of a third party, except those in a contractual relationship with the RP
- This defense is only available if the RP took precautions against foreseeable acts or omissions of said third party
- There are almost no cases on record of an RP succeeding with a complete defense under OPA

**See 33 U.S.C. § 2703**



### Government Players – Lead Federal Agencies

- Federal agencies perform an oversight function and often bring resources/expertise for response efforts:
  - The U.S. Coast Guard is the lead federal agency for response to “offshore” oil pollution incidents
  - The Environmental Protection Agency is lead federal agency for response to “inland” oil pollution incidents
- Referred to as the “Federal On-Scene Coordinator” (FOSC)



### Government Players – the NPFC

- In 1991, the United States Coast Guard created the National Pollution Funds Center (“NPFC”) to implement Title 1 of OPA, administer the Oil Spill Liability Trust Fund (“OSLTF”), and ensure effective response and recovery
- The NPFC hears claims by RP’s and those affected by oil spills and administers Certificates of Financial Responsibility
- the NPFC provides funding for response, compensates claimants for cleanup costs and damages, and takes action to recover costs from RP’s
- The RP bears a substantial burden when attempting to recover from the NPFC and the NPFC has a substantial track record of denying claims



### The Oil Spill Liability Trust Fund (OSLTF)

- When OPA 90 was signed into law, the OSLTF was 4 years old
- In addition to authorizing use of the OSLTF, OPA consolidated the liability and compensation requirements of certain prior federal oil pollution laws and the supporting funds, including the:
  - Federal Water Pollution Control Act (FWPCA)
  - Deepwater Port Act
  - Trans-Alaska Pipeline System (TAPS) Authorization Act
  - Outer Continental Shelf Lands Act



### The Oil Spill Liability Trust Fund (*continued*)

- With the consolidation of those funds and the collection of a tax on the petroleum industry, the Fund increased to \$1 billion
- Fund uses were delineated by Congress via OPA to include:
  - Payment of removal costs
  - State access for removal actions
  - Payments to federal, state, and Indian tribe trustees to conduct natural resource damage assessments and restorations
  - Payment of claims for uncompensated removal costs and damages
  - Research and development, and other specific appropriations to Federal Agencies



## The Oil Spill Liability Trust Fund (*continued*)

- **The OSLTF has several sources of revenue:**
  - **Barrel Tax**
    - ◆ Collected from the oil industry on oil produced in or imported to the U.S., currently 8 cents per barrel. The largest source of revenue.
  - **Transfers from other funds**
  - **Interest**
  - **Cost Recoveries**
  - **Penalties**



### The Oil Spill Liability Trust Fund (*continued*)

- The OSLTF provides funding for oil pollution removal activities
- Funding is also provided to prevent or mitigate the substantial threat of such an oil discharge
- Examples of removal costs include:
  - Contract services (e.g., cleanup contractors)
  - Equipment used in removals
  - Chemical testing required to identify the type and source of oil
  - Proper disposal of recovered oil and oily debris
  - Costs for government personnel and temporary government employees hired for the duration of the spill response
  - Completion of documentation
  - Identification of RPs



### The Certificate of Financial Responsibility (COFR)

- OPA requires operators of vessels > 300 gross tons, using the navigable waters of the U.S., or vessels of any size that lighter or trans-ship oil in the EEZ, to provide evidence of their financial ability to satisfy liability claims for removal costs and damages up to the prescribed limits, called the COFR
- The primary goals of the NPFC's COFR program are to ensure that RPs are identified and held financially responsible to the full extent of the law for any expenses involved in dealing with any specific vessel water pollution incident.



### The Certificate of Financial Responsibility (*continued*)

- The NPFC issues COFRs to vessel operators who have demonstrated adequate evidence of financial responsibility
- The NPFC processes thousands of COFR transactions each year, including new issues, name changes, renewals and revocations
- Failure to establish acceptable evidence of financial responsibility, documented by a COFR, may result in:
  - prevention or cessation of operation
  - vessel detainment
  - denial of entry to a U.S. port
  - a civil penalty of up to \$32,500 per day of violation, or,
  - seizure and forfeiture of the vessel



### OPA's Impact

- **Strict liability for vessel owners and operators (RPs)**
- **Potentially unlimited damages for oil spill incidents**
- **Increased federal oversight of spill response and cleanup**
- **Forced the marine insurance industry to re-examine how it conducts business under OPA's new regime**
- **The number and volume of spills from tank vessels in US waters have fallen considerably since enactment**
- **Oil, shipping, insurance companies and class societies have undertaken initiatives to improve prevention of spills and have tightened up environmental standards**



Thank you for your attention!

*Michael G. Chalos*

