Testimony of Jonathan Ramseur
Specialist in Environmental Policy
Congressional Research Service

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Good afternoon Mr. Chairman, Ranking Member, and Members of the Committee. My name is Jonathan Ramseur. I am a Specialist in Environmental Policy in the Congressional Research Service (CRS). On behalf of CRS, I would like to thank the Committee for inviting me to testify here today. I have been asked by the Committee to discuss aspects of oil spill liability policy and allocation of costs associated with a major oil spill. My testimony will provide background on the Oil Pollution Act's liability structure and its interaction with the Oil Spill Liability Trust Fund. I should note that CRS does not advocate policy or take a position on specific legislation.

Oil Spill Liability before the 1989 *Exxon Valdez* Spill

When the *Exxon Valdez* ran aground in March 1989, multiple federal statutes, state statutes, and international conventions dealt with oil discharges. Many observers[1] described this legal collection as an ineffective patchwork. Arguably, each law had perceived shortcomings, and none provided comprehensive oil spill coverage. For more than 15 years prior to the *Valdez*, Congress had made attempts to enact a unified oil pollution law. Several contentious issues hindered the passage of legislation. A central point of debate dealt with state preemption: whether a federal oil spill law should limit a state's ability to impose stricter requirements, particularly unlimited liability.

In the aftermath of *Valdez*—which was followed by a handful of other large oil spills in 1989 and 1990—Members faced great pressure to overcome these disputed issues.[2] The spill highlighted the inadequacies of the existing coverage and generated public outrage. The end result was the Oil Pollution Act of 1990 (OPA)[3]—signed August 18, 1990—the first comprehensive law to specifically address oil pollution to waterways and coastlines of the United States.

Oil Spill Liability under the Oil Pollution Act of 1990

OPA liability provisions apply to any discharge of oil (or threat of discharge) from a vessel (e.g., oil tanker) or facility (e.g., offshore oil rig)[4] to navigable waters, adjoining shorelines, or the exclusive economic zone of the United States (i.e., 200 nautical miles beyond the shore). Responsible parties, including owners/operators of vessels/facilities and/or lessees of offshore facilities[5]—are liable[6] for (1) oil spill removal costs and (2) a range of other costs including:

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[1] See, for example, U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 32.

[2] For further discussion, see CRS Report RL33705, *Oil Spills in U.S. Coastal Waters: Background, Governance, and Issues for Congress*, by Jonathan L. Ramseur (and cited references contained therein).

[3] P.L. 101-380, primarily codified at 33 U.S.C. 2701, et seq.

[4] The definition of "facility" is broadly worded and includes pipelines and motor vehicles. 33 U.S.C. 2701(9).

[5] See 33 U.S.C. 2701(32).

[6] Responsible parties have several defenses from liability (33 U.S.C. 2703): act of God, act of war, and act or omission of certain third parties. These defenses are analogous to those of the Superfund statute (the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as Superfund), P.L. 96-510) enacted in 1980 for releases of hazardous substances. See 42 U.S.C. 9607(b).

- injuries to natural resources (e.g., fish, animals, plants, and their habitats);
- loss of real personal property (and resultant economic losses);
- loss of subsistence use of natural resources;
- lost government revenues resulting from destruction of property or natural resource injury;
- lost profits and earnings resulting from property loss or natural resource injury; and
- costs of providing extra public services during or after spill response.[7]

Compared to the pre-OPA liability framework, OPA significantly increased the range of covered damages.[8] Moreover, a responsible party is now liable (subject to the limits discussed below) for all cleanup costs incurred, not only by a government entity, but also by a private party.[9]

Limits (or Caps) to Liability

Barring exceptions identified below, responsible party liability is limited or capped for each "incident."[10] The liability limits differ based on the source of the oil spill: some limits are simple dollar amounts; others have unlimited liability for cleanup costs with limits on other damages. For example (and relevant to the Gulf spill):

- Mobile offshore drilling units (MODUs), like the *Deepwater Horizon* unit (owned by Transocean), are first treated as a tank vessel for their liability caps. Based on this unit's gross tonnage, its liability cap would be approximately $65 million (per the National Pollution Funds Center).[11] If removal and damage costs exceed this liability cap, a MODU is deemed to be an offshore facility for the *excess* amount.[12]
- Offshore facilities, like the Gulf well leased to British Petroleum, have their liability capped at "all removal costs plus $75 million."

The National Pollution Funds Center (NPFC) described the liability for this incident as follows:

> Liability for the New Horizon Incident: The lessee of the area in which the offshore facility is located is *clearly a responsible party* for the reported discharge below the surface from the well, an offshore facility. The OPA liability limit, if it applies, is all removal costs plus $75 million. The owner of the MODU would also be a tank vessel responsible party for any oil discharge *on or above the surface of the water*. The MODU liability limit, if it applies, as a tank vessel, is approximately $65 million. If the OPA oil removal costs and damages resulting from the discharge on or above the water exceed this liability amount the MODU is treated as an offshore facility for the excess amount. In that case the lessee of the area in which the offshore facility is located would be a liable

[7] OPA Section 1002(b)(2).

[8] Congress recognized that "there is no comprehensive legislation in place that promptly and adequately compensates those who suffer other types of economic loss as a result of an oil pollution incident." U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 31.

[9] OPA Section 1002(b)(1).

[10] "Incident" means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil. 33 U.S.C. 2701(14).

[11] See National Pollution Funds Center, "Oil Pollution Act Liabilities for Oil Removal Costs and Damages as They May Apply to the Deepwater Horizon Incident" (undated).

[12] 33 USC 2704(b).

> responsible party up to the offshore liability limit amount of all removal costs plus $75 million. (emphasis added by CRS)[13]

Loss of Liability Limit

Liability limits do not apply if the incident was "proximately caused" by "gross negligence or willful misconduct" or "the violation of an applicable Federal safety, construction, or operating regulation...." If one of these circumstances is determined to have occurred, the liability would be unlimited. In addition, the responsible party must report the incident and cooperate with response officials to take advantage of the liability caps. According to the National Pollution Funds Center, liability limits are "not usually well defined until long after response," and litigation may be required to resolve the issue.[14]

Increasing Liability Caps

OPA requires the President to issue regulations to adjust the liability limits at least every three years to take into account changes in the consumer price index (CPI).[15] Despite this requirement, adjustments to liability limits were not made until Congress amended OPA in July 2006. The Coast Guard and Maritime Transportation Act of 2006 (P.L. 109-241) increased limits to double- and single-hulled vessels.[16] Subsequently, the Coast Guard made its first CPI adjustment to the liability limits in 2009.[17] The offshore facility limit has remained at the same level since 1990. According to the *Federal Register* preamble (July 1, 2009), the Coast Guard will join efforts with the other relevant agencies—Environmental Protection Agency, Department of the Interior, and Department of Transportation—to submit CPI adjustments together in 2012.

Oil Spill Liability Trust Fund

Before the passage of OPA, federal funding for oil spill response was widely considered inadequate,[18] and damage recovery was difficult for private parties.[19] To help address these issues, Congress established the Oil Spill Liability Trust Fund (OSLTF). Although Congress created the OSLTF in 1986,[20] Congress did not authorize its use or provide its funding until after the *Exxon Valdez* incident.

Pursuant to Executive Order (EO) 12777, the U.S. Coast Guard created the National Pollution Funds Center (NPFC) to manage the trust fund in 1991. The fund may be used for several purposes, including:

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[13] See National Pollution Funds Center, "Oil Pollution Act Liabilities for Oil Removal Costs and Damages as They May Apply to the Deepwater Horizon Incident" (undated).

[14] National Pollution Funds Center, *FOSC Funding Information for Oil Spills and Hazardous Materials Releases, April 2003*, p. 4.

[15] 33 USC 2704(d)(4).

[16] This act increased limits to $1,900/gross ton for double-hulled vessels and $3,000/gross ton for single-hulled vessels.

[17] This rulemaking increased the limits to $2,000 for double-hulls and $3,200 for single-hulls. U.S. Coast Guard, "Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability—Vessels and Deepwater Ports," *Federal Register* Volume 74, No. 125 (July 1, 2009), pp. 31357-31369.

[18] Wilkinson, Cynthia et al., "Slick Work: An Analysis of the Oil Pollution Act of 1990," *Journal of Energy, Natural Resources, and Environmental Law*, 12 (1992), p. 188.

[19] U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 35.

[20] Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509).

- prompt payment of costs for responding to and removing oil spills;
- payment of the costs incurred by the federal and state trustees of natural resources for assessing the injuries to natural resources caused by an oil spill, and developing and implementing the plans to restore or replace the injured natural resources; and
- payment for the range of claims described above (e.g., financial losses; government revenue losses; property damages; etc).

Projected Level of the Fund

OPA provided the statutory authorization necessary to put the fund in motion. Through OPA, Congress transferred other federal liability funds[21] into the OSLTF. In complementary legislation, Congress imposed a 5-cent-per-barrel tax on the oil industry to support the fund.[22] Collection of this fee[23] ceased on December 31, 1994, due to a sunset provision in the law. However, in April 2006, the tax was reinstated by the Energy Policy Act of 2005 (P.L. 109-58). In addition, the Emergency Economic Stabilization Act of 2008 (P.L. 110-343) increased the tax rate to 8 cents through 2016. In 2017, the rate increases to 9 cents. The tax is scheduled to terminate at the end of 2017.[24]

Under the original tax legislation (the Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239)), the per-barrel tax would be suspended in any calendar quarter if the fund balance reached $1 billion, restarting again if it dipped below that number. With the Energy Policy Act of 2005 (P.L. 109-58), Congress raised this threshold from $1 billion to $2.7 billion. The Emergency Economic Stabilization Act of 2008 repealed the requirement that the tax be suspended if the unobligated balance of the fund exceeded $2.7 billion.

As illustrated in **Figure 1**, the fund was projected (in May 2009) to reach approximately $3.5 billion in FY2016. Earlier this year, the Office of Management and Budget (OMB) estimated an (unobligated) balance of $1.575 billion in the trust fund by the end of FY2010.[25]

[21] The Clean Water Act Section 311(k) revolving fund; the Deepwater Port Liability Fund; the Trans-Alaska Pipeline Liability Fund; and the Offshore Oil Pollution Compensation Fund.

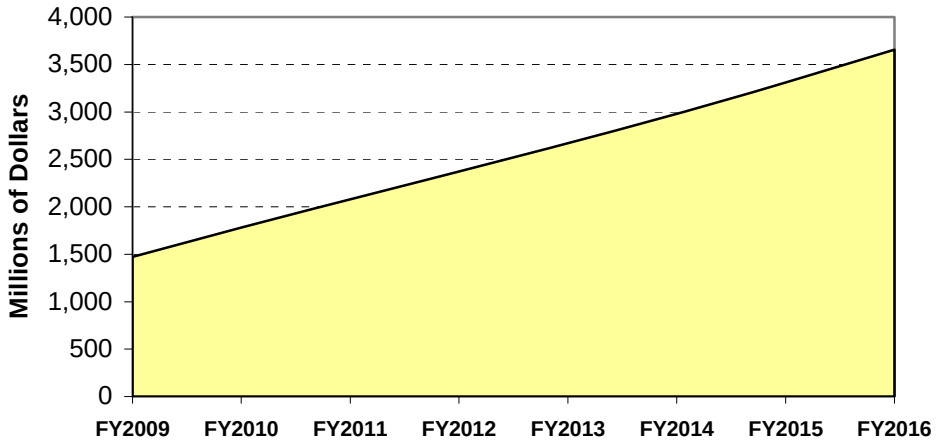
[22] Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239). Other revenue sources for the fund include interest on the fund, cost recovery from the parties responsible for the spills, and any fines or civil penalties collected.

[23] The tax is imposed on (1) crude oil received at U.S. refineries, paid by the operator of the refinery; and (2) imported crude oil and petroleum products, paid by the person entering the product for consumption, use, or warehousing. See 26 USC 4611.

[24] Section 405 of P.L. 110-343.

[25] Office of Management and Budget, *Budget of the U.S. Government for Fiscal Year 2011*, Appendix, p. 548.

Figure 1: Projected Annual Balances for the Oil Spill Liability Trust Fund, FY2009-FY2016



Source: Prepared by CRS with data from National Pollution Funds Center (personal correspondence, May 7, 2009).

Trust Fund Vulnerability and Liability Limits: Considerations for Congress

A primary purpose of the Trust Fund is to reimburse persons for removal costs and/or damages that exceed the responsible parties' liability limits. For example, if a spiller's liability limit is determined to be $100 million, and the total costs of the incident equal $500 million, the trust fund could reimburse parties for the difference (in this case $400 million). However, OPA established a per-incident expenditure cap. The maximum total amount available for each incident is $1 billion. Within this $1 billion limit, natural resource damage awards cannot exceed $500 million. Such a scenario has not occurred under the OPA framework.

A significant spill, particularly one that impacts sensitive environments and/or areas of substantial human populations, could threaten the viability of the fund. As one reference point, the *Exxon Valdez* spill tallied approximately $2 billion in cleanup costs and $1 billion in natural resource damages (not including third-party claims)—*in 1990 dollars*. Punitive damage claims were litigated for more than 12 years, eventually reaching the U.S. Supreme Court in 2008 (*Exxon Shipping v. Baker*). Plaintiffs were eventually awarded approximately $500 million in punitive damages.[26] An additional $500 million in interest on those damages was subsequently awarded.

These issues raise a central policy question: how should Congress allocate the costs associated with a major, accidental oil spill? Under the existing framework, responsible parties (i.e., owners/operators of vessels and facilities) are liable up to their liability caps (if applicable); the trust fund, which is funded primarily through the tax on the oil industry, covers costs above liability limits up to the per-incident cap ($1 billion). Statements from OPA's legislative history suggest that drafters intended the fund to cover "catastrophic spills."[27]

[26] Note that the original (1994) district court award was for $5 billion.

[27] U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 36.

Costs (including, for example, natural resource damages, economic losses, etc.)[28] beyond this per-incident limit could be addressed in several ways. One mechanism would be for parties to use state laws. OPA does not preempt states from imposing additional liability or requirements relating to oil spills, or establishing analogous state oil spill funds (33 U.S.C. 2718). OPA legislative history and statements from OPA drafters[29] indicate that state laws and funds would supplement (if necessary) the federal liability framework under OPA.

Alternatively, existing federal authorities could be used to provide assistance in some circumstances. For example, an emergency declaration under the Stafford Act would appear a potential approach for the current situation, because it is intended to lessen the impact of an imminent disaster. A declaration in the context of a manmade disaster is unprecedented: during the *Exxon Valdez* spill, the President turned down the governor of Alaska's two requests for an emergency declaration.[30] Regardless, other federal authorities may provide mechanisms for assistance.[31]

In addition, Congress may consider modifying this liability framework. Potential options for Congress include (but are not limited to):

1. Increase the liability limits, so that the responsible party would be required to pay a greater portion of the total spill cost before accessing trust fund dollars (e.g., S. 3305, introduced May 4, 2010, by Senator Menendez).
2. Increase the per-barrel oil tax to more quickly raise the fund's balance. Concurrently, Congress could remove or raise the per-incident cap on the trust fund.
3. Authorize "repayable advances" to be made (via the appropriations process) to the trust fund, so that the fund would have the resources to carry out its functions (cleanup efforts, claim awards). Up until 1995, the fund had this authority, in order to ensure it could respond to a major spill before the fund had an opportunity to grow (via the per-barrel tax). S. 3036 (introduced May 4, 2010, by Senator Menendez) would take this approach. This proposal would allow unlimited advances.

Thank you again for invitation to appear today. I will be pleased to address any questions you may have.

[28] Although offshore facilities are liable for all removal costs, liability for removal costs for other responsible party categories (e.g., tank vessels, onshore facilities) is limited. Thus, a significant oil spill from a tank vessel could potentially encounter the per-incident trust fund cap, based solely on its response costs.

[29] See George Mitchell, "Preservation of State and Federal Authority under the Oil Pollution Act of 1990," *Environmental Law*, Vol. 21, no. 2 (1991).

[30] The rationale for the turndowns was that a declaration by the President would hinder the government's litigation against Exxon that promised substantial compensation for the incident. See CRS Report R41234, *Potential Stafford Act Declarations for the Gulf Coast Oil Spill: Issues for Congress*, by Francis X. McCarthy.

[31] For example, see the amendment in the nature of a substitute to H.R. 4899 (Supplemental Appropriations Act, 2010) reported from the Senate Committee on Appropriations May 14, 2010 (S. Rept. 111-188).