

PART 138—FINANCIAL RESPONSIBILITY FOR WATER POLLUTION (VESSELS) AND OPA 90 LIMITS OF LIABILITY (VESSELS, DEEPWATER PORTS AND ONSHORE FACILITIES)

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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, 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 (<https://npfc.uscg.mil/cofr/default.aspx>), 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

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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, NPFCA.

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 Certifi-

cate 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 fishing 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.

[USCG–2005–21780, 73 FR 53697, Sept. 17, 2008, as amended by USCG–2012–0306, 77 FR 37315, June 21, 2012]

§ 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 incident. A guarantor (or a self-insurer for whom the exceptions to limitations of liability are not applicable), therefore, is not required to apply the entire total applicable amount of financial responsibility demonstrated under this subpart to an incident involving oil alone or a release or threatened release involving a hazardous substance alone.

(b) Where a vessel is operated by its owner or demise charterer, or the owner or demise charterer is responsible for its operation, the owner or demise charterer is considered to be the operator for purposes of this subpart, and must submit the Application and requests for renewal for a Certificate. In all other cases, the vessel operator must submit the Application or requests for renewal.

(c) For a United States-flag vessel, the applicable gross tons or gross ton-

nage, as referred to in this part, is determined as follows:

(1) For a documented U.S. vessel measured under both 46 U.S.C. Chapters 143 (Convention Measurement) and 145 (Regulatory Measurement). The vessel's regulatory gross tonnage is used to determine whether the vessel exceeds 300 gross tons where that threshold applies under the Acts. If the vessel's regulatory gross tonnage is determined under the Dual Measurement System in 46 CFR part 69, subpart D, the higher gross tonnage is the regulatory gross tonnage for the purposes of determining whether the vessel meets the 300 gross ton threshold. The vessel's gross tonnage as measured under the International Convention on Tonnage Measurement of Ships, 1969 (Convention), is used to determine the vessel's required applicable amounts of financial responsibility, and limit of liability under Section 1004 of OPA 90 (33 U.S.C. 2704), including subpart B of this part, and Section 107 of CERCLA (42 U.S.C. 9607).

(2) For all other United States vessels. The vessel's gross tonnage under 46 CFR part 69 is used for determining the vessel's 300 gross ton threshold, the required applicable amounts of financial responsibility, and limits of liability under Section 1004 of OPA 90 (33 U.S.C. 2704), including subpart B of this part, and Section 107 of CERCLA (42 U.S.C. 9607). If the vessel's gross tonnage is determined under the Dual Measurement System, the higher gross tonnage is used in all determinations.

(d) For a vessel of a foreign country that is a party to the Convention, gross tons or gross tonnage, as referred to in this part, is determined as follows:

(1) For a vessel assigned, or presently required to be assigned, gross tonnage under Annex I of the Convention. The vessel's gross tonnage as measured under Annex I of the Convention is used for determining the 300 gross ton threshold, if applicable, the required applicable amounts of financial responsibility, and limits of liability under Section 1004(a) of OPA 90 (33 U.S.C. 2704), including subpart B of this part, and under Section 107 of CERCLA (42 U.S.C. 9607).

(2) For a vessel not presently required to be assigned gross tonnage

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under Annex I of the Convention. The highest gross tonnage that appears on the vessel's U.S. Coast Guard Certificate of Documentation or equivalent document and that is acceptable to the Coast Guard under 46 U.S.C. chapter 143 is used for determining the 300 gross ton threshold, if applicable, the required applicable amounts of financial responsibility, and limits of liability under Section 1004 of OPA 90 (33 U.S.C. 2704), including subpart B of this part, and Section 107 of CERCLA (42 U.S.C. 9607). If the vessel has no document, or the gross tonnage appearing on the document is not acceptable under 46 U.S.C. chapter 143, the vessel's gross tonnage is determined by applying the Convention Measurement System under 46 CFR part 69, subpart B, or if applicable, the Simplified Measurement System under 46 CFR part 69, subpart E. The measurement standards applied are subject to applicable international agreements to which the United States Government is a party.

(e) For a vessel of a foreign country that is not a party to the Convention, gross tons or gross tonnage, as referred to in this part, is determined as follows:

(1) For a vessel measured under laws and regulations found by the Commandant to be similar to Annex I of the Convention. The vessel's gross tonnage under the similar laws and regulations is used for determining the 300 gross ton threshold, if applicable, the required applicable amounts of financial responsibility, and limits of liability under Section 1004 of OPA 90 (33 U.S.C. 2704), including subpart B of this part, and Section 107 of CERCLA (42 U.S.C. 9607). The measurement standards applied are subject to applicable international agreements to which the United States Government is a party.

(2) For a vessel not measured under laws and regulations found by the Commandant to be similar to Annex I of the Convention. The vessel's gross tonnage under 46 CFR part 69, subpart B, or, if applicable, subpart E, is used for determining the 300 gross ton threshold, if applicable, the required applicable amount of financial responsibility, and the limits of liability under Section 1004 of OPA 90 (33 U.S.C. 2704), including subpart B of this part, and Sec-

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tion 107 of CERCLA (42 U.S.C. 9607). The measurement standards applied are subject to applicable international agreements to which the United States is a party.

(f) A person who agrees to act as a guarantor or a self-insurer is bound by the vessel's gross tonnage as determined under paragraphs (c), (d), or (e) of this section, regardless of what gross tonnage is specified in an Application or guaranty form submitted under this subpart. Guarantors, however, may limit their liability under a guaranty of financial responsibility to the applicable gross tonnage appearing on a vessel's International Tonnage Certificate or other official, applicable certificate of measurement and will not incur any greater liability with respect to that guaranty, except when the guarantors knew or should have known that the applicable tonnage certificate was incorrect.

§ 138.40 Forms.

All forms referred to in this subpart may be obtained from NPFC by requesting them in writing at the address given in § 138.45(a) or by clicking on the Forms link at the NPFC E-COFR Web site, <https://npfc.uscg.mil/cofr/default.aspx>.

[USCG-2005-21780, 73 FR 53697, Sept. 17, 2008, as amended by USCG-2012-0306, 77 FR 37315, June 21, 2012]

§ 138.45 Where to apply for and renew Certificates.

(a) An operator must submit all Applications for a Certificate and all requests for renewal of a Certificate, together with all evidence of financial responsibility required under § 138.80 and all fees required under § 138.130, to the NPFC at the following address: Director National Pollution Funds Center, Coast Guard Stop 7605, 2703 Martin Luther King Jr. Avenue SE., Washington, DC 20593-7605, telephone 202-795-6130, fax 202-795-6123; or electronically using NPFC's E-COFR Web-based process at <https://npfc.uscg.mil/cofr/default.aspx>

(b) All requests you have for assistance in completing Applications, requests for renewal and other submissions under this subpart, including telephone inquiries, should be directed to the U.S. Coast Guard NPFC at the

Coast Guard, DHS

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addresses in paragraph (a) of this section.

[USCG–2005–21780, 73 FR 53697, Sept. 17, 2008, as amended by USCG–2009–0416, 74 FR 27441, June 10, 2009; USCG–2012–0306, 77 FR 37315, June 21, 2012; USCG–2013–0397, 78 FR 39175, July 1, 2013; USCG–2016–0498, 82 FR 35082, July 28, 2017]

§ 138.50 Time to apply.

(a) A vessel operator who wishes to obtain a Certificate must submit a completed Application form and all required supporting evidence of financial responsibility, and must pay all applicable fees, at least 21 days prior to the date the Certificate is required. The Director, NPFCC, may grant an extension of this 21-day deadline upon written request and for good cause shown. An applicant seeking an extension of this deadline must set forth the reasons for the extension request and deliver the request to the Director, NPFCC, at least 15 days before the deadline. The Director, NPFCC, will not consider a request for an extension of more than 60 days.

(b) The Director, NPFCC, generally processes Applications and requests for renewal in the order in which they are received at the NPFCC.

§ 138.60 Applications, general instructions.

(a) You may obtain an Application for Vessel Certificate of Financial Responsibility (Water Pollution) (Form CG–5585) by following the instructions in §§ 138.40 and 138.45.

(b) Your Application and all supporting documents must be in English, and express all monetary terms in United States dollars.

(c) An authorized official of the applicant must sign the signature page of the Application. The title of the signer must be shown in the space provided on the Application. The operator must submit the original signature page of the Application to NPFCC in hard copy.

(d) If the signer is not identified on the Application as an individual (sole proprietor) applicant, a partner in a partnership applicant, or a director, chief executive officer, or any other duly authorized officer of a corporate applicant, the Application must be accompanied by a written statement cer-

tifying the signer's authority to sign on behalf of the applicant.

(e) If, before the issuance of a Certificate, the applicant becomes aware of a change in any of the facts contained in the Application or supporting documentation, the applicant must, within 5 business days of becoming aware of the change, notify the Director, NPFCC, in writing, of the changed facts.

§ 138.65 Issuance of Certificates.

Upon the satisfactory demonstration of financial responsibility and payment of all fees due, the Director, NPFCC, will issue a Vessel Certificate of Financial Responsibility (Water Pollution) (Form CG–5585) in electronic form. Copies of the Certificate may be downloaded from NPFCC's E-COFR Web site.

§ 138.70 Renewal of Certificates.

(a) The operator of a vessel required to have a Certificate under this subpart must submit a written or E-COFR request for renewal of the Certificate to the NPFCC at least 21 days, but not earlier than 90 days, before the expiration date of the Certificate. A letter may be used for this purpose. The request for renewal must comply in all other respects with the requirements in § 138.60 concerning Applications. The Director, NPFCC, may waive this 21-day requirement for good cause shown.

(b) The operator must identify in the request for renewal any changes which have occurred since the original Application for a Certificate was filed, and must set forth the correct information in full.

§ 138.80 Financial responsibility, how established.

(a) *General.* In addition to submitting an Application, requests for renewal, and fees, an applicant must file, or cause to be filed, with the Director, NPFCC, evidence of financial responsibility acceptable to the Director, NPFCC, in an amount equal to the total applicable amount determined under § 138.80(f)(3). A guarantor may file the evidence of financial responsibility on behalf of the applicant directly with the Director, NPFCC.

(b) *Methods.* An applicant or certificant must establish and maintain evidence of financial responsibility by one or more of the following methods:

(1) *Insurance.* By filing with the Director, NPFPC, an Insurance Guaranty (Form CG-5586) or, when applying for a Master Certificate under §138.110, a Master Insurance Guaranty (Form CG-5586-1), executed by not more than four insurers that have been found acceptable by, and remain acceptable to, the Director, NPFPC, for purposes of this subpart.

(2) *Surety bond.* By filing with the Director, NPFPC, a Surety Bond Guaranty (Form CG-5586-2), executed by not more than 10 acceptable surety companies certified by the United States Department of the Treasury with respect to the issuance of Federal bonds in the maximum penal sum of each bond to be issued under this subpart.

(3) *Self-insurance.* By filing with the Director, NPFPC, the financial statements specified in paragraph (b)(3)(i) of this section for the applicant's fiscal year preceding the date of Application and by demonstrating that the applicant or certificant maintains, in the United States, working capital and net worth each in amounts equal to or greater than the total applicable amount determined under §138.80(f)(3), based on a vessel carrying hazardous substances as cargo. As used in this paragraph, working capital means the amount of current assets located in the United States, less all current liabilities anywhere in the world; and net worth means the amount of all assets located in the United States, less all liabilities anywhere in the world. For each fiscal year after the initial filing, the applicant or certificant must also submit statements as follows:

(i) *Initial and annual filings.* An applicant or certificant must submit annual, current, and audited non-consolidated financial statements prepared in accordance with Generally Accepted Accounting Principles, and audited by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards. These financial statements must be accompanied by an additional statement from the Treasurer (or equivalent offi-

cial) of the applicant or certificant certifying both the amount of current assets and the amount of total assets included in the accompanying balance sheet, which are located in the United States. If the financial statements cannot be submitted in non-consolidated form, a consolidated statement may be submitted if accompanied by an additional statement prepared by the same Certified Public Accountant, verifying the amount by which the applicant's or certificant's—

(A) Total assets located in the United States exceed its total (*i.e.*, worldwide) liabilities; and

(B) Current assets located in the United States exceed its total (*i.e.*, worldwide) current liabilities. This additional Certified Public Accountant statement must specifically name the applicant or certificant, indicate that the amounts so verified relate only to the applicant or certificant, apart from any other affiliated entity, and identify the consolidated financial statement to which it applies.

(ii) *Semiannual self-insurance submissions.* When the self-insuring applicant's or certificant's demonstrated net worth is not at least ten times the total applicable amount of financial responsibility determined under §138.80(f)(3), the applicant's or certificant's Treasurer (or equivalent official) must file affidavits with the Director, NPFPC, covering the first six months of the applicant's or certificant's current fiscal year. The affidavits must state that neither the working capital nor the net worth have, during the first six months of the current fiscal year, fallen below the applicant's or certificant's required total applicable amount of financial responsibility as determined under this subpart.

(iii) *Additional self-insurance submissions.* A self-insuring applicant or certificant—

(A) Must, upon request of the Director, NPFPC, within the time specified in the request, file additional financial information; and

(B) Must notify the Director, NPFPC, within 5 business days of the date the applicant or certificant knows, or has reason to know, that its working capital or net worth has fallen below the

total applicable amounts required by this subpart.

(iv) *Time for self-insurance filings.* All required annual financial statements must be received by the Director, NPFCC, within 90 days after the close of the applicant's or certificant's fiscal year, and all affidavits required by paragraph (b)(3)(ii) of this section must be received by the Director, NPFCC, within 30 days after the close of the applicable six-month period. The Director, NPFCC, may grant an extension of the time limits for filing the annual financial statements, semi-annual affidavits or additional financial information upon written request and for good cause shown. An applicant or certificant seeking an extension of any deadline must set forth the reasons for the extension request and deliver the request to the Director, NPFCC, at least 15 days before the annual financial statements, affidavits or additional information are due. The Director, NPFCC, will not consider a request for an extension of more than 60 days.

(v) *Failure to submit.* The Director, NPFCC, may deny or revoke a Certificate for failure of the applicant or certificant to timely file any statement, data, notification, or affidavit required by paragraph (b)(3) of this section.

(vi) *Waiver of working capital.* The Director, NPFCC, may waive the working capital requirement for any applicant or certificant that—

(A) Is a regulated public utility, a municipal or higher-level governmental entity, or an entity operating solely as a charitable, non-profit organization qualifying under Section 501(c) Internal Revenue Code. The applicant or certificant must demonstrate in writing that the grant of a waiver would benefit a local public interest; or

(B) Demonstrates in writing that working capital is not a significant factor in the applicant's or certificant's financial condition. An applicant's or certificant's net worth in relation to the amount of its required total applicable amount of financial responsibility and a history of stable operations are the major elements considered by the Director, NPFCC.

(4) *Financial guaranty.* By filing with the Director, NPFCC, a Financial Guaranty (Form CG-5586-3), or, when applying for a Master Certificate, a Master Financial Guaranty (Form CG-5586-4), executed by not more than four financial guarantors, including, but not limited to, a parent or affiliate acceptable to the Director, NPFCC. A financial guarantor must comply with all of the self-insurance provisions of paragraph (b)(3) of this section. In addition, a person who is a financial guarantor for more than one applicant or certificant must have working capital and net worth no less than the aggregate total applicable amounts of financial responsibility determined under §138.80(f)(3) provided as a financial guarantor for each applicant or certificant, plus the total applicable amount required to be demonstrated by a self-insurer under this subpart if the financial guarantor is also acting as a self-insurer.

(5) *Other evidence of financial responsibility.* The Director, NPFCC, will not accept a self-insurance method other than the one described in paragraph (b)(3) of this section. An applicant may in writing request that the Director, NPFCC, accept a method different from one described in paragraph (b)(1), (2), or (4) of this section to demonstrate evidence of financial responsibility. An applicant submitting a request under this paragraph must submit the request to the Director, NPFCC, at least 45 days prior to the date the Certificate is required. The applicant must describe in detail the method proposed, the reasons why the applicant does not wish to use or is unable to use one of the methods described in paragraph (b)(1), (2), or (4) of this section, and how the proposed method assures that the responsible parties for the vessel are able to fulfill their obligations to pay costs and damages in the event of an incident or a release or threatened release. The Director, NPFCC, will not accept a method under this paragraph that merely deletes or alters a provision of one of the methods described in paragraph (b)(1), (2), or (4) of this section (for example, one that alters the termination clause of the Insurance Guaranty (Form CG-5586)). An applicant that makes a request under this paragraph must provide the Director, NPFCC, a

proposed guaranty form that includes all the elements described in paragraphs (c) and (d) of this section. A decision of the Director, NPFC, not to accept a method requested by an applicant under this paragraph is final agency action.

(c) *Forms*—(1) *Multiple guarantors*. Four or fewer insurers (a lead underwriter is considered to be one insurer) may jointly execute an Insurance Guaranty (Form CG-5586) or a Master Insurance Guaranty (Form CG-5586-1). Ten or fewer sureties (including lead sureties) may jointly execute a Surety Bond Guaranty (Form CG-5586-2). Four or fewer financial guarantors may jointly execute a Financial Guaranty (Form CG-5586-3). If more than one insurer, surety, or financial guarantor executes the relevant form—

(i) Each is bound for the payment of sums only in accordance with the percentage of vertical participation specified on the relevant form for that insurer, surety, or financial guarantor. Participation in the form of layering (tiers, one in excess of another) is not acceptable; only vertical participation on a percentage basis and participation with no specified percentage allocation is acceptable. If no percentage of participation is specified for an insurer, surety, or financial guarantor, the liability of that insurer, surety, or financial guarantor is joint and several for the total of the unspecified portions; and

(ii) The guarantors must designate a lead guarantor having authority to bind all guarantors for actions required of guarantors under the Acts, including but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims.

(2) *Operator name*. An applicant or certificant must ensure that each form submitted under this subpart sets forth in full the correct legal name of the vessel operator to whom a Certificate is to be issued.

(d) *Direct action*—(1) *Acknowledgment*. Any evidence of financial responsibility filed with the Director, NPFC, under this subpart must contain an acknowledgment by each insurer or other guarantor that an action in court by a claimant (including a claimant by

right of subrogation) for costs or damages arising under the provisions of the Acts, may be brought directly against the insurer or other guarantor. The evidence of financial responsibility must also provide that, in the event an action is brought under the Acts directly against the insurer or other guarantor, the insurer or other guarantor may invoke only the following rights and defenses:

(i) The incident, release, or threatened release was caused by the willful misconduct of the person for whom the guaranty is provided.

(ii) Any defense that the person for whom the guaranty is provided may raise under the Acts.

(iii) A defense that the amount of a claim or claims, filed in any action in any court or other proceeding, exceeds the amount of the guaranty with respect to an incident or with respect to a release or threatened release.

(iv) A defense that the amount of a claim or claims that exceeds the amount of the guaranty, which amount is based on the gross tonnage of the vessel as entered on the vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except when the guarantor knew or should have known that the applicable tonnage certificate was incorrect.

(v) The claim is not one made under either of the Acts.

(2) *Limitation on guarantor liability*. A guarantor that participates in any evidence of financial responsibility under this subpart will be liable because of that participation, with respect to an incident or a release or threatened release, in any proceeding only for the amount and type of costs and damages specified in the evidence of financial responsibility. A guarantor will not be considered to have consented to direct action under any law other than the Acts, or to unlimited liability under any law or in any venue, solely because of the guarantor's participation in providing any evidence of financial responsibility under this subpart. In the event of any finding that liability of a guarantor exceeds the amount of the guaranty provided under this subpart, that guaranty is considered null and void with respect to that excess.

(e) *Public access to data.* Financial data filed with the Director, NPFCC, by an applicant, certificant, and any other person is considered public information to the extent required by the Freedom of Information Act (5 U.S.C. 552) and permitted by the Privacy Act (5 U.S.C. 552a).

(f) *Total applicable amount.* The total applicable amount is determined as follows:

(1) The applicable amount under OPA 90 is equal to the applicable vessel limit of liability, which is determined as provided in subpart B of this part.

(2) The applicable amount under CERCLA is determined as follows:

(i) For a vessel over 300 gross tons carrying a hazardous substance as cargo, the greater of \$5,000,000 or \$300 per gross ton.

(ii) For any other vessel over 300 gross tons, the greater of \$500,000 or \$300 per gross ton.

(3) The total applicable amount is the applicable amount determined under paragraph (f)(1) of this section plus the applicable amount determined under paragraph (f)(2) of this section.

§ 138.85 Implementation schedule for amendments to applicable amounts by regulation.

Each operator of a vessel described in § 138.15 must establish evidence of financial responsibility acceptable to the Director, NPFCC, in an amount equal to or greater than the total applicable amounts determined under § 138.80(f), by not later than January 15, 2009. In the event an applicable amount determined under § 138.80(f) is thereafter amended by regulation, each operator of a vessel described in § 138.15 must establish evidence of financial responsibility acceptable to the Director, NPFCC, in an amount equal to or greater than the amended total applicable amount, by not later than 90 days after the effective date of the final rule, unless another date is required by statute or specified in the amending regulation.

§ 138.90 Individual and Fleet Certificates.

(a) The Director, NPFCC, issues an individual Certificate for each vessel listed on a completed Application or re-

quest for renewal when the Director, NPFCC, determines that acceptable evidence of financial responsibility has been provided and appropriate fees have been paid, except where a Fleet Certificate is issued under this section or where a Master Certificate is issued under § 138.110. Each Certificate of any type issued under this subpart is issued only in the name of a vessel operator and is effective for not more than 3 years from the date of issuance, as indicated on each Certificate. An authorized official of the applicant may submit to the Director, NPFCC, a letter requesting that additional vessels be added to a previously submitted Application for an individual Certificate. The letter must set forth all information required in item 5 of the Application form. The authorized official must also file, or cause to be filed with the Director, NPFCC, acceptable evidence of financial responsibility, if required, and must pay all applicable certification fees for the additional vessels.

(b) An operator of a fleet of two or more barges that are not tank vessels and that from time to time may be subject to this subpart (e.g., a hopper barge over 300 gross tons when carrying oily metal shavings or similar cargo) may apply to the Director, NPFCC, for issuance of a Fleet Certificate, so long as the operator of such a fleet is a self-insurer or arranges with an acceptable guarantor to cover, automatically, all such barges for which the operator may from time to time be responsible.

(c) A person must not make any alteration on any copy of a Certificate issued under this subpart.

(d) If, at any time after a Certificate has been issued, a certificant becomes aware of a change in any of the facts contained in the Application or supporting documentation, the certificant must notify the Director, NPFCC, in writing within 10 days of becoming aware of the change. A vessel or operator name change or change of a guarantor must be reported by the operator as soon as possible by telefax or other electronic means to the Director, NPFCC, and followed by a written notice sent within 3 business days. (See, § 138.45, Where to apply for and renew Certificates, for contact information).

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(e) Except as provided in § 138.90(f), at the moment a certificant ceases to be the operator of a vessel for any reason, including a vessel that is scrapped or transferred to a new operator, the individual Certificate naming the vessel is void and its further use is prohibited. In that case, the certificant must, within 10 business days of the Certificate becoming void, submit the following information in writing to the Director, NPFCA:

(1) The number of the individual Certificate and the name of the vessel.

(2) The date and reason why the certificant ceased to be the operator of the vessel.

(3) The location of the vessel on the date the certificant ceased to be the operator.

(4) The name and mailing address of the person to whom the vessel was sold or transferred.

(f) In the event of the temporary transfer of custody of an unmanned barge with a Certificate under this subpart, where the certificant transferring the barge continues to be liable under the Acts and continues to maintain on file with the Director, NPFCA, acceptable evidence of financial responsibility with respect to the barge, the existing Certificate remains in effect in respect to that vessel, and a temporary new Certificate is not required for the vessel. The temporary transferee is encouraged to require the transferring certificant to acknowledge in writing that the transferring certificant agrees to remain responsible for pollution liabilities.

§ 138.100 Non-owning operator's responsibility for identification.

(a) Each operator that is not an owner of a vessel with a Certificate under this subpart, other than an unmanned barge, must ensure that the original or a legible copy of the demise charter-party (or other written document on the owner's letterhead, signed by the vessel owner, which specifically identifies the vessel operator named on the Certificate) is maintained on board the vessel.

(b) The demise charter-party or other document required by paragraph (a) of this section must be presented, upon

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request, for examination and copying, to a United States Government official.

§ 138.110 Master Certificates.

(a) A contractor or other person who is responsible for a vessel in the capacity of a builder, scrapper, lessor, or seller (including a repairer who agrees to be responsible for a vessel under its custody) may apply for a Master Certificate instead of applying for an individual Certificate or Fleet Certificate for each vessel. A Master Certificate covers all of the vessels subject to this subpart held by the applicant solely for purposes of construction, repair, scrapping, lease, or sale. A vessel which is being operated commercially in any business venture, including the business of building, repairing, scrapping, leasing, or selling (e.g., a slop barge used by a shipyard) cannot be covered by a Master Certificate. Any vessel for which a Certificate is required, but which is not eligible for a Master Certificate, must be covered by either an individual Certificate or a Fleet Certificate.

(b) An applicant for a Master Certificate must submit an Application form in the manner prescribed by §§ 138.40 through 138.60. An applicant must establish evidence of financial responsibility in accordance with § 138.80, by submission, for example, of an acceptable Master Insurance Guaranty Form, Surety Bond Guaranty Form, Master Financial Guaranty Form, or acceptable self-insurance documentation. An Application for a Master Certificate must be completed in full, except for Item 5. The applicant must make the following statement in Item 5: "This is an application for a Master Certificate. The largest tank vessel to be covered by this application is [insert applicable gross tons] gross tons. The largest vessel other than a tank vessel is [insert applicable gross tons] gross tons." The dollar amount of financial responsibility evidenced by the applicant must be sufficient to meet the amount required under this subpart.

(c) Each Master Certificate issued by the Director, NPFCA, indicates—

(1) The name of the applicant (*i.e.*, the builder, repairer, scrapper, lessor, or seller);

(2) The date of issuance and termination, encompassing a period of not more than 3 years; and

(3) The gross tons of the largest tank vessel and gross tons of the largest vessel other than a tank vessel eligible for coverage by that Master Certificate. (The Master Certificate does not identify the name of each vessel covered by the Certificate.)

(d) Each additional vessel which does not exceed the respective tonnages indicated on the Master Certificate and which is eligible for coverage by a Master Certificate is automatically covered by that Master Certificate. Before acquiring a vessel, by any means, including conversion of an existing vessel, that would have the effect of increasing the certificant's required applicable amount of financial responsibility (above that provided for issuance of the existing Master Certificate), the certificant must submit to the Director, NPFC, the following:

(1) Evidence of increased financial responsibility.

(2) A new certification fee.

(3) Either a new Application or a letter amending the existing Application to reflect the new gross tonnage which is to be indicated on a new Master Certificate.

(e) A person to whom a Master Certificate has been issued must submit to the Director, NPFC, every six months beginning the month after the month in which the Master Certificate is issued, a report indicating the name, previous name, type, and gross tonnage of each vessel covered by the Master Certificate during the preceding six-month reporting period and indicating which vessels, if any, are tank vessels.

§ 138.120 Certificates, denial or revocation.

(a) The Director, NPFC, may deny a Certificate when an applicant—

(1) Willfully or knowingly makes a false statement in connection with an Application or other submission or filing under this subpart for an initial or renewal Certificate;

(2) Fails to establish acceptable evidence of financial responsibility as required by this subpart;

(3) Fails to pay the required Application or certification fees;

(4) Fails to comply with or respond to lawful inquiries, regulations, or orders of the Coast Guard pertaining to the activities subject to this subpart; or

(5) Fails to timely file with the Director, NPFC, required statements, data, notifications, or affidavits.

(b) The Director, NPFC, may revoke a Certificate when a certificant—

(1) Willfully or knowingly makes a false statement in connection with an Application for an initial or a renewal Certificate, or in connection with any other filing required by this subpart;

(2) Fails to comply with or respond to lawful inquiries, regulations, or orders of the Coast Guard pertaining to the activities subject to this subpart; or

(3) Fails to timely file with the Director, NPFC, required statements, data, notifications, or affidavits.

(c) A Certificate is immediately invalid, and considered revoked, without prior notice, when the certificant—

(1) Fails to maintain acceptable evidence of financial responsibility as required by this subpart;

(2) Is no longer the responsible operator of the vessel or fleet in question; or

(3) Alters any copy of a Certificate.

(d) The Director, NPFC, will advise the applicant or certificant, in writing, of the intention to deny or revoke a Certificate under paragraph (a) or (b) of this section and will state the reason for the decision. Written advice from the Director, NPFC, that an incomplete Application will be considered withdrawn unless it is completed within a stated period, is the equivalent of a denial.

(e) If the intended revocation under paragraph (b) of this section is based on failure to timely file required financial statements, data, notifications, or affidavits with the Director, NPFC, the revocation is effective 10 days after the date of the notice of intention to revoke, unless, before the effective date of the revocation, the certificant demonstrates to the satisfaction of the Director, NPFC, that the required documents were timely filed or have been filed.

(f) If the intended denial is based on paragraph (a)(1) or (a)(4) of this section, or the intended revocation is based on paragraph (b)(1) or (b)(2) of

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this section, the applicant or certificant may request, in writing, an opportunity to present information for the purpose of showing that the applicant or certificant is in compliance with the subpart. The request must be received by the Director, NPFCC, within 10 days after the date of the notification of intention to deny or revoke. A Certificate subject to revocation under this paragraph remains valid until the Director, NPFCC, issues a written decision revoking the Certificate.

(g) An applicant or certificant whose Certificate has been denied under paragraph (a) of this section or revoked under paragraph (b) or (c) of this section may request the Director, NPFCC, to reconsider the denial or revocation. The certificant must submit a request for reconsideration, in writing, to the Director, NPFCC, within 20 days of the date of the denial or revocation. The certificant must state the reasons for requesting reconsideration. The Director, NPFCC, will generally issue a written decision on the request within 30 days of receipt, provided that, if the Director, NPFCC, does not issue a decision within 30 days, the request for reconsideration will be deemed to have been denied, and the denial or revocation will be deemed to have been affirmed. Unless the Director, NPFCC, issues a decision reversing the revocation, a revoked Certificate remains invalid. A decision by the Director, NPFCC, affirming a denial or revocation, is final agency action.

§ 138.130 Fees.

(a) The Director, NPFCC, will not issue or renew a Certificate until the fees set forth in paragraphs (c) and (d) of this section have been paid.

(b) For those using E-COFR, credit card payment is required. Otherwise, fees must be paid in United States currency by check, draft, or postal money order made payable to the "U.S. Coast Guard".

(c) An applicant who submits an Application under this subpart must pay a non-refundable Application fee of \$200 for each Application (*i.e.*, individual Certificate, Fleet Certificate, or Master Certificate), except as follows:

(1) An Application for an additional (*i.e.*, supplemental) individual Certificate,

(2) A request to amend or renew an existing Certificate, or

(3) An Application submitted within 90 days following a revocation or other invalidation of a Certificate.

(d) In addition to the Application fee of \$200, an applicant must pay a certification fee of \$100 for each vessel for which a Certificate is requested. An applicant must pay the \$100 certification fee for each vessel listed in, or later added to, an Application for an individual Certificate(s). An applicant must pay the \$100 certification fee to renew or to reissue a Certificate for any reason, including, but not limited to, a vessel or operator name change.

(e) A certification fee is refunded, upon receipt of a written request, if the Application is denied or withdrawn before issuance of the Certificate. Overpayments of Application and certification fees are refunded, on request, only if the refund is for \$100 or more. However, any overpayments not refunded will be credited, for a period of 3 years from the date of receipt of the monies by the Coast Guard, for the applicant's possible future use or transfer to another applicant under this subpart.

§ 138.140 Enforcement.

(a) Any person who fails to comply with this subpart with respect to evidence of financial responsibility under Section 1016 of OPA 90 (33 U.S.C. 2716) is subject to a civil penalty under Section 4303(a) of OPA 90 (33 U.S.C. 2716a(a)). In addition, under Section 4303(b) of OPA 90 (33 U.S.C. 2716a(b)), the Attorney General may secure such relief as may be necessary to compel compliance with the OPA 90 requirements of this subpart, including termination of operations. Further, any person who fails to comply with this subpart with respect to evidence of financial responsibility under Section 108(a) of CERCLA (42 U.S.C. 9608(a)), is subject to a Class I administrative civil penalty, a Class II administrative civil penalty or a judicial penalty under Section 109 of CERCLA (42 U.S.C. 9609).

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(b) The Secretary of the Department in which the U.S. Coast Guard is operating will withhold or revoke the clearance required by 46 U.S.C. 60105 to any vessel subject to this subpart that has not provided the evidence of financial responsibility required by this subpart.

(c) The Coast Guard may deny entry to any port or place in the United States or the navigable waters of the United States, and may detain at a port or place in the United States in which it is located, any vessel subject to this subpart, which has not provided the evidence of financial responsibility required by this subpart.

(d) Any vessel subject to this subpart which is found operating in the navigable waters without having been issued a Certificate or maintained the necessary evidence of financial responsibility as required by this subpart is subject to seizure by, and forfeiture to, the United States.

(e) Knowingly and willfully using an altered copy of a Certificate, or using a copy of a revoked, expired or voided Certificate for anything other than recordkeeping purposes, is prohibited. If a Certificate is revoked, has expired or is rendered void for any reason, the certificant must cease using all copies of the Certificate for anything other than the operator's own historical recordkeeping purposes.

§ 138.150 Service of process.

(a) When executing the forms required by this subpart, each applicant, certificant and guarantor must designate thereon a person located in the United States as its agent for service of process for purposes of this subpart and for receipt of notices of responsible party designations and presentations of claims under the Acts (collectively referred to herein as "service of process"). Each designated agent must acknowledge the agency designation in writing unless the agent has already furnished the Director, NPFCC, with a master (*i.e.*, blanket) agency acknowledgment showing that the agent has agreed in advance to act as the United States agent for service of process for the applicant, certificant, or guarantor in question.

(b) If any applicant, certificant, or guarantor desires, for any reason, to

change any designated agent, the applicant, certificant, or guarantor must notify the Director, NPFCC, of the change. If a master agency acknowledgment for the new agent is not on file with NPFCC, the applicant, certificant, or guarantor must furnish to the Director, NPFCC, all the relevant information, including the new agent's acknowledgment, required in accordance with paragraph (a) of this section. In the event of death, disability, unavailability, or similar event of a designated agent, the applicant, certificant, or guarantor must designate another agent in accordance with paragraph (a) of this section within 10 days of knowledge of any such event. The applicant, certificant, or guarantor must submit the new designation to the Director, NPFCC. The Director, NPFCC, may deny or revoke a Certificate if an applicant, certificant, or guarantor fails to designate and maintain an agent for service of process.

(c) If a designated agent cannot be served because of death, disability, unavailability, or similar event, and another agent has not been designated under this section, then service of process on the Director, NPFCC, will constitute valid service of process. Service of process on the Director, NPFCC, will not be effective unless the server—

(1) Sends the applicant, certificant, or guarantor, as applicable (by registered mail, at the last known address on file with the Director, NPFCC), a copy of each document served on the Director, NPFCC; and

(2) Attests to this registered mailing, at the time process is served upon the Director, NPFCC, indicating that the intent of the mailing is to effect service of process on the applicant, certificant, or guarantor and that service on the designated agent is not possible, stating the reason why.

Subpart B—OPA 90 Limits of Liability (Vessels, Deepwater Ports and Onshore Facilities)

SOURCE: 80 FR 72355, Nov. 19, 2015, unless otherwise noted.