

The Oil Pollution Act of 1990 (OPA 90)

The Oil Pollution Act of 1990 (OPA 90), 33 U.S.C. ch. 40 § 2701, was legislation intended to avoid oil spills from vessels and facilities. It enforced removal of spilled oil and assigned liability for the cost of cleanup and damages. The act requires specific operating procedures; defines responsible parties and financial liability; implements processes for measuring damages; specifies damages for which violators are liable; and establishes a fund for damages, cleanup, and removal costs. This statute has resulted in instrumental changes in the oil production, transportation, and distribution industries.

A responsible party under the Oil Pollution Act is one who is found accountable for the discharge or substantial threat of discharge of oil from a vessel or facility into navigable waters, exclusive economic zones, or the shorelines of such covered waters. Responsible parties are strictly, jointly, and severally liable for the cost of removing the oil in addition to any damages linked to the discharge. Unlike the liability for removal costs which are uncapped, liability for damages is limited as discussed in further detail below. Furthermore, the Oil Pollution Act allows for additional liability enacted by other relevant state laws.

Under the Oil Pollution Act, federal, tribal, state, and any other person can recover removal costs from a responsible party so long as such entity has incurred costs from carrying out oil removal activities in accordance with the Clean Water Act National Contingency Plan. Reimbursement claims must first be made to the responsible party. If the potentially responsible party refutes liability or fails to distribute the reimbursement within 90 days of the claim, the claimant may file suit in court or bring the claim to the Oil Spill Liability Trust Fund described below. In some instances, claims for removal cost reimbursement can be initially brought to the Oil Spill Liability Trust Fund thus sidestepping the responsible party. For example, claimants advised by the EPA, governors of affected states, and American claimants for incidents involving foreign vessels or facilities may initially present their claims to the Oil Spill Liability Trust Fund. When claims for removal cost reimbursement are brought to the fund, the claimant must prove that removal costs were sustained from activities required to avoid or alleviate effects of the incident and that such actions were approved or directed by the federal on-scene coordinator.

In a manner similar to that described above, costs for damages can be recovered from a responsible party. However, the Oil Pollution Act only covers certain categories of damages. These categories include: natural resource damages, damages to real or personal property, loss of subsistence use, loss of government revenues, loss of profits or impaired earning capacity, damaged public services, and damage assessment costs. Additionally, some categories are recoverable for any person impacted by the incident while others are only recoverable by federal, tribal, and state governments. Furthermore, the Oil Pollution Act proscribes limits to liability for damages based on the responsible party, the particular incident, and the type of vessel or facility from which the discharge occurred.

The Oil Spill Liability Trust Fund is a trust fund managed by the federal government, primarily by the U.S. Coast Guard, and financed by a per-barrel tax on crude oil produced domestically in the United States and on petroleum products imported to the United States for consumption. The

fund was created in 1986, but use of the fund was not authorized until the Oil Pollution Act's passage in 1990. The funds may be called upon to cover the cost of federal, tribal, state, and claimant oil spill removal actions and damage assessments as well as unpaid liability and damages claims. No more than one billion dollars may be withdrawn from the fund per spill incident. Over two decades of court cases have demonstrated that obtaining funding from the Oil Pollution Spill Liability Fund can be a difficult task.

The Oil Pollution act imposes long term impacts due to the potential for unlimited liability and the statute's that hold insurers to serve as guarantors, which has ultimately resulted in the refusal of insurance companies to issue agreements of financial liability to vessel operators and owners. Thus, the inability to acquire proof of financial liability results in vessels not being able to legally enter waters of the United States. Since OPA does not exempt vessel creditors to enter U.S. waters, there is a disincentive for any lender to finance fleet modernization and or replacement. Lastly, OPA has the ability to directly impact the domestic oil production industry due to the rigorous offshore facility provisions.

1. Financial responsibility: The U.S. Coast Guard is responsible for the implementation of the vessel provisions mandated by the Oil Pollutions Act. According to OPA, vessel owners need evidence of financial liability that covers complete responsibility of a disaster if their vessel weighs more than 300 gross tons. Vessel owners are required by OPA to apply to the Coast Guard to acquire a "Certificate of Financial Responsibility" that serves as proof of their ability to financially responsible for cleanup and damages of an oil spill. In the case of an uncertified vessel entering the waters of the United States, the vessel will have to be forfeited to the United States. This is not a new protocol because vessel owners were always mandated to acquire certificates under the FWPCA 74 and Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA). Since 2011, over 23,000 vessels have obtained the Coast Guard Certificates to allow access to waters of the U.S.
2. Disincentives for fleet replacement and modernization: Since the Oil Pollution Act holds the vessel owners fully liable, it has created a disincentive for oil companies to transport crude oil in their vessels and for charterers to transport their oil on the most suitable vessels. Many financially successful oil companies select the highest quality of ships to transport their products, however, other companies continue to transport their product on the lower quality, older vessels due to the cheaper costs. The majority of charterers refuse to pay more for higher grade vessels despite the liability and compensation regulations enforced by OPA. The new and safer double hull tanker vessels are approximately 15-20% more costly to operate. In 1992, approximately 60% of global vessels was at least fifteen years old or older. The major oil companies are still delaying the fleet replacement requirement of retiring single hull vessels mandated by OPA. For example, Exxon and Texaco have delayed the replacement of their single hull vessels for new double hulled ships. However, companies like Chevron and Mobil have ordered two new double hull tankers. Leading by example, other independent shipping companies to invest in new double hull tankers as well. Despite the change from single to double tanker vessels, it is

still not sufficient enough to accommodate the needs of the oil industry. It is expected that over the next decade there will be a serious lack of suitable tonnage to meet the expected demand for newer vessels. It is estimated that the global oil industry must invest approximately 200-350 billion dollars to meet global demands for new and environmentally sound vessels.

3. Domestic production: In the Oil Pollution Act, the U.S. Coast Guard is in charge of screening the application process for vessels, however, the Bureau of Ocean Energy Management (BOEM) implements and enforces all of the Oil Pollution Act's regulations for offshore oil facilities. Under OPA, the responsible parties are mandated to provide evidence declaring financial responsibility of \$150 million for potential liability. If a party is unable to provide evidence declaring financial responsibility of \$150 million, they will be subject to pay a penalty of \$25,000 per day in violation of OPA and may also be subject to judicial decision of terminating all operations.

With respect to OCS facilities, BOEM regulations in part 553 describe who is a responsible party in accordance with the Act and who must be financially responsible under the Act to pay the costs associated with damages from oil spills.