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United States
Coast Guard



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DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

STATEMENT OF

**REAR ADMIRAL THOMAS GILMOUR
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AND

**JAN LANE
DIRECTOR, NATIONAL POLLUTION FUNDS CENTER**

BEFORE THE

SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

U. S. HOUSE OF REPRESENTATIVES

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Mr. Chairman, Representative Filner, and distinguished Members of the Committee: Good afternoon. I am RADM Thomas H. Gilmour, Assistant Commandant for Prevention, and with me today is Ms. Jan Lane, Director of the National Pollution Funds Center. We are pleased to appear before you today to discuss oil pollution prevention and the Oil Spill Liability Trust Fund.

Congress enacted the Oil Pollution Act of 1990 (OPA) in the wake of the T/S EXXON VALDEZ oil spill in Prince William Sound, Alaska and a rash of other major spills. OPA's scope was ambitious, including extensive provisions to prevent the circumstances under which spills occur, to enhance federal authority and resources to respond to spills and to compensate those who incur removal costs or damages when spills do inevitably occur to our nation's navigable waters, adjoining shorelines, and exclusive economic zone.

OPA set new requirements for vessel construction, crew licensing and manning, mandated contingency planning, enhanced federal response capability, broadened enforcement authority, increased penalties, created new research and development programs, and increased the liability of those responsible for the vessels and facilities that spill oil. OPA added entirely new compensation provisions for a wide array of costs and damages caused by oil spills, and significantly strengthened financial responsibility requirements to ensure that persons liable for large vessel and offshore facility spills have the ability to compensate claimants up to their liability limit.

The Oil Spill Liability Trust Fund ("Fund") has been referred to as the cornerstone of the OPA regime. While the various federal agencies are the engine for federal administration and enforcement of OPA, the Fund has been the fuel. The Fund provides the resources for federal incident specific response. The Fund is available to compensate individuals, businesses, natural resource trustees and state and local governments for their costs and damages resulting from a spill when responsible parties do not pay. The Fund is also used by Congress as a source for direct appropriations to the various federal agencies responsible for administration and enforcement of OPA. Those appropriations provide funds to support programs to prevent spills, to coordinate preparedness for spill response at the national, state and local levels, enhance spill research and development initiatives, to compensate injured parties and to make polluters pay when spills occur.

The enormous success of the OPA regime can be measured in large part by the overall reduction in the quantity of oil spilled since 1990. The partnership between OPA and the Fund has been highly effective in achieving this success and in comprehensively addressing oil pollution risks and damages.

Despite the many success stories over the 16 years since OPA was enacted, risks to the long-term viability of the Fund persist. In the May 12, 2005, Implementation of the Oil Pollution Act of 1990 Report to Congress, the Coast Guard addressed risks to the Fund and concerns that with the expiration of the financing rate, or tax, on oil in 1994, the Fund was not self sustaining. As a result the Coast Guard expected the Fund to be exhausted by fiscal year 2009. By late summer of 2005, Congress provided for a resumption of the financing rate pursuant to section 1361 of the Energy Policy Act of 2005. The rate is effective this month and continues in effect through the end of 2014, with revenue to be deposited to the Fund. While the resumption of the financing rate is an important step in ensuring continued viability of the Fund there are new challenges on the horizon.

One key issue that continues to come up has been limits on liability. The inadequacy of vessel liability limits has begun to be felt only in recent years with the increase in the number and cost of responsible party claims for costs and damages in excess of liability limits presented for payment from the Fund. We recognize significant limit adjustments are needed, at least in respect to vessels. For vessels, liability limits are based on vessel type (tank and non-tank) and gross tonnage. OPA also provides for adjustment to those limits by regulation to reflect increases in the Consumer Price Index (CPI). Limits have not been adjusted for CPI increases since OPA was enacted. While the Coast Guard has taken steps toward making CPI based adjustments for vessels through regulation, we believe the magnitude of the adjustment needed is greater than what CPI based adjustments will provide. The Department has supported those provisions of H.R. 889 and H.R. 1412 that would ensure liability limits are adequate. We therefore welcomed the recent results of the conference committee on H.R. 889, the “Coast Guard and Maritime Transportation Act of 2006.” As reported by the committee, section 603 of H.R. 889 increases vessel liability limits by 50% or more to reflect CPI increases since OPA was enacted.

OPA Limits on Liability

Under section 1004 of OPA (33 U.S.C. 2704), a responsible party’s liability for removal costs and damages is limited, unless certain exceptions apply. The liability limit for a vessel spill is based on a formula that considers the vessel tonnage and whether the vessel (ship or barge) is a tank vessel or non-tank vessel. Liability limits for onshore facilities, offshore facilities, and deepwater ports are set at designated amounts. Fundamental to OPA is the “polluter pays” principle. Thus the issue is whether the current liability limits are sufficient to support the “polluter pays” principle.

The catastrophic impacts of Hurricanes Katrina and Rita included substantial damage to oil production infrastructure and the estimated discharge of more than 9 million gallons of oil. Fortunately Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) disaster relief funds were available to finance federal response and assistance in connection with environmental cleanup. The Fund has not been tapped for federal cleanup of oil spills caused by these hurricanes. However, we are concerned about the potential for major claims to be filed for natural resource damages and for oil removal costs and damages incurred by responsible parties, and other third parties. While responsible parties are generally liable under the Oil Pollution Act for such costs, they too may present a claim to the Fund for their costs and damages that exceed their applicable OPA liability limit or for all their costs and damages if they can establish one of the OPA complete defenses to liability. One OPA defense that is likely to be seriously tested as a result of these hurricanes is the “Act of God” defense.

Major oil spills will always present a risk to the Fund, one that cannot be predicted with any specificity. The response and compensation challenges presented by the catastrophic spill to the Delaware River from the T/S ATHOS I in November 2004 is one relatively recent example and its effects on the Fund are still being determined. The fund managers project as much as \$270 million in claims could be presented for adjudication. While a portion of those claims would be in the form of a third party damage claim, the claims of the responsible party, which are based on alleged entitlement to limit liability and alleged defenses, comprise the largest portion of the risk.

One of the principal reasons the Fund was created was to provide a source of financing for response and compensation when responsible parties do not pay. The question today is whether that risk is properly apportioned between the responsible parties and the Fund. Clearly responsible party liability limits, at least for vessels, are long overdue for an increase. That need was recognized in H.R. 1412, the “Delaware River Protection Act,” which Chairman LoBiondo introduced and which was subsequently incorporated in large part as Title VI of H.R. 889, the “Coast Guard and Maritime Transportation Act of 2006.” We look forward to working closely with Congress as we report further on the adequacy of liability limits as a means to ensure the polluter pays its fair share and that the OPA and Fund regime continues to provide effective and efficient oil spill prevention, response and compensation services to the public.

The Fund in Brief

Section 9509 of the Revenue Code (26 U.S.C. 9509) authorizes the establishment of the Fund.

Fund Revenues

The Fund has had two principal sources of revenue. The largest source of revenue had been a 5¢ per barrel tax, imposed on crude oil received at U.S. refineries and on certain petroleum products entered into the United States pursuant to 26 U.S.C. 4611. That tax expired as scheduled on December 31, 1994, pursuant to 26 U.S.C. 4611(f)(1). The Energy Policy Act of 2005, in section 1361, recently reinstated this revenue source starting in April 2006 and continuing in effect through December 2014.

The other principal revenue source was the transfer of balances from the various legacy oil pollution funds replaced by the Fund, just as OPA consolidated and replaced the various related oil pollution regimes served by those funds:

- The Federal Water Pollution Control Act (FWPCA) 311k revolving fund,
- The Deepwater Port Liability Fund,
- The Trans-Alaska Pipeline Liability Fund, and
- The Offshore Oil Pollution Compensation Fund.

Total legacy fund transfers into the Fund since 1990 total approximately \$551 million. Over \$216 million in transfers from the Oil Pollution Fund, Offshore Oil Pollution Compensation Fund, and Deepwater Port Liability Fund were deposited into the Fund in 1990. The largest source has been the Trans-Alaska Pipeline Liability Fund (TAPS), which transferred \$335 million over the period 1995 to 2000. No additional amounts remain to be transferred to the Fund.

Another significant source of revenue is the interest on the Fund principal from U.S. Treasury investments. Interest income has declined significantly in recent years, as a result of historically low interest rates, falling to \$13.5 million (or 45% of revenue) in FY 2004. However, with interest rates rising and fund balances increasing due to the reinstatement of the barrel tax, interest revenue should rise.

Another source of revenue is cost recoveries from responsible parties. Those responsible for oil incidents are liable for costs and damages resulting from the spill. The NPFC has a collection program to recover federal removal costs and removal cost and damage claims paid from the Fund. Cost recoveries usually fluctuate between \$3 million and \$12 million per year.

Penalties paid pursuant to section 311 of the FWPCA, section 309(c) of the FWPCA for violations of section 311, the Deepwater Port Act of 1974, and section 207 of the Trans-Alaska Pipeline Authorization Act are required to be deposited into the Fund. Penalty deposits are generally between \$4 million and \$7 million per year, with two very large penalties deposited to the Fund in FY 2000 and FY 2003.

Fund expenses

Section 1012 of OPA (33 U.S.C. 2712) further delineated Fund uses, including most importantly Fund availability to the President for payment of:

- Federal removal costs;
- Claims for uncompensated removal costs and damages, including natural resource damages; and
- Administrative, operational, and personnel costs and expenses incidental to implementation, administration, and enforcement of OPA

Federal removal costs – emergency fund

To ensure rapid, effective response to oil spills, section 6002 of OPA provides that the President has the authority to make available from the Fund, without further appropriation, up to \$50 million each year to respond and remove oil spills and to initiate Natural Resource Damage Assessments. These amounts remain available until expended. To the extent that \$50 million is inadequate, authority was granted under Section 323 of the Maritime Transportation Security Act (MTSA) of 2002 to advance up to \$100 million from the OSLTF to fund removal activities. This provision has not been utilized to date, however, had the responsible party in the T/V ATHOS I spill not accepted responsibility, it may well have been used to ensure effective response, where total response costs exceeded \$175 million. The NPFC manages use of these removal cost funds, providing ready financing when Coast Guard or EPA Federal Coordinators respond to a spill.

Claims

OPA provides that any person or government may present a claim for compensation for removal costs or damages resulting from an oil pollution incident covered by the Act. Claims can be presented for:

- Uncompensated Removal Costs,
- Natural Resource Damages,
- Damage to Real or Personal Property,
- Loss of Profits and Earning Capacity,
- Loss of Subsistence Use of Natural Resources,
- Loss of Government Revenues, and
- Increased Cost of Public Services.

Responsible parties may also file claims for removal costs and damages they pay or incur in certain situations. They may be compensated from the Fund if they can establish one of the defenses provided under OPA (spill caused solely by “Act of God,” “Act of war,” or “sole fault of a third party”), or to the extent their costs and damages exceed the applicable OPA liability limit. To date, the largest claims paid from the Fund have been paid to responsible parties.

The Fund is available to pay claims without further appropriation and the NPFC is delegated authority to process, adjudicate and pay such claims. The NPFC claim procedures strike a reasonable balance between the objectives of compensating deserving claimants and acting as a fiduciary for the Fund. Before claimants can be compensated, they must establish that the removal costs or damages claimed resulted from a discharge of oil or a substantial threat of a discharge of oil from a vessel or facility into the navigable waters, adjoining shorelines, or the exclusive economic zone of the United States. The removal actions for which costs are claimed must be consistent with the National Contingency Plan (NCP), and the claim must be submitted within express time periods (generally three years for damages, six years for removal costs).

Claimants must first present their claims to the responsible party or guarantor except in certain circumstances. State governments may present claims for uncompensated removal costs directly to the NPFC. Any claimant may present removal cost or damage claims directly to the NPFC if the source of the spill is not known. Other exceptions allow a claim to be presented directly to the Fund when the Fund advertises for such claims or when the claimant is a responsible party presenting a claim based on an OPA defense or liability limit.

The most common claims paid by NPFC are state claims for removal costs.

OPA Implementation - Agency Appropriations

Various federal agencies receive annual appropriations from the Fund for administrative, operational, personnel, enforcement, and research and development costs as authorized in OPA and as delegated by Executive Order 12777. Agency responsibilities for carrying out OPA requirements include regulatory development and enforcement, program implementation and research and development programs for prevention, preparedness, response, compensation and liability as required by OPA. Specific initiatives include the establishment of double and single hull vessel requirements; implementation of vessel traffic systems; tighter controls on licensing and manning; requirements for vessel and facility (onshore, offshore and pipelines) operations and response planning; ongoing spill response readiness including the National Response Teams, Federal Coordinators, and the National Response Center; improved cooperative relationships among responding agencies and oil industry stakeholders, including periodic drills and implementation of changes to the National Contingency Plan, Area Contingency Plans and National Response System; stricter liability and compensation requirements including increased financial responsibility, compensation to claimants, and cost recovery from responsible parties; and overall management of the OSLTF.

Appropriations from the Fund are the responsibility of the various agencies. The Coast Guard has no role or oversight responsibility with respect to the appropriations for other agencies. Year to year, the total appropriations to agencies from the Fund have been the largest expenditure, exceeding combined amounts expended for federal response and payment of claims.

Fund Forecast

The current Fund balance is approximately \$662 million. The passage of the Energy Policy Act of 2005 resumed the per barrel oil tax beginning in April 2006. The Fund is projected to remain viable barring any significant impacts from the hurricanes or other major oil pollution incidents. To date there have been no Hurricane Katrina or Rita related expenses against the OSLTF.

Based on past spending trends, known Fund commitments, and the resumption of revenue, current forecasts (**excluding** Hurricane losses) indicate the OSLTF balance is expected to reverse it's downward trend in FY 2008 and slowly rebuild itself, achieving a level of approximately \$830 million by the time the per barrel tax sunsets in 2014.

As a result of Hurricanes Katrina and Rita there were 6 major, 5 medium, and over 5000 minor oil and hazmat responses. Additional minor spills continue to be identified and addressed. It is estimated that over 9 million gallons of oil was released, and this total does not include oil released from the 5000 minor spills.

All Katrina and Rita oil pollution response activities thus far have been funded by either Stafford Act funding or by a responsible party. The Coast Guard has received \$178 million in Stafford Act funds for coastal zone hazardous materials response. These funds are expected to be sufficient through FY2006.

A bigger threat to the OSLTF is from claims. On April 13, 2006, NPFC received its first claim resulting from Hurricane Katrina, for real and personal property damage in the amount of \$478,000. It is also possible that Responsible Parties who have spent their own money in response to the spills may try to claim either a limit of liability or Act of God defense and seek reimbursement from the OSLTF. These claims would have to be evaluated on a case by case basis. If they meet the requirements of OPA 90 they would constitute legitimate claims against the fund. There is no way to know with any degree of certainty how much has been spent by the major refineries and other facility owners in their response to these Hurricane related spills.

NOAA, as the federal Administrative Trustee for the Natural Resource Damage (NRD) Trustees, has indicated that there will be a potential for assessment and restoration claims depending on responsible party cooperation and the ultimate determination in respect to any Act of God defense.

The size and number of potential damages and NRD claims that could impact the fund is currently impossible to estimate with any degree of certainty. Based on press reports of what the major facilities are spending on clean up, and the sheer size of this Katrina disaster, as well as historical cost data from other large spills, the total claims submitted are still being evaluated by the natural resource trustee agencies and could be significant. While the risk to the Fund from the hurricanes cannot be gauged with any certainty, the NPFC is carefully monitoring the situation to ensure the long-term viability of the fund is not comprimsed.

T/S ATHOS I Spill in the Delaware River

The Fund played a pivotal role in the response to the T/S ATHOS I spill and continues to do so in respect to compensation for claimants.

Response

NPFC provided immediate resources from the Fund to enable the Federal On-Scene Coordinator to manage and oversee the response, including effective coordination with the affected state and local authorities. The Fund was also available to finance a major increase in federal activities when needed. That need arose in March 2005 when the responsible party, who had reportedly expended some \$124 million for response, stopped responding (the vessel limit for the spill was \$45.4 million). The Fund was immediately available to the Federal Coordinator to ensure a seamless transition of the response activities to direct federal control. Those response activities continued until early June 2005 when ongoing active cleanup of the Delaware River shoreline was completed. Maintenance and monitoring activities continued under the direction of Sector Delaware Bay until November 2005. In January 2006, Sector Delaware Bay signed off that clean up for all areas was complete.

The NPFC has made \$51.5 million available from the Fund to the Federal On-Scene Coordinator for this effort. This entire amount has been obligated or expended.

The Coast Guard completed an investigation into the cause(s) of the marine casualty and the oil discharge. This report was issued in January of this year.

Claims

In March 2005, the responsible party announced it would not pay claims resulting from the ATHOS I spill. The NPFC accordingly advertised to the public that claims may be presented to the NPFC for payment from the Fund. As of April 19, 2006, NPFC has received 116 claims in connection with the incident totaling approximately \$187 million, including claims received from the Salem Nuclear Power Plant totaling in excess of \$57 million for loss of profits, and a Responsible Party claim for \$124 million. We anticipate additional claims, estimated at more than \$20 million, from refineries, port facilities, and port and harbor services impacted by the spill. Natural resource damage claims are roughly estimated at \$10 million. While most claims have yet to be adjudicated, including adjudication of the responsible party's defense to liability, the total estimate to date of all known fund liabilities is approximately \$268 million.

Conclusion

In conclusion, thank you again for the opportunity to testify before you today about the Fund, its continued viability and the critical functions it serves to help prevent and respond to oil spills to our nation's waters and compensate those who are injured by such spills. We will be happy to answer any questions you may have.