Subcommittee on the
Oil Pollution Act of 1990

OIL SPILL FINANCIAL RESPONSIBILITY FOR OFFSHORE FACILITIES

Implementing Issues and Recommendations

Report to the U.S. Outer Continental Shelf Policy Committee

April 3, 1995

Foreword

This report by the Subcommittee on the Oil Pollution Act of 1990 was prepared in response to Department of the Interior Assistant Secretary Bob Armstrong's request to the Outer Continental Shelf Policy Committee of the Minerals Management Advisory Board for assistance in resolving several issues associated with the Act's implementation. It presents the Subcommittee's findings and recommendations on these complex and difficult issues.

Policy Committee Chairman Paul Kelly named the members of the Subcommittee by letter dated December 6, 1994. The membership of the Subcommittee represents a broad cross-section of the constituencies potentially affected by the Oil Pollution Act provisions, as well as reflecting the membership of the Committee itself. The Subcommittee has worked diligently over the past several months to gain a thorough understanding of the issues, to consider a wide range of options for resolution, and to develop recommendations. The recommendations were forwarded to the Policy Committee with the expectation that it will offer them to the Secretary of the Interior.

The Subcommittee's efforts have focused on developing proposals that will help achieve the Act's goal of ensuring that adequate funds will be available to pay for oil spill cleanup and damages without imposing unnecessary financial burdens on large segments of the U.S. economy. The difficulty of this task is evidenced by the fact that since 1990, a series of studies and recommendations related to these issues have failed to gain the broad support needed to allow development of reasonable implementing regulations.

The Subcommittee's deliberations reflected the divergence of views surrounding the Oil Pollution Act's financial responsibility provisions. Indeed, some Subcommittee members continue to hold opinions that differ from this report's findings and recommendations. Nevertheless, this report represents the Subcommittee majority's best advice for resolving the issues. The Subcommittee hopes that this advice will be found to have merit and will make a significant contribution toward ensuring that the Oil Pollution Act's goals and objectives are achieved.

Finally, the Subcommittee wishes to express its gratitude to all of those who participated in its deliberations and contributed to this report. The Subcommittee especially wishes to recognize and thank the Department of the Interior employees and the special advisors who provided technical support and gave so generously of their time and expertise. Their diligence and promptness in responding to all the requests made by the Subcommittee were invaluable.

Executive Summary

SUBCOMMITTEE CHARGE

The Subcommittee on the Oil Pollution Act (OPA) was chartered by the Outer Continental Shelf (OCS) Policy Committee of the Minerals Management Advisory Board at the request of the U.S. Department of the Interior (DOI). The charge to the Subcommittee was to assist the Minerals Management Service (MMS) in resolving issues related to the OPA oil spill financial responsibility (OSFR) requirements for offshore facilities. The OPA requires that parties responsible for offshore facilities demonstrate that they can pay certain costs of oil cleanup and damages that might result from facility spills. The Subcommittee was asked to address three specific issues related to the OSFR requirements: Jurisdiction; financial responsibility amounts; and possible exemptions from OSFR requirements. In addition, the Subcommittee considered the role that insurance plays in demonstrating financial responsibility.

FINDINGS

The Subcommittee agreed that it would be unreasonable for MMS to adopt the type of regulations that would be needed to comply with the legal opinion on OSFR that was issued by the DOI Solicitor. To do so would apply the $150 million OSFR requirement over an unnecessarily large universe of facilities and impose potentially severe financial burdens on parties responsible for thousands of facilities that pose little oil spill risk. Accordingly, the majority of the Subcommittee members find the following.

- Jurisdiction The geographic scope of OSFR for offshore facilities implied in OPA is too broad. Although the DOI Solicitor asserts that, under OPA, "offshore facilities" could include facilities located far beyond traditional offshore areas (e.g., on wetlands in interior Alaska), the application of OSFR should be limited to facilities located seaward of the coastline. It is the facilities located seaward of the coastline which are traditionally and logically considered "offshore facilities."

- Amount The amount of OSFR required should not exceed $150 million. The amount of OSFR required for an offshore facility should be proportional to the oil spill risk posed by the facility. The determination of oil spill risk should be based on an assessment of risk factors like the amount of oil that might be spilled, the location of the facility relative to sensitive ecological resources, and other factors. If it is determined that OSFR should be demonstrated for a facility, the amount should not be less than an established minimum (i.e., $35 million for OCS; $10 million for State waters).

- Exemption Some offshore facilities may not represent an oil spill risk that is great enough to justify demonstrating the *minimum amount of* OSFR. A *de minimis* exemption should be created to address those cases.

- Insurance The availability and cost of insurance that can be used to demonstrate OSFR is a critical issue to oil and gas operators that do not have the financial resources to *self-insure. Additional mechanisms for qualifying as a self-insurer are needed in order to* ensure that the costs of demonstrating OSFR do not cause serious economic harm to responsible parties.

RECOMMENDATIONS

The Subcommittee sought consensus on how to incorporate the majority findings into OSFR regulations. However, some members believe that defensible rules could be developed within the existing OPA provisions while others believe that the OPA OSFR requirements for *offshore facilities must* be changed before such rules can be developed. The majority of the Subcommittee members recommend the following.

New legislation would be required to implement two of the recommendations (i.e., jurisdiction, and OSFR amount). The Subcommittee recognizes the complexities and uncertainties associated with securing *legislative changes. Therefore,* the Subcommittee feels strongly that legislative changes should be limited strictly to those needed to implement the recommendations. To accomplish this, legislative proposals should be made as narrow and specific as possible.

- Jurisdiction *The Subcommittee recommends that the Secretary of the Interior resolve the* issue of OSFR jurisdiction for offshore facilities by seeking legislation which limits the application of OSFR to areas seaward of the "coastline," as defined in the Submerged Lands Act.

- Amount The Subcommittee recommends that the Secretary of the Interior resolve the issue of the amount of OSFR for offshore facilities by seeking legislation which permits the Secretary to establish the amount of OSFR using an assessment of facility oil pollution risk. The risk assessment criteria should be like those included in OPA §1004(d) for *adjusting the limits of* liability for onshore facilities (i.e., size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks). The Subcommittee also recommends that such legislation continue the use of $150 million as the maximum amount of OSFR, and establish minimum OSFR amounts of $35 million for facilities located on the OCS and $10 million for facilities located in State waters seaward of *the coastline.*

- Exemption The Subcommittee recommends that the Secretary of the Interior resolve the issue of *de minimis* exemptions to OSFR for offshore facilities by developing a regulation which exempts from OSFR all facilities that could cause a worst case oil spill of less than 250 barrels, unless the Secretary finds that such a spill could result in significant damage. The Subcommittee further recommends that such regulation also exempt from OSFR those facilities that could cause worst case spills of 250 to 1,000 barrels, if it is determined that the benefits of demonstrating OSFR are trivial or nonexistent based on criteria like those in OPA §1004(d) and in consideration of elements of damages like those in OPA §1002(b)(2).

- Insurance The Subcommittee recommends that the Secretary of the Interior thoroughly explore a broad range of reasonable options for demonstrating OSFR through self-insurance. The Subcommittee also recommends that the Secretary specifically consider alternatives that would allow consideration of proven oil and gas reserves and other identifiable financial assets. The Subcommittee further recommends that the Secretary encourage development of new insurance mechanisms, including responsible party pooling arrangements.

At the November 1-2, 1994, Outer Continental Shelf (OCS) Policy Committee meeting, Bob Armstrong, Assistant Secretary for Land and Minerals Management (ASLM), U.S. Department of the Interior (DOI), requested that the Committee establish a subcommittee to assist the Minerals Management Service (MMS) in resolving issues related to implementing the Oil Pollution Act of 1990 (OPA).[1] In response, the Policy Committee approved a resolution (Appendix A) establishing the Subcommittee on OPA (Subcommittee).

Subsequently, Paul Kelly, Policy Committee Chairman, named representatives from State and local government, industry and trade associations, and environmental organizations to the Subcommittee (Appendix B). This includes members of the Policy Committee and individuals representing interests not normally associated with offshore natural gas and oil issues, but who might be affected by OPA's financial responsibility provisions.

This report presents the Subcommittee's findings and recommendations with respect to financial responsibility for offshore facilities.

BACKGROUND

In the wake of the *Exxon Valdez* and other marine oil spill incidents, Congress passed the OPA with the aim of strengthening oil spill prevention and cleanup capabilities. The OPA also established a scheme for oil pollution liability compensation, including

OPA DEFINITIONS

Facility - ". . . any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil . . . includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes."

Navigable waters - ". . . the waters of the United States, including the territorial sea."

Offshore facility - ". . . any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel."

Onshore Facility - ". . . any facility (including but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land."

Responsible party - ". . . in the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal Agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit."

liability limits for the responsible party and payments from the $1 billion Oil Spill Liability Trust Fund. The OPA extends and expands upon oil spill protection measures provided by the OCS Lands Act Amendments, the Federal Water Pollution Control Act, and other laws. The OPA addresses vessels and both onshore and offshore facilities that produce, handle, or transport oil or its by-products.

At the heart of OPA is the principle that the polluter should pay the costs of cleanup and damages resulting from oil spills. This "polluter pays" principle is reflected in the OPA requirement that responsible parties for offshore facilities demonstrate they can pay for a spill up to statutory liability limits. The intent is to ensure that the spiller, and not the taxpayer, bears the burden of paying for oil spill cleanup and damages.

Among other things, OPA:

- Establishes limits of liability for responsible parties for onshore and offshore facilities in the event of oil spills: At least $8 million but not more than $350 million for onshore facilities; and the total of all oil removal costs plus $75 million for offshore facilities, other than deepwater ports.

- Requires the responsible party for a vessel or an offshore facility to establish and maintain a specified amount of evidence of oil spill financial responsibility (OSFR). Responsible parties for onshore facilities are not required to demonstrate OSFR.

The responsibility for enforcing the OSFR requirements for offshore facilities (except deepwater ports) was delegated[2] by the President to the Secretary of the DOI. These responsibilities were subsequently delegated by the Secretary to the MMS.[3]

Based on preliminary guidance provided by the DOI Solicitor, MMS issued an Advance Notice of Proposed Rulemaking (ANPR)[4] to collect additional information on issues related to OSFR. The ANPR indicated that the OSFR requirements could apply to a wide range of oil-related facilities, including those located on inland waters (e.g., lakes, rivers, canals, and wetlands). The ANPR further advised that there appeared to be no provision in OPA for making facility specific adjustments to the $150 million OSFR requirement.

The vast majority responding to the ANPR stated that implementing OPA in accordance with the DOI Solicitor's preliminary guidance would cause significant, widespread, and unwarranted economic harm. Several also stated that many traditional "onshore facilities" located on inland waterways and in wetlands, and to which the OSFR requirements could apply under the ANPR, are small businesses with limited financial resources, or personal residences located in wetland areas that store oil for heating, cooking or transportation purposes.

Some commenters said that the cost of obtaining the financial guarantees, perhaps hundreds of thousands of dollars per year

per facility, would be prohibitive. They stated that unless changes were made in MMS's approach to OSFR as presented in the ANPR, promulgation as a regulation could force many companies out of business.

Others who commented on the ANPR expressed concerns that the economic impacts on owners or residents of personal dwellings also could be severe. In addition, it was asserted that the availability of refined petroleum products to coastal and rural Alaska communities would be eliminated, and that air taxi businesses, which are the primary means of transportation throughout much of the State, would fail.

Many who commented on the ANPR took the position that the MMS misread the plain meaning of OPA §1016(c). They argued that MMS had focused incorrectly on the term "offshore facility" as the limiting factor in determining the scope of covered facilities, rather than on the precise language in the statute that stated "each responsible party with respect to an offshore facility shall establish and maintain evidence of financial responsibility" (emphasis added). Commenters further argued that the definition of "responsible party for an offshore facility" was narrowly defined by OPA §1001(32)(c) to include only traditional oil and gas exploration, production, and transportation facilities on the OCS and State territorial seas. The MMS was urged to reconsider the position of the ANPR in light of these facts in order to prevent unnecessary and improper impacts on parties responsible for facilities located outside this limited universe.

Many offshore oil and gas operators said they would be unable to meet the OSFR requirements and would be forced to shut in or assign producing leases if MMS's interpretation in the ANPR was implemented. However, since many leases, especially on the Gulf of Mexico OCS, are nearing the end of their economic life, few, if any, firms may be willing to acquire the leases. If the leases cannot be assigned, the result would be premature abandonment of substantial oil and gas reserves.

CHARGE TO THE SUBCOMMITTEE

In response to Assistant Secretary Armstrong's request for assistance in resolving the serious concerns raised in the ANPR, the Policy Committee asked the Subcommittee to focus on three primary issues:

JURISDICTION. What facilities fall within the definition of an "offshore facility" and are, therefore, subject to the OPA financial responsibility requirements?

POLLUTION RISK. Can the level of financial responsibility that an offshore facility must demonstrate be based on the pollution risk that it represents?

EXEMPTION. Can facilities that handle small quantities of oil and are, therefore, a minimal risk to the environment, be exempted from the financial responsibility requirements?

The Policy Committee also asked the Subcommittee to consider other issues of concern, including the availability and cost of insurance and other financial guarantees used to demonstrate OSFR.

Subsequent to the formation of the Subcommittee, the MMS Director transmitted the final DOI Solicitor's opinion (Appendix C) to the Policy Committee members. In that transmittal the Director requested that the Subcommittee focus on resolving the potential problems posed by the OPA OSFR provisions.

In particular, the Director asked that the Subcommittee consider the specific issues raised in the opinion. Given those issues, the Director asked that the Subcommittee express its views on whether rulemaking could address the issues, or whether legislative changes that meet the spirit and intent of OPA might be appropriate to help address potentially significant economic impacts.

The Subcommittee reviewed and discussed the conclusions included in the Solicitor's opinion. Although the Subcommittee did not necessarily agree with the Solicitor's findings, they appear to be consistent with the preliminary guidance upon which the ANPR was based. Among other things, the Subcommittee specifically focused on the following conclusions set forth in the opinion:

- The definition of an "offshore facility" is very broad in its geographic scope in that it includes all oil-related facilities located in, on, or under the "navigable waters." This includes inland waters (lakes, rivers, canals, and other waterways including wetlands), seacoasts, State and Territorial waters, and the OCS, except that appurtenances to onshore facilities that extend offshore may be deemed a part of an onshore facility;

- The definition of "responsible party" for an offshore facility is interpreted to reflect that all private landowners generally have a "right of use and easement" on their land that is derived from State law;

- The OPA clearly requires that the responsible party for each offshore facility demonstrate evidence of $150 million in OSFR regardless of the level of oil pollution risk posed by the facility; and,

- The OPA does not statutorily authorize *de minimis* exemptions from the requirement that the responsible party for an offshore facility must demonstrate $150 million in OSFR. However, exemptions may be statutorily justified in limited circumstances.

FINDINGS AND RECOMMENDATIONS

In general, the Subcommittee found that the regulations MMS develops to implement the OSFR requirements for offshore facilities must be reasonable.[5] The Subcommittee believes that regulations like those suggested in the MMS ANPR

and supported by the DOI Solicitor's opinion would be unreasonable. The Subcommittee offers practical recommendations to resolve the issues that for 5 years have inhibited effective implementation of OSFR.

Three possible approaches to addressing the OSFR issues were considered: Recommend that no action be taken to resolve the issue; develop implementation strategies that are consistent with the provisions of existing law; and legislative action.

Each approach has inherent limitations. A no action approach leaves MMS to pursue a regulatory path like that suggested in the ANPR, which created a high level of anxiety and controversy. The net effect of no action probably would be to continue indefinitely the OSFR program that was established under the OCS Lands Act for OCS facilities,[6] or publication of an unreasonable rule that is immediately subjected to legal challenge and/or is impossible to enforce.

The MMS believes that opportunities for resolving the issues through creative interpretation of current law are constrained by the DOI Solicitor's interpretation of the law. However, some members of the Subcommittee believe that other interpretations of the issues examined by the Solicitor are possible. They also believe that still other aspects of OSFR not examined by the Solicitor may provide regulatory flexibility, and that the Department of Justice could be asked to consider all these issues to confirm or modify the Solicitor's opinion.

Finally, the Subcommittee recognizes that the Administration's ability to resolve OSFR issues through amendments to the current law is uncertain and controversial.

The Subcommittee analyzed the principal OSFR issues in light of these limitations. The Subcommittee's majority findings and recommendations are presented below. In no case did the "no action" approach appear to resolve the issues considered.

JURISDICTION

Opinions regarding the area of jurisdiction attendant to OPA OSFR provisions for offshore facilities are wide ranging. As noted previously, the DOI Solicitor has determined that every oil-related facility located in, on, or under the "navigable waters" is subject to OSFR. An exception is "an appurtenance directly connected to an onshore facility, which it is 'reasonable' to treat as part of that facility," the Solicitor said. Other interpretations of jurisdiction offered, to varying degrees, are less inclusive.

The Subcommittee believes that OSFR requirements should be applied to traditional oil and gas facilities that lie seaward of the traditional coastline. Conversely, the Subcommittee believes that OSFR requirements should not apply to facilities located in coastal bays, estuaries, wetlands, or onshore areas. Only traditional offshore oil and gas exploration, production, processing, and transportation facilities are located within the area

seaward of this "coastline." The Subcommittee believes that limiting the application of OSFR in this manner is consistent with the traditional understanding of what constitutes offshore facilities.

Several options for defining the appropriate geographic scope of OSFR (i.e., seaward of the coastline) were considered by the Subcommittee. One option was for the Subcommittee to develop its own precise definition. Another was to use a clearly delineated boundary that is already established in Federal law. In particular, the Subcommittee considered two existing definitions from the Submerged Lands Act (SLA).[7] The first relates to areas that lie seaward of "the line of mean high tide."[8] The second is the area seaward of "the line of ordinary low water along that portion of the coast that is in direct contact with the open sea and the line marking the seaward limit of inland waters."[9] The Subcommittee found that this "low water" delineation accurately depicts the area that should be subject to OSFR. The "high tide" delineation was not favored because the additional areas that would be included are within State jurisdiction. If a State determines (as some already have[10]) that OSFR is needed for facilities located in areas landward of the low water line, requirements can be established in State law.

Although some members of the Subcommittee believe that OPA's current language supports the development of a regulation that effectively limits OSFR to areas seaward of the coastline, this option was not pursued in detail because it is inconsistent with the opinion of the DOI Solicitor, and seeking a revised opinion was not a viable option. Pursuant to the legislative option, the Subcommittee decided that the most efficient legislative initiative to address jurisdiction would be to add language to OPA §1016(c) which limits the application of OSFR to facilities that lie seaward of the coastline, as defined in the SLA. The Subcommittee recognizes that while such an option may be easy to describe, it may be difficult to implement because of the complexities and uncertainties associated with securing legislative change.

Recommendation

The Subcommittee recommends that the Secretary of the Interior resolve the issue of OSFR jurisdiction for offshore *facilities by seeking legislation which* limits the application of OSFR to areas seaward of the "coastline," as defined in the Submerged Lands Act.

AMOUNT

The Subcommittee recognizes that the risk of oil pollution from offshore facilities can vary widely. Therefore, the Subcommittee found it unreasonable to require responsible parties to demonstrate a fixed amount (i.e., $150 million) of OSFR for every facility.

The Subcommittee believes it would be better to determine the amount of OSFR needed using an assessment of the oil pollution risk that a facility represents.

This approach would be consistent with OPA's philosophy, and would help address concerns expressed by many responsible parties that the cost of OSFR compliance at the level of $150 million would be prohibitive.

The Subcommittee found that an assessment of oil spill risk should be based on pre-defined criteria that take into account factors such as the amount of oil that could be spilled from the facility and location of the facility in relation to sensitive ecological resources. In particular, the Subcommittee considers criteria like those included in OPA §1004(d)[11] for adjusting the limits of liability for onshore facilities to be suitable.

Although the Subcommittee found that the amount of OSFR required for offshore facilities should be based on oil spill risk, the need to establish upper and lower limits was also considered. The Subcommittee concluded that both upper and lower OSFR limits are appropriate.

With respect to the upper limit, it was agreed that a suitable amount would be $150 million, primarily because it is the OSFR amount required by OPA. Further, it is significantly more than cleanup and damage estimates that were calculated for past oil spills from OCS oil facilities.[12]

Some members of the Subcommittee believe that using risk-based methods to establish the amount of OSFR obviates the need to establish a lower limit. However, the Subcommittee did find that an OSFR floor is appropriate. Further, it was determined that the lower limit of OSFR should be higher for offshore facilities located on the OCS than for facilities located elsewhere. The Subcommittee further agreed that the lower limits should be $35 million for facilities located on the OCS, and $10 million for facilities located elsewhere. The reasons for establishing different floors are that there is an historical precedent for the OCS (i.e., $35 million in OSFR required under the OCS Lands Act), that facilities located in State waters tend to be smaller, and that States may impose additional requirements because they have concurrent jurisdiction.

The Subcommittee could not identify any suitable regulatory options for establishing risk-based OSFR amounts or upper and lower limits that were consistent with the DOI Solicitor's opinion. The Subcommittee believes that the only practical option for implementing these provisions is legislation. As noted in the discussion on OSFR jurisdiction, the Subcommittee recognizes that there are inherent difficulties in securing legislative resolutions to OPA OSFR issues.

Recommendation

The Subcommittee recommends that the Secretary of the Interior resolve the issue of the amount of OSFR for offshore facilities by seeking legislation which permits the Secretary to establish the amount of OSFR using an assessment of facility oil pollution risk. The risk assessment criteria should be like those included in OPA §1004(d) for

adjusting the limits of liability for onshore facilities (i.e., size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks). The Subcommittee also recommends that such legislation continue the use of $150 million as the maximum amount of OSFR, and establish minimum OSFR amounts of $35 million for facilities located on the OCS and $10 million for facilities located in State waters seaward of the coastline.

DE MINIMIS EXEMPTIONS

The Subcommittee finds that an exemption from the requirement to demonstrate OSFR is appropriate for certain classes of offshore facilities.

The Subcommittee considered whether a *de minimis* exemption should be based solely on the volume of oil handled at a facility. This approach was incorporated into the OSFR provisions developed earlier under the OCS Land Act.[13] Upon review, the Subcommittee found that, except in the case of very small oil spills, the location of a spill relative to sensitive ecological resources may be a more important consideration than the amount of oil spilled. For this reason the Subcommittee agreed that a determination whether to allow a *de minimis* exemption from OSFR should be based on oil pollution risk, which factors in potential spill volume and location and other factors.

The Subcommittee reviewed the approach developed by the National Petroleum Council (NPC)[14] for making *de minimis* exemption determinations. The NPC protocol considers both potential spill volume and location and other mitigating factors. Specifically, the NPC suggests that an exemption be allowed for all facilities that could spill not more than 250 barrels of oil, and that a demonstration of OSFR be required for all facilities that could spill more than 1,000 barrels. Facilities that could spill an amount between 250 and 1,000 barrels would be assessed to determine the potential damage that could be caused. Decisions to allow any *de minimis* exemptions would be based on those assessments.

With one exception, the Subcommittee concurred in principle with the NPC approach to *de minimis*. The Subcommittee believes that there may be instances where an oil spill of 250 barrels (or perhaps less) might result in significant damages. Therefore, the Subcommittee finds it would not be prudent to categorically exempt all facilities that could cause worst case spills of 250 barrels or less.

The Subcommittee noted that the NPC did not develop specific methods for making oil spill damage estimates for the purpose of *de minimis* exemption determinations. Although the Subcommittee did not find it appropriate to review specific assessment methods or develop its own, consideration was given to the basic criteria that should be used. Specifically, the Subcommittee finds suitable those criteria included in

OPA §1002(b)(2) for determining liability with respect to oil spill damages.[15]

The Subcommittee considered whether new legislation would be needed to put a *de minimis* exemption provision into place. The DOI Solicitor's opinion indicated that such exemptions might be appropriate under OPA where the benefits of the requirement are trivial or nonexistent. An example is a case where the costs of spill cleanup and damages would rarely exceed the responsible party's ability to pay. Given this latitude, albeit narrow, the Subcommittee agreed that an attempt should be made to develop a *de minimis* exemption regulation under current law.

Recommendation

The Subcommittee recommends that the Secretary of the Interior resolve the issue of *de minimis* exemptions to OSFR for offshore facilities by developing a regulation which exempts from OSFR all facilities that could cause a worst case oil spill of less than 250 barrels unless the Secretary finds that such a spill could result in significant damage. The Subcommittee further recommends that such a regulation also exempt from OSFR those facilities that could cause worst case spills of 250 to 1,000 barrels, if it is determined that the benefits of demonstrating OSFR are trivial or nonexistent based on criteria like those in OPA §1004(d) and in consideration of elements of damages like those in OPA §1002(b)(2).

INSURANCE

The Subcommittee was not specifically charged to develop recommendations on the means used to demonstrate OSFR. However, the Subcommittee was asked to consider the availability and cost of insurance. Insurance is relevant to OSFR, and it is not addressed by the Subcommittee's recommendations on jurisdiction, amount of OSFR, and *de minimis* exemptions.

The issue of insurance is particularly important to small oil and gas operators because the cost of demonstrating OSFR for their facilities may cause severe economic hardships. Small oil and gas operators usually cannot meet self-insurance requirements, and traditional insurers have not been willing to accept the consequences of the "direct access" provisions of OPA (e.g., by waiving their rights to exercise normal policy defenses). The Subcommittee finds that the issue of insurance is complex and will continue to evolve until final OSFR regulations are promulgated which reflect possible modifications to OPA like those suggested by the Subcommittee. Given these factors, the Subcommittee also finds that making specific recommendations is beyond its ability. However, the Subcommittee believes alternatives may be available under current law that can be used to address the insurance issue.

The Subcommittee considered several options. Some members suggested that the Secretary of the Interior accept oil pollution liability insurance as a financial

asset for the purpose of qualifying as a self-insurer. Given the experience of the U.S. Coast Guard (USCG) regarding OSFR under OPA, the Subcommittee specifically considered its position on the use of insurance as an asset for demonstrating financial responsibility for tank vessels. The USCG found that using liability insurance as an asset for self-insurance purposes would circumvent the direct access provisions of OPA. Allowing insurance to be credited as a financial asset also appears to conflict with the Generally Accepted Accounting Principles. Finally, the Subcommittee did not identify any precedent in Federal law for allowing the use of insurance as a financial asset.

Another option considered by the Subcommittee is to allow the value of proven oil and gas reserves to be included as part of a responsible party's financial assets. Although the Secretary does not currently credit responsible parties with the value of proven reserves, the Subcommittee believes it should be further considered.

Because the true worth of an exploration and production company is the value of its oil and gas reserves less its liabilities. historical cost financial statements may not accurately reflect reserve value or "worth" of the company. Independent third-party reserve reports may indicate asset values substantially greater than those established by historical cost financial statements, and they should be incorporated in the value of net worth. Reports assessing proven oil and gas reserve quantities are required and accepted as part of the financial reports submitted to the Securities and Exchange Commission by public energy companies. Even private companies may have included such a report in an application for borrowing money.

The Subcommittee also reviewed pooling arrangements, which appear to be allowed under OPA. Responsible party pools that resemble tank vessel protection and indemnity clubs might be set up for those who need them. However, all the responsible parties who join such pools would have to agree to act as guarantors (i.e., submit to direct access). The Subcommittee believes that pools may be a useful OSFR option, and that they should be investigated further.

Finally, the Subcommittee considered resolving the insurance issue through new legislation. In particular, rescission of OPA's direct access provision as it relates to oil and gas facilities was evaluated. The Subcommittee determined, however, that such a rescission would not be consistent with OPA's fundamental objectives.

Recommendation

The Subcommittee recommends that the Secretary of the Interior thoroughly explore a broad range of reasonable options for demonstrating OSFR through self-insurance. The Subcommittee also recommends that the Secretary specifically consider alternatives that would allow consideration of proven oil and gas reserves and other identifiable financial assets. The Subcommittee further recommends that the Secretary

encourage development of new insurance mechanisms, including responsible party pooling arrangements.

NOTES

1 Reference 33 U.S.C. 2716; passed August 18, 1990.

2 This delegation was achieved through Executive Order 12777 which was signed on October 18, 1991 (reference the October 22, 1991, Federal Register at page 54757).

3 Refer to the DOI Operating Manual, Section 218 DM 2.1.

4 Reference the Federal Register dated August 25, 1993, at page 44797.

5 The Subcommittee also recognized that implementing some of the recommendations it considered (e.g., extend jurisdiction inland to the mean high tide line) could create enforcement problems for MMS (e.g., not enough resources to properly administer the OSFR program). However, the Subcommittee's foremost concerns were whether its recommendations would be consistent with the spirit and intent of OPA and be fair to the regulated community.

6 The OPA provides that the OCS Lands Act OSFR program will be continued until such time that the OPA OSFR rules for offshore facilities are promulgated; the OCS Lands Act requirements apply only to facilities located on the OCS. Reference 33 U.S.C. 2716.

7 Reference 43 U.S.C. 1301.

8 Reference 43 U.S.C. 1301(a)(2) which, in part, defines lands beneath navigable waters as "... all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide [emphasis added] and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles."

9 Reference 43 U.S.C. 1301(c) which defines coastline as "... the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."

10 For example, California and Alaska have established OSFR requirements for facilities located within State jurisdiction. California requires up to $100 million in OSFR, and Alaska $50 million.

11 Section 1004(d)(1) of OPA allows the limits of liability to be adjusted "... taking into account size, storage capacity, oil throughput, proximity to sensitive areas, type of oil handled, history of discharges, and other factors relevant to risks posed by the class or category of facility."

12 The MMS has estimated, using the computer model "SPILLCALC," the costs in 1993 dollars of cleanup and damages from oil spills of over 1,000 barrels on the Gulf of Mexico OCS between 1971 and 1991. The model estimated cleanup and damage costs to be less than $35 million in every case.

NOTES (cont.)

13 Prior to OPA, OSFR was required only for facilities located on the OCS. *De minimis* exemptions from OSFR were authorized under the OCS Lands Act for certain facilities that handled less than 1,000 barrels of oil. Reference 43 U.S.C. 1815.

14 National Petroleum Council, 1994. *The Oil Pollution Act of 1990: Issues and Solutions*; pp. 74-80.

15 The OPA authorized recovery for the following categories of damages: Natural resources; real or personal property; subsistence use; profits and earning capacity; and public services. Reference 33 U.S.C. 2702.

Appendix A

Resolution of the OCS Policy Committee
November 2, 1994

Resolved, that the OCS Policy Committee hereby approves the establishment of a subcommittee for the purpose of assisting the Minerals Management Service in resolving issues related to the implementation of the financial responsibility section of the Oil Pollution Act of 1990 (OPA), including but not limited to the following primary issues:

(1) Jurisdiction - What facilities fall within the definition of an "offshore facility" and are, therefore, subject to the OPA financial responsibility requirements?

(2) Pollution Risk - Can the level of financial responsibility that an offshore facility must demonstrate be based on the pollution risk that it represents?

(3) Can facilities that handle small quantities of oil and are, therefore, a minimal risk to the environment be exempted from the financial responsibility requirements?

In addition to these primary issues, other issues of concern include the availability and cost of insurance and other financial guarantees to demonstrate financial responsibility.

RESOLVED FURTHER, that in its deliberation the Subcommittee consider legislative changes to OPA if necessary;

RESOLVED FURTHER, that the Chairman of the OCS Policy Committee is hereby directed to appoint the members of the Subcommittee and further;

RESOLVED, that the Subcommittee report back to the full Committee with its recommendations at the Committee's spring 1995 meeting.

Appendix B

The Subcommittee on the Oil Pollution Act

MEMBERS

Robert R. Jordan (Chairman); State Geologist and Director, Delaware Geological Survey; University of Delaware

James I. Palmer, Jr. (Vice Chairman); Executive Director, Mississippi Department of Environmental Quality

Robert D. Armstrong; Assistant to the Chairman and CEO, The Louisiana Land and Exploration Company

Robert C. Ball; Group Vice President, Products, Supply and Transportation, Ashland Petroleum Company

Margot J. Brown; President, National Boating Federation

Larry Innis; Washington Representative, Marina Operators Association of America

Joseph Martinelli; President, Chevron Pipe Line Company

Thomas P. McConn; President, Seagull Energy E&P, Inc.

Jerome Selby; Mayor, Kodiak Island Borough

John Shively; Commissioner, State of Alaska Department of Natural Resources

Lisa Speer; Senior Policy Analyst, Natural Resources Defense Council

Rosemary Stein; Counsel, Exxon Company U.S.A.

Elissa Weil; Environmental Policy Director, American Oceans Campaign

DATE OF APPOINTMENTS

December 5, 1994

MEETINGS

January 19-20, 1995; Herndon, Virginia

February 22-23, 1995; Dallas, Texas

March 22-23, 1995; Herndon, Virginia

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

November 28, 1994

M-36981

Memorandum

To: Acting Director, Minerals Management Service

Through: Assistant Secretary, Land and Minerals Management

From: Solicitor

Subject: Implementation of the Oil Pollution Act of 1990 by the Minerals Management Service

This memorandum responds to your request of September 19, 1994, regarding implementation of the Oil Pollution Act of 1990 (33 U.S.C. 2701-2761) (OPA). Your memorandum raised the following questions:

I. Geographic Scope: How should the statutory phrase "offshore facility" be interpreted? Does it apply to facilities located anywhere other than the Outer Continental Shelf (OCS)? Does it apply to over-water facilities appurtenant to onshore facilities, e.g., a pipeline on a pier? At what geographic point does an offshore pipeline cease to be an "offshore facility" for the purposes of these requirements? ("Scope of OPA's Requirements")

II. Risk-Based Levels: What latitude does the Minerals Management Service (MMS) have to reduce the financial responsibility requirements for offshore facilities below $150 million: e.g., to make the coverage proportional to the actual pollution risk posed by a specific offshore facility? ("Authority to Provide Risk-Based Levels of Responsibility")

III. De Minimis: May MMS create a de minimis exemption from the financial responsibility requirements of section 1016(c) for offshore facilities that pose little or no risk of a serious oil spill, similar to that previously provided under related requirements of the Outer Continental Shelf Lands Act? ("Authority to Allow De Minimis Exemption From Financial Responsibility")

Appendix C

Opinion of the Department of the Interior Solicitor on Oil Spill Financial Responsibility for Offshore Facilities

SUMMARY OF RESPONSES

I. Geographic Scope

OPA's definition of "offshore facility" includes oil handling facilities in all waters, not just the waters of the OCS. The definition may be limited to those facilities not a part of an onshore facility, as explained in the legislative history and further delineated in Union Petroleum Corporation v. United States, 651 F.2d 734 (Ct. Cl. 1981).

II. Risk-Based Levels

OPA does not authorize MMS to set different responsibility levels for offshore facilities based on risk.

III. De Minimis

On its face, OPA requires universal coverage. To exempt from its reach facilities that otherwise fall within the statutory ambit, but that handle a de minimis amount of oil, MMS would have to demonstrate that the benefit of requiring evidence of financial responsibility in such instances is either nonexistent, trivial, or that the statutory design fairly implies allowing an exemption. Being designed to assure the availability of funds for spill clean-up, OPA presents a high hurdle for such a justification.

BACKGROUND

The Oil Pollution Act of 1990, 104 Stat. 484 (1990), 33 U.S.C. 2701-2761, was enacted after many years of legislative effort, and approximately a year and a half after the Exxon Valdez oil spill. It is a complex regulatory and liability regime to prevent oil spills and to pay for cleanup and damages if spills occur. Section 1016 of OPA, 33 U.S.C. 2716, requires that responsible parties demonstrate evidence of financial responsibility for offshore facilities, vessels, and deepwater ports.

Prior to OPA, section 305(b) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1815(b), required owners of OCS facilities handling more than 1,000 barrels of oil at any one time to evidence financial responsibility of $35 million. OCS facilities were exempt if they handled fewer than 1,000 barrels. See 43 U.S.C. 1815(b) (1978), repealed by OPA, section 2004, 104 Stat. 504 (1990). Prior to OPA, no financial responsibility requirement existed for onshore or non-OCS offshore facilities. The Clean Water Act required financial responsibility evidence only of vessel owners. 33 U.S.C. 1321(p).

OPA reaches all offshore facilities, broadly defined, not just facilities on the OCS. Under OPA, responsible parties for all offshore facilities are required to evidence $150 million in

financial responsibility to cover the total costs of cleanup and removal plus potential liability for damages (which the statute limits to $75 million). See section 1004(a)(3) (33 U.S.C. 2704(a)(3)) and section 1016(c) (33 U.S.C. 2716(c)). OPA continues to exempt onshore facilities from the financial responsibility requirement and limits the liability of those responsible for onshore facilities to $350 million for removal costs and damages combined. See section 1004(a)(4) (33 U.S.C. 2704(a)(4)).

The following chart captures the essence of OPA's changes:

Topic	Pre-OPA	Post-OPA
	Offshore Facilities	
Coverage	Financial responsibility-OCS facilities handling at least 1,000 barrels of oil (OCSLA) Liability-All facilities in, on, or under waters of the U.S., regardless of volume	Financial responsibility and liability-All facilities in, on, *or under waters of* the U.S., regardless of volume
Responsible Party	Owner or operator	Lessees, Permittees, Holders of Rights of Use & Easement
Financial Responsibility Evidence	*$35 million (OCS only)*	*$150 million*
Liability Limit	OCS-$35 million plus all removal and cleanup costs Other offshore: Damages-governed by state law Removal-$50 million (subject to reduction to $8 million)	All offshore (incl. OCS): $75 million for damages No limit for cleanup or removal

Onshore Facilities

Coverage	In, on, or under land (other than submerged land)	Same
Responsible Party	Owner or Operator	Same
Financial Responsibility Evidence	None	None
Liability Limits	Damages-governed by state law Removal-$50 million (subject to reduction to $8 million). Lower limits could be set for facilities handling 1,000 barrels or less that presented no substantial risk of discharge.	$350 million (incl. cleanup, removal and damages)

I. Scope of OPA's Requirements

Section 1016(c)(1) of OPA states:

> Except as provided in paragraph (2), each responsible party with respect to an offshore facility shall establish and maintain evidence of financial responsibility of $150,000,000 to meet the amount of liability to which the responsible party could be subjected under section 2704(a) of this title in a case in which the responsible party would be entitled to limit liability under that section. In a case in which a person is the responsible party for more than one facility subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the facility having the greatest maximum liability.

33 U.S.C. 2716(c)(1).

The scope of the financial responsibility requirement in OPA depends on several definitions and how they interrelate with the statutory requirement. The questions of where, what, and who comprise the three basic areas for analysis to determine the statutorily imposed scope.

A. Where

Section 1001(22) of OPA defines "offshore facility" to mean

> any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

33 U.S.C. 2701(22).[1] Section 1001(21) defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 2701(21). Combining the two means OPA defines "offshore facility" broadly to include facilities in, on, or under all "waters of the United States," and not merely the territorial sea and the waters above the OCS.

Section 1016(c) requires evidence of financial responsibility of all responsible parties for all "offshore facilities" (with different requirements for deepwater ports). OPA specifically uses the term "Outer Continental Shelf facility" in addressing the unlimited liability of owners of an "Outer Continental Shelf facility" for removal costs, even though the same is true of other offshore facilities. Compare 33 U.S.C. 2704(c)(3) with 33 U.S.C. 2704(a)(3). OPA defines "Outer Continental Shelf facility" much more narrowly than "offshore facility."[2] It seems plain then, that the term "offshore facility" covers more than facilities on the OCS.

The legislative history confirms this. For example, the Senate bill's definition of offshore facility was the same as finally enacted, but it applied a different financial responsibility level to an Outer Continental Shelf facility ($100 million) from that applying to an "other offshore facility" ("sufficient to meet the

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[1] "Onshore facility" means any facility (including, but not limited to, motor vehicle and rolling stock) of any kind located in, on, or under any land within the United States other than submerged land. 33 U.S.C. 2701(21).

[2] OPA defines "Outer Continental Shelf facility" as

> an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf.

33 U.S.C. 2701(25).

maximum amount of liability to which the owner or operator could be subject"). See section 104(b) of S. 686, as recited in 135 Cong. Reg. 18,738 (1989). See also section 102(c) of S. 686, as recited in 135 Cong. Rec. 18,735 (1989) which refers to an "Outer Continental Shelf facility" being subject to unlimited removal costs plus $75 million while the liability cap for "any other onshore or offshore facility" is $350 million. See also S. Rep. No. 94, 101st Cong., 1st Sess. 13 (1990) which separately recites liability limits of $100 million for "any Outer Continental Shelf facility" and "any other onshore or offshore facility." These various distinctions in earlier versions indicate a congressional choice to include facilities on both the OCS and other waters within the concept of "offshore facility" in the final version.

Title I of OPA adopted the existing Federal Water Pollution Control Act (FWPCA, now the Clean Water Act) definitions of "onshore facility," "offshore facility," and "navigable waters." Thus, FWPCA's legislative and regulatory history bears directly on the scope of the term "offshore facility."[3] The FWPCA, as originally enacted in 1972, defined the term "offshore facility" as "any facility . . . in, on, or under any navigable water of the United States." 33 U.S.C. 1321 (1974). It defined "navigable waters" as "the waters of the United States."[4] The FWPCA's legislative history reflects an intent to adopt as broad an interpretation of "navigable waters" as the Commerce Clause allows: jurisdiction over all activities that could conceivably affect navigation or

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[3] The OPA Conference Report states:

> In each case, these FWPCA definitions shall have the same meaning in this legislation as they do under the FWPCA and shall be interpreted accordingly.

H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. 102 (1990).

[4] EPA's regulatory elaboration of the definition embraces waters used in the past, or susceptible to use as a means to transport interstate or foreign commerce, including adjacent wetlands; tributaries of navigable waters and adjacent wetlands; intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation, or destruction of which affect interstate commerce *including, but not limited to those utilized by travelers for* recreational or other purposes, those from which fish or shellfish could be taken and sold in interstate commerce, and those utilized for industrial purposes by industries in interstate commerce. Wetlands are also defined quite broadly. 40 C.F.R. 116.3.

interstate commerce, including activities in wetlands.[5] In 1977 Congress considered and rejected attempts to exclude wetlands from the scope of section 404 "because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.'" United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985).

The 1977 amendments added to the FWPCA definition of "offshore facility" the phrase "and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters . . . ." 33 U.S.C. 1321(11) (1988) (emphasis added). The FWPCA explains that "subject to the jurisdiction of the United States" is determined "by virtue of United States citizenship, United States vessel documentation, or as provided by international agreement to which the United States is a party." 33 U.S.C. 1321(a)(17); see also 33 U.S.C. 1321(b)(1). The legislative history shows an intent to expand federal jurisdiction for the cleanup of oil spills "to the limits of the jurisdiction of the United States" to protect "resources over which the United States exercises jurisdiction. . . ." (i.e., fisheries within what has since been called the Exclusive Economic Zone). See H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 91-92 (1977), and S. Rep. No. 370, 95th Cong., 1st Sess. 64-65 (1977).

The statutory definitions unambiguously dictate an extensive geographic reach. Nothing in the statute or its legislative history provides a basis for MMS to limit facilities subject to the financial responsibility requirement to just those facilities on the OCS.

B. What

Section 1001(9) of OPA defines "facility" to mean

> any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;

33 U.S.C. 2701(9).

As indicated above, OPA applies different requirements to onshore

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[5] The FWPCA conference report states: "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 1236, 92nd Cong., 2nd Sess. 144 (1972). See also 118 Cong. Rec. 33,756-57 (1972) (statement of Cong. Dingell).

facilities ("in, on, or under land . . . other than submerged land") and offshore facilities ("in, on, or under . . . navigable waters"). OPA does not on its face indicate which set of rules governs a facility that is both on dry land and over navigable waters. Neither does the statutory language specify whether an appurtenance to a facility should be treated as a component of the facility, or whether instead it should be classified onshore or offshore based on its own characteristics.

We look to the legislative history for guidance. The Conference Report for OPA indicates Congress' desire not to treat as "offshore facilities" over-water facilities connected to "onshore facilities" to the extent FWPCA treated them as "onshore facilities":

> To the extent that docks, piping, wharves, piers and other similar appurtenances that rest on submerged land and that are directly or indirectly connected to a land-based terminal are deemed to be part of an onshore facility under the FWPCA, they are likewise deemed to be part of an onshore facility under the Conference substitute.

H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. 102 (1990)

Nine years before OPA was enacted, the Court of Claims decided that docks and other appurtenances to an onshore facility (in that case an oil terminal) were part of an onshore facility under FWPCA. Union Petroleum Corporation v. United States, 651 F.2d 734 (Ct. Cl. 1981). The terminal included loading racks for trucks and railroad tank cars, and a dock for oil tankers extending into a creek. The issue was whether the company that reported a spill into the creek from a tank car on tracks connected to its terminal could be reimbursed for its cleanup costs, despite the fact that it did not own, lease or operate the tank car. The Clean Water Act allows an owner or operator who removes spilled oil from an "onshore or offshore facility" to recover cleanup costs. 33 U.S.C. 1321(i)(1) (1986). The United States argued that "facility" in this context referred only to the tank car, and because the company did not own, lease or operate the tank car, its reporting of the spill did not allow it to recover cleanup costs. The court declined to construe the term "facility" narrowly to refer to tank cars alone. It rejected that "hypertechnical approach" and instead construed "facility" broadly so as not to discourage immediate cleanup operations, a principal thrust of this part of the FWPCA. Id. at 743-44. The court found "operational responsibility," or "possession and control" more appropriate tests for its purposes than ownership. Id. at 745.

Consistent with Union, the Coast Guard defined "facility" for FWPCA purposes prior to OPA to include "structures, equipment and appurtenances thereto." 33 C.F.R. 154.05. We are unaware of any administrative interpretations by the Environmental Protection Agency and Coast Guard, the agencies responsible for administering

FWPCA before 1990, that conflict with the judicial guidance in Union. All of the regulations implementing the FWPCA simply recite the statutory definitions of "onshore facility" and "offshore facility" without elaboration. See 33 C.F.R. 153.103(0); 40 C.F.R. 110.1; 40 C.F.R. 112.2(c) and 40 C.F.R. 116.3. Indeed, because no difference existed in requirements imposed on offshore facilities vis-a-vis onshore facilities under the FWPCA, the agencies had little reason to determine whether a facility was onshore or offshore. Furthermore, jurisdiction between EPA and the Coast Guard was not divided along onshore-offshore lines, but instead on the basis of whether the facility was or was not transportation-related.

Union Petroleum is therefore the only guidance available. It effectively holds, albeit in a considerably different context, that *an appurtenance directly connected to an onshore facility is considered part of that facility under the FWPCA.* The OPA Conference Report underscored that the FWPCA definition shall have "the same meaning" in OPA. Therefore, although the issue is not free from doubt given the different context and the lack of any evidence that anyone in the Congress that enacted OPA knew of the Union Petroleum decision, I believe it is reasonable to apply its approach to OPA.

Such treatment is consistent with Congress' decision in OPA not to subject onshore facilities to financial responsibility requirements. Moreover, the justification for more rigorous regulation in OPA of "offshore facilities," from unadjustable liability limits to a universal response plan requirement, 33 U.S.C. 1321(j)(5)(B)(ii), is that offshore spills, especially those *on the OCS, are potentially much more serious* than onshore spills.[6]

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[6] For example, the Senate decisively rejected a motion to table California Senator Wilson's amendment to remove limits on OCS facility liability for cleanup costs. Senator Wilson had argued:

> When Exxon Valdez went aground and it tore a jagged hole in its hull streaming out its cargo of crude oil, what it did was to let go some 262,000 barrels. Mr. President, when Ixtop I blew in the Gulf of Mexico, it blew with 20 times that much oil, 20 times....$100 million...would not be enough or begin even to approach what would be necessary to contain the spill of the magnitude of the Ixtop I...this is not the finite capacity of a tanker, but the vastly great amount of *oil...that there is, potentially, under that rig....*Unlimited liability *for cleanup costs [for OCS facilities]...*has been true for over 20 years.

135 Cong. Rec. 18,366 (1989). Senator Lieberman added, "unlike other facilities or vessels, OCS rigs may not be subject to these

(continued...)

MMS will need to determine, as in Union, when something is a separate facility, and when it is a component of another facility. Where a pipeline extends out on a pier, assuming far more of the pipeline rests on land than on the pier, it should not be difficult to find that the onshore portion is the facility and the pier portion a mere appurtenance. If MMS' classification of facilities and appurtenances has a rational basis, it should survive judicial scrutiny.[7]

The same approach would apply to determining when an offshore pipeline extending onshore ceases to be an offshore facility for purposes of section 1016(c). A rational basis for classification here could be whether or not the potential for a spill from a given portion of a pipeline arises from offshore activities (such as production) or onshore activities (such as distribution). The Memorandum of Understanding (MOU) between the Environmental Protection Agency (EPA) and the Coast Guard dividing Clean Water Act responsibilities on the basis of whether a facility is transportation-related may suggest suitable points, such as valve junctions, at which to change the classification of a pipeline from offshore to onshore. See 40 C.F.R. Part 112. Appendix A.

In making its classifications, however, MMS should be aware of all the potential consequences. Specifically, while MMS' classification would be for the purpose of enforcing the evidence of financial responsibility requirements, the courts could apply the MMS treatment of "appurtenances" in determining who is liable

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[6](...continued)
tough State laws because they are outside a State's jurisdiction." 135 Cong. Rec. 18,371 (1989). See also Additional Views at S. Rep. No. 94, 101st Cong., 1st Sess. 26-27 ("There are several good reasons for maintaining one policy with respect to oil tankers and other facilities handling oil, but a different one with respect to OCS facilities"). See also S. Rep. No. 94, 101st Cong., 1st Sess. 16 and H.R. Rep. No. 242, 101st Cong., 1st Sess., pt. 2 at 53.

[7] The legislative history does not reflect any conscious attempt to limit the Secretary's discretion to define how much of a facility must be on land to constitute an onshore facility. Like the Conference Report, the House bill used such broad, overlapping definitions as to make it necessary for the Secretary to exercise judgment as to whether a facility on or over both water and land would be an offshore facility or an onshore facility. That is, the House bill defined "offshore facility" as a facility "located, in whole or in part, on lands beneath navigable waters . . . or on the Outer Continental Shelf. . . ." It defined "onshore facility" to include a facility "any portion of which is located in, on, or under" nonsubmerged land. See 135 Cong. Rec. 27,942 (1989) (emphasis added).

and for how much in cleanup costs and damages. This is because OPA itself draws distinctions on these issues, depending upon whether the facility is onshore or offshore. That is, the "responsible party" *for appurtenances of "onshore facilities" is the owner or* operator of the facility, not the lessee, permittee, or holder of a right of use or easement of the underlying land. See the discussion in the next section. Also, liability for cleanup costs is limited (to $350 million) only for "onshore facilities." See pp. 3-4, supra.

C. Who

OPA defines the party responsible for evidencing the financial responsibility for offshore facilities (except for those licensed under the Deepwater Port Act) in terms of interest in the underlying land or its use.[8] This contrasts with its definition of "responsible party" for onshore facility, which relies on a *property interest in, or operational responsibility for,* the facility itself. Apparently this difference stems from Congress' desire not to burden offshore drilling contractors, who own facilities such as drilling rigs, but who have less of a stake in the income from the property than the lessee or permittee.[9]

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[8] Specifically, OPA defines "responsible party" for offshore facility as:

> the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

Section 1001(32)(C), 33 U.S.C. 2701(32)(C).

[9] The 1989 Senate Environment and Public Works Committee report explained its definition of "owner or operator" as follows:

> A major deficiency of title III of the Outer Continental Shelf Lands Act is corrected by the reported bill. Under that title, the owner or operator of an OCS facility is held liable. Often, that owner or operator is an independent drilling contractor and not the actual holder of the rights to produce the oil....The reported bill restores the balance among leaseholders and drilling contractors on the OCS....The

(continued...)

33 U.S.C. 2701(32)(B). "Lessee" is defined as someone holding a leasehold interest in an oil or gas lease on lands beneath navigable waters or on submerged lands of the Outer Continental Shelf. 33 U.S.C. 2701(16). "Permittee" is defined as a person holding authorizations, licenses, or permits for geological exploration under OCSLA section 11 or applicable state law. 33 U.S.C. 2701(28). OPA does not further define "holder of a right of use and easement. . . ."

Although the use of drilling contractors on the OCS may have given rise to the distinction OPA draws between "responsible parties" offshore and onshore, it would torture the plain language of the Act to read this as limiting the definition of "offshore facility" to the OCS. See the discussion on pages 4-7, supra. The legislative history is bereft of any such suggestions; e.g., the conferees stated: "[all offshore facilities, except deepwater ports, must establish necessary evidence of financial responsibility for offshore facilities." H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. 119 (1990) (emphasis added).

Nor is there any reason to believe Congress intended for the term "responsible party" for an offshore facility to apply to a narrower range of facilities than the term "offshore facility." To the contrary, the Act contemplates that there be a responsible party for every "offshore facility," not just for those on tracts leased for mineral development, permitted for geological exploration, or the subject of an easement or use permit associated with oil and gas.

The term "holder of a right of use and easement" used in the definition of "responsible party" is broad enough to include landowners. Landowners generally have a "right of use and easement" on their land. If the definition were construed not to embrace landowners, Congress would not have needed to exempt governmental landowners/lessors from the definition, as it did. See note 8, supra.

Given the expansive definition of "offshore facility," a narrow reading of "responsible party" that excludes landowners could leave some offshore facilities--such as those inland of the coast which are not on leased water bottoms--without any responsible party answerable for damages and cleanup. For example, an owner of a drilling platform on an inland lake who also owns the bed of the

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[9](...continued)

> *bill accomplishes this by defining "owner or operator" for OCS* facilities to mean the lessee or permittee of the area in which the facility is located (or the holder of the OCS rights).

S. Rep. No. 94, 101st Cong., 1st Sess. 12.

lake would not be a permittee, lessee, nor a holder of a right of use under this narrow view, and thus would not come under the definition of "responsible party." I can find no support for such a result in OPA or its history. The better reading is that landowners are included in the definition of "responsible party" for "offshore facility."

II. Authority to Provide Risk-Based Levels of Responsibility

Section 1016(c)(1) requires responsible parties for offshore facilities (other than deepwater ports) to

> establish and maintain evidence of financial responsibility of $150,000,000 to meet the amount of liability to which the responsible party could be subjected under section 2704(a) of this title in a case in which the responsible party would be entitled to limit liability under that section. In a case in which a person is the responsible party for more than one facility subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the facility having the greatest maximum liability.

33 U.S.C. 2716(c)(1).[10] The Act unambiguously requires evidence of $150 million in financial responsibility. Given the clarity of that minimum, the phrase "to meet the amount of liability to which the responsible party could be subjected" does not authorize MMS to increase or reduce that level. It merely refers to the purpose of the requirement.[11] Construing this sentence to allow the

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[10] OPA's language is taken verbatim from the House bill. In contrast the Senate bill set a flat $100 million evidence requirement for OCS facilities and a requirement for all other offshore facilities tied to the $350 million cap on liability. Compare section 1016(d)(1) of H.R. 1465, 135 Cong. Rec. 27,946 (1989) with section 104(b) of S. 686, 135 Cong. Rec. 18,738 (1989). See note 11, infra.

[11] Id. Even standing alone, this phrase would not authorize a reduction in the level of evidence required below the cap on liability. "[T]he amount. . .to which the responsible party could be subjected in a case in which the responsible party would be entitled to limit liability under section 2704(a)" is the liability cap. Id. The House Merchant Marine and Fisheries Committee bill was very clear on this point, reciting no precise dollar figure but setting the level of evidence required at "the maximum liability to which the responsible party could be subjected. . . ." Section 107(b) of H.R. 1465, printed in H.R. Rep. No. 242, 101 Cong., 1st Sess., pt. 2, at 12 (1989). The phrase appears three times in 33 (continued...)

flexibility of risked-based amounts would simply read the specification of $150 million out of the statute.[12]

The second sentence states that the owner of multiple facilities need not maintain more evidence than the greatest maximum liability for a single facility. The term "maximum" in the second sentence cannot fairly be read as providing authority to reduce the amount required for a single facility. To do so would rob the flat $150 million requirement in the first sentence of its straightforward meaning. The second sentence is, instead, a rather inartful way of saying that a responsible party will never have to furnish evidence of more than $150 million, no matter how many facilities exist for which it is responsible.[13]

Perhaps the clearest indication that Congress did not intend to authorize establishment of a risk-based financial responsibility requirement for offshore facilities is the fact that in the same statute Congress did use a risk-based approach for both deepwater ports and vessels. On the former, OPA expressly authorizes the Secretary of Transportation to conduct rulemaking to reduce the

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[11](...continued)
U.S.C. 2716, 2716(c)(1) (offshore facilities), 2716(a) (vessels) and 2716(c)(2) (deepwater ports). The amount to which it refers in the case of vessels and deepwater ports can be readily determined by formula, since liability is capped. In the case of offshore facilities, however, the maximum liability is not so readily determinable inasmuch as liability for cleanup and removal costs is unlimited, above and beyond the $75 million ceiling on damages. This probably explains the specification of a definite figure, $150 million, in the case of offshore facilities. In the Senate version the financial responsibility level had been fixed at $100 million for OCS facilities, which was the only type of facility in that bill for which liability for removal costs was unlimited. See section 104(b) of S. 686, 135 Cong. Rec. 18,738 (1989) ("Each owner or operator of an outer continental shelf facility, deepwater port facility or other offshore facility shall establish and maintain evidence . . . sufficient to meet the maximum amount of liability to which the owner or operator could be subjected . . . or, in the case of an Outer Continental Shelf facility, in the amount of $100,000,000.")

[12] "Mere words and ingenuity * * * cannot by description make permissible a course of conduct forbidden by law." United States v. City and County of San Francisco, 310 U.S. 16, 28 (1940).

[13] The Conference Report explains the matter succinctly: "[I]n practice, this means that if a person is the responsible party for more than one offshore facility, that person must provide evidence of $150 million in financial responsibility." H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. 119.

level of financial responsibility and liability from $350 million to as little as $50 million upon a determination that the use of deepwater ports "results in a lower operational or environmental risk." Such rulemaking is to follow a study of "the relative operational and environmental risks posed by the transportation of oil by vessel to deepwater ports versus the transportation of oil by vessel to other ports." See 33 U.S.C. 2716(c)(2) and 33 U.S.C. 2704(d)(2). With regard to vessels, OPA ties financial responsibility to the level of potential liability, which is expressly based on the volume of oil handled, 33 U.S.C. 2716(a) and 33 U.S.C. 2704(a)(1) and (2). These provisions show that when Congress wanted to authorize risk-based or varying levels of financial responsibility, it knew how. There is no indication in OPA that Congress intended similar risk-based levels of financial responsibility for offshore facilities.

III. Authority to Allow De Minimis Exemption From Financial Responsibility

The courts have occasionally recognized an implied power to exempt a de minimis class from regulation if the regulation produces only a trivial gain, in order to avoid absurd or futile results. Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1978); Washington Red Raspberry Commission v. United States, 859 F.2d 898 (Fed. Cir. 1988). "Unless Congress has been extraordinarily rigid, there is likely a basis for implication of de minimis authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." Alabama Power at 360.

But the courts have also made clear that even where a power to make a de minimis exception may be implied, it does not extend to making cost-benefit calculations in the conventional sense:

> That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs. For such a situation any implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history.

Id. at 361.

In a broad sense the difference between determining when a regulatory application is truly de minimis, and when it is simply not cost-effective by conventional cost-benefit analysis, is one of degree. But as the Alabama Power court took pains to underscore, this "difference of degree is an important one." The de minimis exemption authority is "narrow in reach and tightly bounded by the need to show that the situation is genuinely de minimis. . . ." Id.

Even if the authority to make de minimis exceptions may be implied, the courts are clear that it can be exercised only to implement the legislative design, not to thwart a statutory command. Id. Indeed, courts often find no authority for a de minimis exemption once they examine the statute. In NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977), *the court held that EPA lacked authority to exempt* categories of point sources from the permit requirements established in section 402 of FWPCA. The court stated that "courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute." See also Public Citizen v. Young, 831 F.2d 1108, 1113 (D.C. Cir. 1987); FPC v. Texaco, Inc., 417 U.S. 380 (1973); NRDC v. EPA, 966 F.2d 1292, 1305 (9th Cir. 1991).

To survive judicial scrutiny the agency must design the de minimis exemption with specific administrative burdens and a specific regulatory context in mind. Moreover, the burden of proof that the de minimis level selected fulfills the statutory purpose and has a rational basis is on the agency. Id. at 360. See also NRDC v. EPA, *966 F.2d 1292, 1305 (9th Cir. 1991)* ("Without data supporting the expanded exemption, we owe no deference to EPA's line-drawing.")[14]

The strength and breadth of OPA's financial responsibility command, i.e., to assure that the offshore facility's responsible party has the financial resources needed to cover any claim filed under OPA, suggests that MMS has a rather heavy burden to justify a de minimis exception.[15]

The terms of section 1016(c) express a congressional intent to achieve universal coverage. The financial responsibility

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[14] The Alabama Power court found EPA had not established a rational basis for its decision to exempt facilities emitting less than 100-250 tons of certain air pollutants from the Prevention of Significant Deterioration and Best Available Control Technology requirements of the Clean Air Act, even though the levels selected coincided with levels the Act itself set for other purposes. It remanded the matter to the agency. Id. at 405.

[15] EPA was unable to convince the courts that exempting small construction sites from Clean Water Act requirements faithfully implemented that Act, because EPA had to admit that the cumulative effect of runoff from small sites could have a significant effect on local water quality. NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1991). Nor could FDA satisfy the courts that exempting color additives which posed exceedingly small (but measurable) carcinogenic risks was consistent with the objectives of the Delaney Clause of the Food and Drug Act, Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987).

requirement applies to "each responsible party with respect to an offshore facility." 33 U.S.C. 2716(c) (emphasis added). "Facility" is defined to mean "any structure, group of structures, equipment or device used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing or transporting oil." 33 U.S.C. 2701(9) (emphasis added).[16]

A final indication of how narrow MMS' authority to create de minimis exemptions might be is the fact that OPA replaced Title III of the Outer Continental Shelf Lands Act. That Act contained an express exemption for facilities handling less than 1,000 barrels of oil at any one time. See 43 U.S.C. 1815(b) (1986), repealed by OPA, section 2004, 104 Stat. 504 (1990). Congress chose not to carry that exemption forward in OPA.

CONCLUSION

I have not focused upon practical considerations in resolving these interpretive questions because the statutory commands are clear, and the legislative history bears out the plain meaning. Whether Congress was wise or foolish in crafting and enacting these provisions of the Oil Pollution Act in this manner is not for me to say, in the context of answering the interpretive questions you have put to me. As a great jurist once wrote, in a not dissimilar context:

> In the last analysis, . . . the Executive [must] abide by the limitations prescribed by the Legislature. The scrupulous vindication of that basic principle of law . . . looms more important in the abiding public interest *than the embarkation on any immediate or specific* project, however desirable in and of itself, in contravention of that principle.

Wilderness Society v. Morton, 479 F.2d 842, 892-93 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973). If it makes sense for facilities over inland or near-shore waters to be treated differently from OCS facilities, or for financial responsibility requirements to be risk-based, or for MMS to have general authority to create a de minimis exemption, Congress will have to say so.

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[16] I believe, however, that MMS may use a reasonable functionality test in defining "facility." OPA specifies facilities "used for . . . storing, handling, transferring, processing or transporting oil." Crankcase oil in an engine on an offshore platform producing only natural gas would not render the platform a "facility," even though the engine "stores" oil, because the presence of the oil is only incidental to the purpose of the facility itself, which is not to store, handle, transfer, process, or transport oil.

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Appendix D

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