Oil Pollution

Oil Spills and the Oil Pollution Control Act of 1990

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The major regulatory program under the Clean Water Act (CWA) is section 311, which prohibits the unauthorized discharge of oil and hazardous substances into or upon the surface waters or adjoining shorelines and authorizes the federal government to respond to oil spills as well as to recover cleanup costs and damage to natural resources.[1] Until the passage of the Oil Pollution Control Act of 1990 (OPA),[2] section 311 was the primary federal program for responding to oil spills because petroleum and its fractions were excluded from the definition of hazardous substances or wastes covered by CERCLA.[3] EPA developed a framework under the CWA to respond to oil spills, which is contained in the National Contingency Plan (NCP).[4]

Following the March 24, 1989 Exxon Valdez oil spill and a series of lesser known spills, it became obvious that there were glaring deficiencies in the federal oil spill program. As a result, Congress enacted the OPA, which amended and superseded section 311 of the CWA and a number of other federal statutes that regulate the transportation of oil.[5] OPA imposes new potential liabilities, capital, and operating costs on the owners and operators of vessels, demise charterers, as well as on owners and operators of terminals and facilities, which may exceed commercially available insurance and could jeopardize the financial viability of small or single-vessel companies.

In addition to the liability provisions, OPA imposed a panoply of structural, equipment, and operating requirements that will substantially increase operating costs for responsible parties.

Under the oil spill response framework established under the CWA, the federal government's representative at the site of the spill, who is known as the on-scene coordinator (OSC), was only initially authorized to monitor an oil spill cleanup. The OSC could "federalize" or assume partial or total control of the cleanup only after it was clear that the discharger was unknown, was not acting responsibly, or its cleanup effort was ineffective. In contrast, OPA established the Oil Spill Liability Trust Fund (the "Oil Spill Fund"), which can be used to immediately remove or otherwise respond to discharges or threatened discharges of oil.[6]

Finally, OPA also presents risks to lenders with existing loans or who are contemplating participating in new financing transactions involving onshore or offshore facilities, as well as vessels that may operate within 200 miles of the United States. These financial institutions may not only find OPA's financial obligations affect their borrowers' ability to repay their loan obligations but also may find themselves directly liable for the cleanup costs of oil spills if they become too involved in the operations of their borrowers.

DEFINITIONS

For the purposes of determining liability under section 311 of the CWA, as amended by OPA, the following definitions apply.

A "discharge" refers to any intentional or unintentional emission (except natural seepage) of oil.[7]

The term "facility" is defined as any structure, group of structures, equipment, or device other than a vessel that may be used to produce, explore, drill, store, handle, transfer, process, or transport oil, including any motor vehicle, rolling stock, or pipeline used for such purposes.[8] This term is broad enough to encompass oil spills from most terminals and exploration platforms. Indeed, courts have liberally interpreted this definition so that a spill from a tank car that was located on a railroad siding adjacent to an onshore facility that was not owned by the facility nevertheless was deemed to be part of the facility and the facility owners were held responsible for the cleanup.[9]

The term "oil" includes petroleum, fuel oil, sludge, oil refuse, and oil mixed with other wastes except dredged sediments including crude oil, No. 2 fuel oil, bunker oils, motor oils, and gasoline. However, it does not include any form of petroleum that is specificially listed as a hazardous substance under CERCLA and thus subject to that statute.[10] These substances would include benzene, naptha, listed gasoline additives such as toluene, detergents for gasoline, diesel fuel, and other listed petroleum distillates.

An "offshore facility" includes any facility that is not a vessel or public vessel found in the waters of the United States or any waters subject to the jurisdiction of the United States.[11]

An "onshore facility" is any facility located on, in, or under any land and includes motor vehicles and rolling stock.[12]

The term "removal costs" includes all expenses incurred to contain or remove a discharge oil from water and shorelines or any actions that are necessary to minimize or mitigate damage to the public health or welfare, including but not limited to fish, shellfish, wildlife, public and private property, shorelines, and beaches. In the case of a substantial threat of a discharge of oil, it includes costs to prevent, minimize, or mitigate impending oil pollution from such a threatened discharge.[13]

A "responsible party" (RP) includes any owner or operator, demise or bareboat charter of a vessel, owners and operators of onshore facilities, and the lessee or permittee of the area where an offshore facility is located.[14] Since OPA adopts the "owner or operator" liability scheme of CERCLA, it is possible that courts will construe these terms under the CERCLA case law. Thus, it is conceivable that liability could be imposed on shareholders, parent or sister corporations, a corporate officer, managing partner, or a finance lessor.

For abandoned vessels and facilities, the RP is the person who owned or operated the facility or vessel immediately prior to its abandonment.[15] Thus, companies that abandoned oil production or processing facilities still could face potential liability even though those assets are no longer reflected on their books if a discharge takes place from an abandoned facility or vessel after the effective date of OPA. Interestingly, the version of OPA that was passed by the United States House of Representatives had provided that the owner of a "vessel" includes any watercraft or artificial contrivance used or capable of being used for water transportation, such as tank vessels, self-propelled barges, freighters, ferries, and private yachts.[16] Excluded from the definition of vessel are public vessels, which are vessels owned or bare-board chartered by the United States, a state, a political subdivision, or a sovereign and which vessel is not used in commerce.[17]

SCOPE OF LIABILITY

Under section 311, as amended by OPA, RPs are jointly and strictly liable for all removal costs incurred by a governmental authority or removal costs of third parties that are consistent with the NCP associated with discharges or substantial threats of discharges of oil that occur on or after August 18, 1990.[18]

In addition to removal costs, the following damages may be recovered from RPs:

- —Damage to natural resources, which will be measured by the cost of restoring or replacing the damaged resource plus the diminshed value of the resource while restoration is pending;
- —Damages for injury or economic losses resulting from destruction of real or personal property;
- —Damages of loss of use of natural resources used for subsistence;
- —Damages equal to the loss of tax revenue, royalties, rents, or net profit shares suffered by federal, state, or local governments due to injury to real or personal property;
- —Damages equal to the loss of profits or impaired earning power because of injury to real or personal property or natural resources;
- —The net costs of providing increased or additional public services during or after removal activities.[19]

RPs are not liable for oil discharges that are pursuant to a NPDES, that come from a public vessel, or from an onshore facility associated with the subject to the Trans-Alaska pipeline.[20]

Unlike CERCLA, liability for oil spills under OPA is prospective. Thus, purchasers of assets that include vessels or facilities that suffered a discharge of oil should not be retroactively liable for the oil spill simply by virtue of the transfer. However, a stock purchaser of a company owning a vessel or facility that has suffered an OPA regulated spill would acquire that liability.

Although OPA originally was intended to replace the patchwork of state and federal laws establishing oil spill liability, the final bill that was

signed into law did not preempt state laws. Under section 2718, states may impose additional liability or other requirements relating to spills or removal activities and can afford common-law remedies to claimants that are broader than those contained under OPA.[21] For example, of the 24 states that have oil spill statutes, 15 provide for strict liability and in 11 of those states, the liability is unlimited. Thus, vessel owners/ operators and their bankers may find their liability largely defined by the fortuity of where an oil spill takes place.

Another controversial liability issue addressed by OPA was the restriction on the applicability of the Limitation of Liability Act of 1851 to oil spills.[22] Under this statute, the liability of ship owners is limited to the value of the vessel and its cargo. Thus, if a vessel was severely damaged or sank, the liability of its owner could be less than the maximum liability provided in the CWA. Prior to OPA, there was some question as to whether the liability provisions of section 311 were capped by the Limitation of Liability Act. However, the OPA expressly provides that the 1851 law shall not limit the liability responsible parties face under federal or state laws.[23]

LIMITATIONS ON LIABILITY AND EXCEPTIONS TO THE LIMITATIONS

Section 311 contained several important liability limitations for owners or operators of vessels or facilities that were substantially increased by the OPA.[24] The maximum liability limitations are based on the size and nature of the vessel or facility.

The liability for responsible parties of vessels was raised from $150 per gross ton to $1,200 per gross ton for each spill, with a maximum liability of $10 million for oil tankers of 3,000 or more gross tons, while the liability limitation for smaller oil tankers is $2 million.[25] All other vessels (e.g., dry cargo vessels) face a maximum liability of $600 per gross ton.[26]

Owners or operators of offshore facilities that are not deepwater ports, such as oil platforms, now are liable for all cleanup costs plus $75 million per spill, while the responsible parties for onshore facilities and deepwater ports are liable for up to $350 million per spill.[27]

However, the liability limitations will not apply and the RP will face unlimited liability if the spill is (1) proximately caused oy the gross negligence or wilful misconduct of the responsible person, (2) failure to comply with an applicable federal safety, construction, or operating regulation, or (3) failure or refusal to report a spill, to cooperate or assist governmental authorities with a removal action when requested, or to comply with an order without sufficient cause.[28]

Prior to OPA, any costs due the U.S. government constituted a maritime lien on the vessel, which could be enforced in an action in rem in any district court where the vessel was located.[29] While this provision was deleted by the OPA, it is still possible that the government and third parties may be able to assert a maritime lien that would have priority over a lender's security interest. Under the U.S. Ship Mortgage Act of 1920, damages arising out of maritime torts are given preferred maritime lien status with priority over ship mortgages and certain other maritime liens. There is no statutory definition of what constitutes a maritime tort; instead it is an evolving concept of case law. In general, however, a maritime tort is one occuring on navigable waters that has some connection with traditional maritime activities. In adopting OPA, Congress did not indicate whether the strict liability under the statute also would constitute a maritime tort that would be afforded preferred maritime lien status. Thus, this issue probably will have to be resolved on a case-by-case basis by the courts.

DEFENSES TO LIABILITY

OPA only provides for three limited defenses to liability.[30] An RP may avoid liability for removal costs or damages if it can demonstrate by a preponderance of the evidence that the discharge or substantial threat of a discharge of oil AND the resulting removal costs or damages were caused solely by an act of God, an act of war, or act or omission by a third person who is neither an agent nor employee of the RP nor in a contractual relationship with the RP.[31] In addition, an RP will not be liable to a claimant to the extent that the incident for which the claimant seeks reimbursement or damages was due to the gross negligence or wilful misconduct of the claimant.[32]

In order to qualify for the third-party defense, the RP will have to show that it exercised due care with respect to the oil that was discharged and took precautions against foreseeable acts or omissions of such a third party as well as the foreseeable consequences of those acts or omissions.[33] Examples of such contractual relationships may include employees or contractors, such as a tugboat operator or a firm that designed an ineffective Spill Prevention Control and Countermeasure Plan (SPCC).[34] The most common third-party claims filed for discharges are due to vandalism but the owner or operator will have to show that it took all reasonable precautions to prevent such conduct and inadequate security, particularly during a strike or an ill-conceived SPCC, will defeat a third-party claim.[35]

An RP will lose its complete defense to liability if it (1) fails to report a discharge or substantial threat of discharge that it knows or has reason to know, (2) fails to provide "all reasonable cooperation and assistance" requested by the OSC or other responsible officer regarding removal activities, or (3) fails to comply "without sufficient cause" with an order issued under section 311 of the

CWA.[36] The likely effect of these broad exceptions to the affirmative defenses is that the defenses will be largely unavailable.

OPERATING, EQUIPMENT, AND PERSONNEL REQUIREMENTS UNDER OPA

OPA also contains a panoply of federal structural, equipment, and procedural requirements that will substantially increase operating costs of responsible persons. The operating practices mandated by OPA, which are codified in title 46, and the procedures that will be developed under demonstration projects authorized by OPA will be the first requirements that reponsible persons will have to comply with under OPA. Indeed, many coastal states are racing ahead to aggressively adopt their own operating requirements. The standards that are promulgated pursuant to OPA are of critical importance because owners and operators who fail to comply with these requirements will forfeit their liability caps and face unlimited liability for oil spills.[37] Some of the more important provisions are highlighted below.

A. Double Hull Requirements

OPA establishes dates when single-hulled vessels that are constructed or put into operation prior to 2015 must be retrofitted with double hulls or retired.[38] The dates are based on the ages of the vessels as well as their tonnage category. If a particular vessel is younger than the age specified on the particular date for its weight class, it can remain in service for either: (1) the maximum age set for that tonnage category of vessel or (2) 2010, whichever occurs first. The significance of the double hull provisions to lenders is not only that the value of their security interest will be impaired by a vessel that must be retrofitted or retired but also that their borrowers will face unlimited liability if they continue to operate vessels failing to conform to the double hull design standards.

B. Structural Requirements

The Coast Guard was required to promulgate regulations by August 18, 1991, establishing minimum standards for plating thickness for vessels that carry or are adapted for carrying oil in bulk as cargo or cargo residue.[39] The Coast Guard also is required by that same date to issue regulations requiring the use of cargo tank overfill devices, tank level or pressure monitoring instruments, and to establish minimum standards for such devices.[40]

C. Manning Pilotage Operational Requirements

OPA contains limitations for the number of hours certain tanker crew members can work. For example, licensed individuals and seamen are limited to a 15-hour shift during a 24-hour period and may not work more than 36 hours in a three-day period.[41] For purposes of these restrictions, work includes administrative duties performed on board the vessel or onshore. These work restrictions do not apply to emergencies or drills.[42] It is uncertain at this time if these work restrictions apply to foreign flag vessels.

For foreign flag vessels, the Coast Guard is required to evaluate the manning, training, qualification, and watchkeeping standards of foreign nations on a periodic basis or after such a vessel has been involved in an incident to determine if that nation's standards are equivalent to United States or international standards and if those standards are being enforced.[43] The Coast Guard is authorized to deny entry to vessels that are under the flag of a nation who is found not to be in compliance with U.S. or international standards.[44] However, the Coast Guard may allow the entry if it determines that the vessel is safe or entry is necessary for the safety of the crew or the vessel.[45]

Under section 4116, the Coast Guard must designate those waters in which tankers over 1,600 gross tons must have a master or mate licensed to direct and control the vessel under 46 U.S.C. 7101(c)(1).[46] By February 18, 1991, the Coast Guard also was required to propose regulations defining those areas where single hull tankers over 5,000 gross tons must be escorted by at least two towing vessels or other appropriate vessels.[47]

Finally, OPA provides that a master may be relieved when the two next most senior licensed officers reasonably believe that the master is under the influence of alcohol or drugs so that he is incapable of commanding the vessel.[48]

D. Financial Responsibility

Under section 1016, vessels over 300 tons using any place subject to the jurisdiction of the United States (except non-self-propelled vessels that do not carry oil as cargo or fuel) and any vessels using waters of the exclusive economic zone to trans-ship or lighter oil destined for a place subject to United States jurisdiction must have evidence of financial responsibility sufficient to meet the maximum amount of liability that the vessel or facility would be subject to under OPA.[49] Vessels without the requisite evidence of financial responsibility may be denied entry to the waters of the United States.[50] In addition, vessels and their oil may be subject to seizure and forfeiture to the United States if found in the waters of the United States without such certificates.[51]

Since OPA specifically provided that states may enforce the financial responsibility requirements against vessels in their navigable waters, it is possible that states could board and seize vessels that are not in compliance with the financial responsibility requirements. Some states have established or are in the process of establishing their own financial responsibility requirements, which may require certificates separate from those required by the federal government. This has posed a problem in

Florida and Rhode Island since the P & I clubs refused to issue separate certificates.

E. Contingency Plans for Vessels and Facilities

OPA also requires vessel and facility owners and operators to prepare and submit comprehensive contingency plans for responding to a worst case oil spill or a substantial threat of a spill.[52] These response plans must be consistent with the national and local area contingency plans, identify the person having full authority for implementing cleanups, require immediate communication with local authorities, indentify and ensure availability of cleanup equipment and personnel, and describe training and equipment testing programs, including provisions for unannounced drills. The plans will have to be submitted periodically and must be resubmitted if there is a significant change to a facility.

The Coast Guard is required to promulgate regulations for the review and approval of contingency plans by August 18, 1992.[53] These regulations also must require periodic inspection of containment booms, skimmers, and vessels, and require vessels operating in the navigable waters of the United States to use the best technology economically feasible for responding to oil spills.

Vessel and facility owners and operators must have their plans approved by August 18, 1993. Prior to that date, owners and operators may be allowed to operate, provided they demonstrate that they have contracted with an oil spill response contractor who can respond to a worst case oil spill. After August 18, 1993, no vessel or facility may handle, store, or transport oil without an approved contingency plan.[54]

The EPA also was required to establish, by February 18, 1991, area committees to develop area contigency plans by February 18, 1992. These area contigency plans may impose further responsibilities on owners and operators and contain additional procedures that must be followed for ensuring removal of oil spills or mitigation of substantial threats of oil spills. Likewise, many coastal states are in the process of developing their own requirements for such plans. Some coastal states are planning to require that booms must be deployed for all oil transfers.

F. Compliance Audits

In connection with its obligation to review compliance of foreign flag vessels, the Coast Guard will be developing a model audit program that is intended to help vessel owners and operators, as well as their lenders, determine if their vessels are in compliance with applicable OPA. In addition, several private consortiums have announced plans to conduct comprehensive environmental audits of their members' management practices, environmental compliance, crew training, and equipment maintenance. It is hoped that these audits will identify areas of vulnerability as well as effective practices that can be used to minimize the risk of oil spills.

CONTRIBUTION AND FILING OF CLAIMS

RPs are authorized to bring contribution actions against persons who may be liable under OPA or any other state or federal law.[55] An RP may file a contribution claim for removal costs or damages so long as the action is brought within three years of the date of judgment or a judicially-approved settlement.[56] RPs also may file claims against the Oil Spill Fund, provided they could assert a complete defense to liability and are entitled to a limitation of liability addition.[57] Furthermore, the RP may assert a claim only for the amount of removal costs, damages, and other monies actually paid by the RP or its guarantor that exceed the limitation of liability for the particular RP.[58] While OPA expressly allows any party to insure against or seek indemnity for liability that it may incur under the law, any indemnity agreement will be effective only between the parties and shall not have the effect of transferring liability that an RP may have to the government or a third party for damages or removal costs.[59]

Parties who have incurred removal costs or damages may file claims against the Oil Spill Fund only after they have sought recovery from the RP or its guarantor.[60] However, claims may be presented first to the Oil Spill Fund if the claimants are so notified by the federal government. A claim may not be presented to the Oil Spill Fund if the claimant has filed a cost recovery action against the RP. If a claim presented to an RP is not settled within 90 days, the claimant has the option of either commencing a civil action or submitting its claim to the Oil Spill Fund.[61]

Any actions for removal costs must be brought within three years of the termination of the removal action, whereas actions for damages must be filed three years after the date the loss was reasonably ascertainable or the natural resource damage assessment was completed.[62]

REPORTING REQUIREMENTS AND ENFORCEMENT PROVISIONS

OPA added new reporting requirements and increased the penalties for noncompliance with the federal oil spill response program.

Under OPA, any "person in charge" of a facility must notify the appropriate agency of the federal government immediately after becoming aware of any discharge of oil or a discharge of a hazardous substance that exceeds its reportable quantity.[63] Under cases decided under the CWA, a person in charge may include a truck driver if the facility responsible for the discharge

is a motor vehicle, a pipeline operator, managerial personnel, such as shift supervisors and responsible corporate officers, and also corporate entities and municipalities.[64] Failure to comply with this notice requirement can result in the imposition of fines of up to $250,000 for an individual or $500,000 for a corporation and up to three years' imprisonment for a first offense or up to five years' imprisonment for subsequent convictions.

A. Administrative Penalties

Owners or operators or a "person in charge" of a vessel or facility from which oil is discharged or who fail to comply with any regulation may be subject to either a Class I administrative Penalty of up to $10,000 per violation, which cannot exceed an aggregate of $25,000, or a Class II administrative penalty of up to $10,000 per violation not to exceed $125,000 in the aggregate.[65] As in the case of other administrative penalties, the fines cannot be assessed until notice of the penalty assessment is provided and the recipient is given 30 days to request a hearing.[66]

B. Civil Penalties

In addition, any person who is an owner, operator, or "person in charge" of a vessel or facility that suffered a discharge may be subject to a civil penalty of up to $25,000 per day or $1,000 per barrel of oil or unit of RQ discharged.[67] However, where the discharge was due to gross negligence or wilful misconduct, the minimum civil penalty is increased to $100,000 and not more than $3,000 per barrel of oil or unit of RQ of hazardous substance discharged.[68]

If such a person fails to remove or carry out a governmental order to remove the discharge, the civil penalty is a maximum of $25,000 per day of violation or an amount three times the cost incurred by the Oil Spill Fund.[69]

In either of the civil penalty violations, a person who has already been assessed an administrative penalty shall not be liable for a civil penalty.[70] Any action to impose a civil penalty may be brought in the district court where the defendant is located, resides, or is doing business.[71] In determining the amount of the civil penalty, OPA requires a number of factors to be evaluated. The conference committee that wrote the final bill indicated that oil spills typically involve human error and that civil penalties should serve as incentives to encourage owners and operators to alter their operational practices to order to minimize such errors.[72] The factors are as follows:

- —seriousness of the violation;
- —the economic benefit to the violator resulting from the violation;
- —the degree of culpability;
- —history of prior violations;
- —prior penalties for the same incident;
- —the nature, degree or extent of success of an effort of the violator to minimize or mitigate the effects of the discharge;
- —the economic impact of the penalty on the violator; and
- —any other factors justice may require.[73]

C. Criminal Penalties

OPA amended the CWA so that the criminal provisions of section 309 now apply to oil discharges as well.[74] In addition, OPA strengthened the criminal penalties under a variety of marine transportation safety laws codified in title 46.[75]

For discharges attributable to the negligent operation of a vessel or facility, the fine ranges from $2,500 to $25,000 and imprisonment of up to one year. The penalty for a release due to a knowing violation is a $5 to $50,000 fine and up to three years imprisonment, while a fine of up to $250,000 and maximum imprisonment of 15 years may be imposed for knowing endangerment.

SPECIAL NOTE ON LIABILITY OF LENDERS FOR OIL SPILLS

In enacting OPA, Congress adopted the CERCLA concept of imposing strict and joint liability for owners and operators of facilities or vessels. However, OPA does not contain CERCLA's secured creditor exemption, which provides that a lender who holds indicia of ownership in a facility or vessel subject to a cleanup will not be liable so long as the lender does not participate in the management of the facility or vessel.[76] Interestingly, the House of Representatives version that was not adopted by Congress contained the CERCLA secured creditor's exemption.

In the absence of this exemption, a court may read OPA narrowly and conclude that the mere holding of a mortgage interest in a vessel is sufficient ownership to trigger liability. Finance lessors acting as financial owners in leasing transactions would be particularly vulnerable under such a reading since the creditor literally would be the owner of the vessel. However, in all of the cases that have imposed liability on lenders under CERCLA, the lenders have had some threshold of involvement in the management of the facility. Thus, it would appear unlikely that a lender holding a mortgage on an oil tanker vould incur liability solely on the basis of its status as a mortgagee.

A more likely scenario for imposing liability on a holder of a ship mortgage would be if a lender forecloses and takes title to a vessel that is carrying a cargo of oil that subsequently leaks from the vessel while in the territorial waters of the United States. Many CERCLA cases have concluded rather strongly that a lender who takes title to a secured asset upon foreclosure will be deemed the owner of the collateral regardless of the reason or the length of time it is in the chain of title. However, lenders recently received a ray of hope when a federal court of appeals decision in the ninth Circuit held *In re Bergsoe Metal Corporation* that a lender who foreclosed in order to protect its security interest should not be liable under CERCLA.[77]

The greatest risk of exposure for a lender, though, is the possibility that it exercises such control over its borrower that it would be named a responsible party in the event the borrower had insufficient funds or insurance to pay for the cleanup costs and other liabilities associated with the oil spill. The line between prudent oversight of loans and excessive entanglement in the affairs of a borrower has become exceedingly fine. Indeed, in *U.S. v. Fleet Factors,*[78] a federal court of appeals ruled that a lender could be liable for the cleanup costs of its borrower even when its actions fell below that of an owner or operator if the lender has the mere capability of influencing the borrower's business. However, the *Bergsoe* case mentioned above held that a lender must exercise actual management authority before it can be held liable.

Some of the states also have enacted "Superlien" provisions, which grant a first priority lien to a state for the amount of cleanup expenditures incurred by the state that may be superior to previously perfected mortgages or security interests. The relative priorities of such state superliens and preferred mortgages under the U.S. Ship Mortgage Act may prove to be the source of future litigation. Some superlien laws contain forfeiture provisions that allow state environmental authorities to take possession of the vessel that caused the discharge. Furthermore, some of these laws allow the states to attach a super-priority lien to all of the personal property and business revenues of the owner or operator located or derived from within the state.

In addition, lenders holding ship mortgages may find themselves directly liable for the oil spill liability of their borrowers. In view of these risks, prudent lenders should consider taking the following actions to minimize their direct and indirect liability under the OPA.

First, lenders should rigorously apply the traditional classification society and insurance requirements found in existing loan documents. New loan commitments should be conditioned on a demonstration that all vessels owned or operated by the borrower are in compliance with the relevant classification society requirements and recommendations, and that adequate insurance coverage is maintained. Lenders should consider specialist mortgagee insurance now available to insure against pollution claims taking priority over ship mortgages.

Second, loan documents should be reviewed and revised if necessary to make sure that they require all covered vessels to meet the various requirements of OPA (e.g., maintenance of adequate financial responsibility, spill response plans, manning and safety requirements, and double hull requirements where applicable).

Finally, lenders might consider requiring environmental compliance audits similar to those required by lenders for financing transactions involving real property located in the United States until the Coast Guard develops its model OPA compliance audit. The environmental compliance audit would involve an investigation by an independent environmental consultant that would assess the past regulatory and operational history of the vessel and borrower as well as a physical inspection of the vessel. If the borrower owns or operates any onshore or offshore facilities within the territorial jurisdiction of the United States, these facilities also should be examined.

Although an environmental compliance audit requirement would mark a radical departure from present business practice and would result in an unwelcome expense for the borrower, such an audit would serve to alert lenders to potentially troublesome loans and could provide lenders with a defense in the event they are named as a responsible party for an oil spill that they should not be liable because they did all that was commercially reasonable to ensure that the vessel was in compliance with all applicable standards.

ENDNOTES

1. 33 U.S.C. 1321.
2. 33 U.S.C. 2701 et seq.
3. 42 U.S.C. 9601(14).
4. 40 C.F.R. 300.
5. Additional federal oil spill provisions are contained in the Trans Alaska Pipeline Authorization Act, 43 U.S.C 1651 et seq.; Deepwater Ports Act of 1974, 33 U.S.C. 1517(c); and the Outer Continental Shelf Lands Act, 43 U.S.C. 1313(b).
6. 33 U.S.C. 1321(c).
7. 33 U.S.C. 2701(7).
8. 33 U.S.C. 2701(9).
9. *Union Petroleum Corporation v. United States,* 651 F.2d 734 (Ct. Cl. 1981).
10. 33 U.S.C. 2701(23).
11. 33 U.S.C. 1321(a)(11).
12. 33 U.S.C. 1321(a)(10).
13. 33 U.S.C. 2701(30), (31).
14. 33 U.S.C. 2701(32).
15. 33 U.S.C. 2701(32)(F).
16. 33 U.S.C. 1321(a)(3).
17. 33 U.S.C. 1321(a)(4).
18. 33 U.S.C. 2702(a).
19. 33 U.S.C. 2702(b).
20. 33 U.S.C. 2702(c).
21. 33 U.S.c. 2718(a).
22. 46 U.S.C. 183 et seq.
23. 33 U.S.C. 2718(c).
24. 33 U.S.C. 1321(f)(1), as amended by OSPA § 1004.
25. 33 U.S.C. 2704(a)(1).
26. 33 U.S.C. 2704(a)(2).
27. 33 U.S.C. 2704(a)(3), (4).
28. 33 U.S.C. 2704(c).
29. *Id.*
30. 33 U.S.C. 2703.
31. 33 U.S.C. 2703(a)(1)-(3).
32. 33 U.S.C. 2703(b).
33. 33 U.S.C. 2703(a)(3)(A)-(B).
34. *St. Paul Fire & Marine Insurance Co. v. United States,* 4 Ct. Cl. 762 (Cl. Ct. 1984); *United States v. LeBeouf Brothers Towing Co.,* 621 F.2d 787 (5th Cir. 1980).
35. *Union Petroleum Corp. v. United States,* 651 F.2d 734 (Ct. Cl. 1981).
36. 33 U.S.C. 2703(c).
37. 33 U.S.C. 2704(c)(1)(B).

38. 46 U.S.C. 3703(a).
39. OPA § 4109, codified at 46 U.S.C. 3703.
40. OPA § 4110, codified at 46 U.S.C. 3703.
41. OPA § 4114, codified at 46 U.S.C. 8104(n).
42. *Id.*
43. OPA § 4106(a), codified at 46 U.S.C. 9101.
44. 46 U.S.C. 9101(a)(3).
45. 46 U.S.C. 9101(a)(4).
46. 46 U.S.C. 8502.
47. OPA § 4116, codified at 46 U.S.C. 3703.
48. OPA § 4114, codified at 46 U.S.C. 8101.
49. 33 U.S.C. 2716(a).
50. 33 U.S.C. 2716(b)(2).
51. 33 U.S.C. 2716(b)(3).
52. OPA § 4202, 33 U.S.C. 1321(j)(5).
53. *Id.*
54. *Id.*
55. 33 U.S.C. 2709.
56. 33 U.S.C. 2717(f)(3).
57. 33 U.S.C. 2708(a).
58. 33 U.S.C. 2708(b).
59. 33 U.S.C. 2710.
60. 33 U.S.C. 2713.
61. 33 U.S.C. 2713(c).
62. 33 U.S.C. 2717(f).
63. 33 U.S.C. 1321(b)(5).
64. *United States v. City of New York*, 481 F. Supp. 4 (S.D.N.Y.), *aff'd*, 614 F.2d 1292 (2d Cir. 1979); *Apex Oil Co., v. United States*, 530 F.2d 1291 (8th Cir. 1976).
65. 33 U.S.C. 1321(b)(6).
66. 33 U.S.C. 1321(b)(6).
67. 33 U.S.C. 1321(b)(7)(A).
68. 33 U.S.C. 1321(b)(7)(D).
69. 33 U.S.C. 1321(b)(7)(B).
70. 33 U.S.C. 1321(b)(7)(F).
71. 33 U.S.C. 1321(b)(7)(E).
72. Joint Explanatory Statement of the Committee of Conference, p. 6275, Congressional Record, August 1, 1990.
73. 33 U.S.C. 1321(b)(8).
74. 33 U.S.C. 1319(c).
75. OPA § 4302.
76. 42 U.S.C. 9601(20)(A).
77. 910 F.2d 668 (9th Cir. 1990).
78. 901 F.2d 1550 (11th Cir. 1990).

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