

## Coast Guard, DHS

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AUTHORITY: 33 U.S.C. 2704; 33 U.S.C. 2716, 2716a; 42 U.S.C. 9608, 9609; Sec. 1512 of the Homeland Security Act of 2002, Public Law 107-296, Title XV, Nov. 25, 2002, 116 Stat. 2310 (6 U.S.C. 552(d)); E.O. 12580, Sec. 7(b), 3 CFR, 1987 Comp., p. 198; E.O. 12777, Sec. 5, 3 CFR, 1991 Comp., p. 351, as amended by E.O. 13286, 68 FR 10619, 3 CFR, 2004 Comp., p.166; Department of Homeland Security Delegation Nos. 0170.1 and 5110. Section 138.30 also issued under the authority of 46 U.S.C. 2103 and 14302.

SOURCE: USCG-2005-21780, 73 FR 53697, Sept. 17, 2008, unless otherwise noted.

### Subpart A—Financial Responsibility for Water Pollution (Vessels)

#### § 138.10 Scope.

This subpart sets forth the procedures by which an operator of a vessel must establish and maintain, for itself and for the owners and demise charterers of the vessel, evidence of financial responsibility required by Section 1016(a) of the Oil Pollution Act of 1990, as amended (OPA 90) (33 U.S.C. 2716), and Section 108 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA) (42 U.S.C. 9608), equal to the total applicable amount determined under this subpart and sufficient to cover their liability arising under—

(a) Sections 1002 and 1004 of OPA 90 (33 U.S.C. 2702, 2704); and

(b) Section 107 of CERCLA (42 U.S.C. 9607).

#### § 138.15 Applicability.

(a) This subpart applies to the operator as defined herein of —

(1) A tank vessel of any size, and a foreign-flag vessel of any size, using

the waters of the exclusive economic zone to transship or lighter oil (whether delivering or receiving) destined for a place subject to the jurisdiction of the United States; and

(2) Any vessel using the navigable waters of the United States or any port or other place subject to the jurisdiction of the United States, including a vessel using an offshore facility subject to the jurisdiction of the United States, except—

(i) A vessel that is 300 gross tons or less; or

(ii) A non-self-propelled barge that does not carry oil as cargo or fuel and does not carry hazardous substances as cargo.

(b) For the purposes of financial responsibility under OPA 90, a mobile offshore drilling unit is treated as a tank vessel when it is being used as an offshore facility and there is a discharge, or a substantial threat of a discharge, of oil on or above the surface of the water. A mobile offshore drilling unit is treated as a vessel other than a tank vessel when it is not being used as an offshore facility.

(c) In addition to a non-self-propelled barge over 300 gross tons that carries hazardous substances as cargo, for the purposes of financial responsibility under CERCLA, this subpart applies to a self-propelled vessel over 300 gross tons, even if it does not carry hazardous substances.

(d) This subpart does not apply to operators of public vessels.

#### § 138.20 Definitions.

(a) As used in this subpart, the following terms have the meaning as set forth in—

(1) Section 1001 of the Oil Pollution Act of 1990 (33 U.S.C. 2701), respecting the financial responsibility referred to in § 138.10(a): *claim, claimant, damages, discharge, exclusive economic zone, liable, liability, navigable waters, mobile offshore drilling unit, natural resources, offshore facility, oil, owner or operator, person, remove, removal, removal costs, security interest, and United States*; and

(2) Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601), respecting the financial responsibility referred to in § 138.10(b): *claim, claimant,*

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*damages, environment, hazardous substance, liable, liability, navigable waters, natural resources, offshore facility, owner or operator, person, release, remove, removal, security interest, and United States.*

(b) As used in this subpart —

*Acts* means OPA 90 and CERCLA.

*Applicable amount* means an amount of financial responsibility that must be demonstrated under this subpart, determined under §138.80(f)(1) for OPA 90 or §138.80(f)(2) for CERCLA.

*Applicant* means an operator who has applied for a Certificate or for the renewal of a Certificate under this subpart.

*Application* means an Application for Vessel Certificate of Financial Responsibility (Water Pollution) (Form CG–5585), which can be obtained from the U.S. Coast Guard National Pollution Funds Center as provided in §§138.40 and 138.45.

*Cargo* means goods or materials on board a vessel for purposes of transportation, whether proprietary or non-proprietary. A hazardous substance or oil carried solely for use aboard the carrying vessel is not Cargo.

*CERCLA* means title I of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601–9675).

*Certificant* means an operator who has a current Certificate issued by the U.S. Coast Guard National Pollution Funds Center (NPFC) under this subpart.

*Certificate* means a Vessel Certificate of Financial Responsibility (Water Pollution) (Form CG–5585) issued by the NPFC under this subpart, as provided in §138.65.

*Day or days* means calendar days. If a deadline specified in this subpart falls on a weekend or Federal holiday, the deadline will occur on the next working day. Compliance with a submission deadline will be determined based on the day the submission is received by NPFC.

*Director, NPFC* means the head of the NPFC.

*E-COFR* means the Electronic Certificate of Financial Responsibility web-based process located on the NPFC Web site (<http://www.npfc.gov/cofr>),

which may be used by operators to apply for and renew Certificates.

*Financial guarantor* means a guarantor who provides a financial guaranty under §138.80(b)(4), and is distinct from an insurer, a self-insurer or a surety.

*Financial responsibility* means the statutorily required financial ability to meet a responsible party's liability under the Acts.

*Fish tender vessel* and *fishing vessel* have the same meaning as set forth in 46 U.S.C. 2101.

*Fuel* means any oil or hazardous substance used or capable of being used to produce heat or power by burning, including power to operate equipment. A hand-carried pump with not more than five gallons of fuel capacity, that is neither integral to nor regularly stored aboard a non-self-propelled barge, is not equipment.

*Guarantor* means any person, other than a responsible party, who provides evidence of financial responsibility under the Acts on behalf of a vessel's responsible parties. A responsible party who can qualify as a self-insurer under §138.80(b)(3) may act as both a self-insurer of vessels owned, operated or demise chartered by the responsible party, and as a financial guarantor for the responsible parties of other vessels under §138.80(b)(4).

*Hazardous material* means a liquid material or substance that is—

(1) Flammable or combustible;

(2) A hazardous substance designated under Section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1321(b)); or

(3) Designated a hazardous material under the Hazardous Materials Transportation Act, Section 104 (46 U.S.C. 5103(a)) (1994).

*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 into or upon the navigable waters or adjoining shorelines or the exclusive economic zone.

*Insurer* is a type of guarantor and means one or more insurance companies, associations of underwriters, ship

owners' protection and indemnity associations, or other persons, each of which must be acceptable to the Director, NPFC.

*Master Certificate* means a Certificate issued under this subpart to a person who is a builder, repairer, scrapper, lessor, or seller of a vessel and is acting as the vessel's operator.

*Offshore supply vessel* has the same meaning as set forth in 46 U.S.C. 2101.

*OPA 90* means the Oil Pollution Act of 1990 (33 U.S.C. 2701, *et seq.*).

*Operator* means a person who is an owner, a demise charterer, or other contractor, who conducts the operation of, or who is responsible for the operation of, a vessel. A builder, repairer, scrapper, lessor, or seller who is responsible, or who agrees by contract to become responsible, for a vessel is an operator. A time or voyage charterer that does not assume responsibility for the operation of a vessel is not an operator for the purposes of this subpart.

*Owner* means any person holding legal or equitable title to a vessel. In a case where a U.S. Coast Guard Certificate of Documentation or equivalent document has been issued, the owner is considered to be the person or persons whose name or names appear thereon as owner. Owner does not include a person who, without participating in the management of a vessel, holds indicia of ownership primarily to protect the owner's security interest in the vessel.

*Public vessel* means a vessel owned or bareboat chartered by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce.

*Responsible party*, for purposes of OPA 90 financial responsibility has the same meaning as defined at 33 U.S.C. 2701(32), and for purposes of CERCLA financial responsibility means any person who is an owner or operator, as defined at 42 U.S.C. 9601(20), including any person chartering a vessel by demise.

*Self-elevating lift vessel* means a vessel with movable legs capable of raising its hull above the surface of the sea and that is an offshore work boat (such as a work barge) that does not engage in drilling operations.

*Tank vessel* means a vessel (other than an offshore supply vessel, a fish-

ing vessel or a fish tender vessel of 750 gross tons or less that transfers fuel without charge to a fishing vessel owned by the same person, or a towing or pushing vessel (tug) simply because it has in its custody a tank barge) that is constructed or adapted to carry, or that carries, oil or liquid hazardous material in bulk as cargo or cargo residue, and that—

- (1) Is a vessel of the United States;
  - (2) Operates on the navigable waters;
- or
- (3) Transfers oil or hazardous material in a place subject to the jurisdiction of the United States.

*Total applicable amount* means the amount determined under §138.80(f)(3).

*Vessel* means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

#### § 138.30 General.

(a) The regulations in this subpart set forth the procedures for an operator of a vessel subject to this subpart to demonstrate that the responsible parties of the vessel are financially able to meet their potential liability for costs and damages in the applicable amounts set forth in this subpart at §138.80(f). Although the owners, operators, and demise charterers of a vessel are strictly, jointly and severally liable under OPA 90 and CERCLA for the costs and damages resulting from each incident or release or threatened release, together they need only establish and maintain evidence of financial responsibility under this subpart equal to the combined OPA 90 and CERCLA limits of liability arising from a single incident and a single release, or threatened release. Only that portion of the total applicable amount of financial responsibility demonstrated under this subpart with respect to—

(1) OPA 90 is required to be made available by a vessel's responsible parties and guarantors for the costs and damages related to an incident where there is not also a release or threatened release; and

(2) CERCLA is required to be made available by a vessel's responsible parties and guarantors for the costs and damages related to a release or threatened release where there is not also an