

LEGISLATIVE HEARING TO CONSIDER S. 3305

HEARING BEFORE THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

JUNE 9, 2010

Printed for the use of the Committee on Environment and Public Works



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ONE HUNDRED ELEVENTH CONGRESS
SECOND SESSION

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LEGISLATIVE HEARING TO CONSIDER S. 3305

WEDNESDAY, JUNE 9, 2010

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The full Committee met, pursuant to notice, at 10:30 a.m. in room 406, Dirksen Senate Office Building, Hon. Barbara Boxer (Chairman of the full Committee) presiding.

Present: Senators Boxer, Inhofe, Baucus, Bond, Voinovich, Carper, Lautenberg, Alexander, Vitter, Cardin, Klobuchar, Whitehouse, Udall, and Merkley.

OPENING STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. The Committee will come to order.

Today, we will hear from fishermen, tourism officials, and legal experts about the drastic and heartbreaking economic damages caused by a significant oil spill and the need to pass legislation to ensure that the people whose jobs and livelihoods are impacted are made whole again.

Several of us sitting here represent coastal States, and as we watch this we have the strongest of feelings about what it would mean if it happened in our State. And we have the strongest of feelings as to what it would mean to our fishermen, to our people who run tourism businesses and recreation businesses, and to our wildlife. So our hearts are in this hearing.

I want to thank all the dedicated people who are now in the Gulf responding to the current disaster. This includes 17,500 National Guard troops, more than 20,000 people sent by President Obama, and countless State and local officials who are working day and night to protect and clean up the coast.

As Chairman of this Committee, I want to unequivocally state that I want to make available as many people as it takes to clean up this mess with BP paying the bill as is required by current law. But as we know from previous oil spills, the road to recovery can be long and arduous. The *Exxon Valdez* spill showed how protracted and painful this experience can be. Listen to this history.

On March 24, 1989, shortly after midnight, the oil tanker *Exxon Valdez* struck a reef in Prince William Sound, Alaska, spilling more than 11 million gallons of crude oil, which eventually contaminated 1,300 miles of shoreline. The spill decimated fisheries and ended the lives of thousands that depended on the precious natural resources in Prince William Sound.

Exxon reached a settlement agreement for \$900 million to restore injured natural resources over a period of 10 years. But more court cases followed, and Exxon continued to successfully fight the court's ruling of an additional \$5 billion to Alaska fishermen, natives, and businesses. In 2006 an Appeals Court cut this to \$2.5 billion. And in 2008, nearly 20 years, 20 years after the spill, the case wound its way to the Supreme Court, who cut the amount Exxon owed even further to \$507 million. After two decades of waiting, each plaintiff received \$15,000.

Exxon successfully fought to minimize the economic damages it paid after the spill, leaving many without adequate compensation. And while the court cases played out, the impact of the oil spill continued. The Prince William Sound herring fishery has been closed for the majority of the 21 years since the spill, 21 years. Further, surveys conducted since 2001 indicate that as much as 21,000 gallons of oil remain on the coasts of Prince William Sound.

Congress responded to *Exxon Valdez* by enacting the Oil Pollution Act of 1990, which included reforms, but it had serious shortcomings. Recent events make that clear. The Oil Pollution Act says that the party responsible for a spill at an offshore facility only has to pay \$75 million for economic and natural resources damages. This is a recipe for another horrible, unfair, and long road.

In the wake of the disaster in the Gulf, we must act. Already businesses are complaining that BP is not acting on claims. Coming from California, where our coastal tourism, recreation, and fishing ocean economies generate \$23 billion in economic activity and support 388,000 jobs, I believe it is critical that we protect those whose jobs and livelihoods could be devastated by a spill that was no fault of their own.

Shielding companies from responsibility for damages sends the wrong signal. If anything it increases the risk to the public. If you or I, colleagues, or anyone in the audience, members of the press, any of us, got into an accident that we caused, we are responsible for all the damages. No caps in that case, and there should be no caps in this case.

The law should be clear that the polluter pays for the damages they cause, period.

I look forward to the testimony from our witnesses today, and I call on my distinguished Ranking Member, Senator Inhofe.

**OPENING STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. Thank you, Madam Chairman.

I am glad we scheduled this hearing today because it will be an example to see how complex this whole thing is. On May 27 President Obama held a press conference to explain his role in addressing the BP spill. He said, "This Administration is relying on every resource and every idea, every expert, every bit of technology to work to stop it. We will take ideas from anywhere and we are going to stop it."

When I heard this, I thought, that is great, Mr. President. You are focused on the right thing that you should be focused on. Of course, we in Congress need to do the same, as I have said during the previous hearings. Congress should focus on three priorities.

We need to mitigate and contain the environmental impacts, provide assistance to the Gulf's affected commercial and recreational industry, and investigate the causes so that we can prevent an accident of this kind from happening again.

That is essentially what the President initially said before emotion starting rising in this thing. Staying focused will help us to make the prudent decisions. I think we all agree on that. This is why I was discouraged when President Obama in the same press conference veered off course, and he said the spill occasioned passage of the global warming legislation. He referred prudently to the Waxman-Markey bill, the cap and trade bill that the House had passed last year.

Now this raises the obvious question. How would cap and trade, a massive energy tax on consumers, stop the spill? How would it clean up the spill? How would it help those affected by the spill? And how would it help us determine what happened so that we can prevent this from happening again? The answer is it wouldn't, but it makes great theater. And so we have had a lot of that.

So I respectfully call on President Obama and my colleagues here in the Senate to concentrate on fixing the problem. Let's avoid getting sidetracked by cap and trade and other issues that will needlessly complicate the efforts in addressing the real problem.

We do have a lot of people right now who are trying to use this very tragic situation to advance their own agendas. Since the Chairman mentioned the *Exxon Valdez*, I recall that, Madam Chairman, when that happened, I was in the House on the appropriate committee, and so I actually went up there. When I got there, this horrible thing that took place, some of the far left environmental extremists were celebrating. They were actually celebrating that it happened. And I said, why would you do this? Well, because we are going to parlay this into stopping any kind of exploration or drilling on the North Slope. And they attempted to do that.

And I said, wait a minute. The *Exxon Valdez* was not an exploration. It was not a drilling accident. It was a transportation accident. If you stop the drilling, stop our ability to produce and export our own resources, we are going to have to be reliant upon foreign countries, and so transportation would play a much larger role. Nonetheless, we are seeing a lot of that happen now.

And I would say this. I think we should avoid overreaching. This thing was really tragic. People died. People's economic livelihoods are at stake, as the Chairman said, and the environment is being harmed. But I am concerned that the President's moratorium on deepwater drilling could harm the economy in the Gulf, as I am sure Senator Vitter will talk about. The Louisiana Department of Economic Development estimates that the President's active drilling suspension alone will result in the loss of 3,000 to 6,000 Louisiana jobs in the next few weeks and over 10,000 in the next few months.

So today's hearing on S. 3305 is a welcome step, Madam Chairman.

Senator BOXER. Thank you.

Senator INHOFE. I am not through yet.

Senator BOXER. Oh, so sorry.

Senator INHOFE. Two weeks ago, I had to object twice to a unanimous consent agreement to debate 3305 on the floor. We hadn't had a hearing on it, and that is one of the reasons that I objected. This bill involves complex issues that must be understood before we act. If we get it wrong, we can set back this Nation's energy future for decades.

Now, why do I say that? Well, it is what the experts are telling us. In a recent letter from the Alliant Insurance, they said insurers offshore in gas operations sums it up well: "If the liability cap is increased to levels we understand are now under consideration, in our view only the major oil companies and the NOCs," that is the national oil companies, and we are talking about China and Venezuela and some of the rest of them, "would be in a position to do this."

Now, I would go so far as to say—and I am not quoting them when I say this—that if we remove the caps altogether, even the big five who would be self-insuring—I think all of them self-insure—would not be able to cover it. So we would be completely reliant upon China and Venezuela and the national oil companies, the only ones who could actually handle an unlimited cap.

So I think we need to look at this thing and to approach it logically and not emotionally. And I think we have some good witnesses today that are going to shed some light on this.

Thank you, Madam Chairman.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA

Thank you, Madam Chairman, for scheduling today's hearing to examine the complex issues surrounding the strict liability limits in the Oil Pollution Act of 1990.

On May 27 President Obama held a press conference to explain his role in addressing the BP spill. He said his Administration is "relying on every resource and every idea, every expert and every bit of technology, to work to stop it. We will take ideas from anywhere, but we are going to stop it."

When I heard this, I thought, "That's great, Mr. President; you're focused on exactly what you should be focused on." Of course, we in Congress need to do the same. As I've said during previous hearings, Congress should focus on three priorities. We need to:

- Mitigate and contain the environmental impacts;
 - Provide assistance to the Gulf's affected commercial and recreational industries;
- and
- Investigate the causes so we can prevent a disaster of this kind from happening again.

Staying focused will help us make prudent decisions. Which is why I was discouraged when President Obama, in the same press conference, veered off course: he said the spill occasioned passage of global warming legislation. He referred approvingly to the Waxman-Markey cap-and-trade vote in the House last year.

This raises obvious questions: How would cap-and-trade, a massive energy tax on consumers, stop the spill? How would it clean up the spill? How would it help those affected by the spill? And how would it help us determine what happened so we can prevent it from happening again?

Well, it wouldn't. So I respectfully call on President Obama—and my colleagues here in the Senate—to concentrate on fixing this problem. Let's avoid getting sidetracked by cap-and-trade or other issues that will needlessly complicate efforts to address real problems.

And I would add this: let's avoid overreaching. Now this incident is serious—people died, people's economic livelihoods are at stake, and the environment is being harmed. But I am concerned that the President's moratorium on deepwater drilling could harm the economy in the Gulf. The Louisiana Department of Economic Development estimates that the President's active drilling suspension alone will result in a loss of 3,000 to 6,000 Louisiana jobs in the next few weeks and over 10,000 Lou-

isiana jobs in the next few months. More than 20,000 jobs are at risk over the next 12 to 18 months.

So, today's hearing on S. 3305 is a welcome step, Madam Chairman. Two weeks ago I had to object twice to unanimous consent agreements to debate S. 3305 on the floor. We hadn't had a hearing on it—that's one of the reasons I objected. This bill involves complex issues that must be understood before we act. If we get this wrong, we could set back this Nation's energy future for decades.

Now why do I say that? Well, it's what the experts are telling us. A recent letter from Alliant Insurance, which insures offshore oil and gas operations, sums it up well:

"If the liability cap is increased to the levels we understand are under consideration ... in our view only major oil companies and NOCs (National Oil Companies) will be financially strong enough to continue current exploration and development efforts."

This letter was in reference to S. 3305's \$10 billion liability cap on economic damages. The insurers believe smaller U.S. independent producers won't be able to drill with that limit. And bear in mind that "National Oil Companies" means those that are state-owned, such as the Chinese Offshore Oil Corporation. Do we really want China drilling in place of America's independent producers?

Alliant is not alone in holding this view. Consider this statement from INDECS insurance consultancy: "If we have understood the proposals correctly, then it would appear to us that the proposed bill will not act as 'Big Oil Bailout Prevention Liability Act of 2010', rather making it impossible for anyone other than 'Big Oil' to operate." I ask that this letter be submitted for the record. Lockton Companies insurance brokerage has said much the same thing: "Without insurance, many of the active exploration and production companies would be unable to operate in the Gulf of Mexico. This decision will affect thousands of people, their families, and their local economies." I ask that this letter be submitted for the record.

Madam Chairman, our response to this tragedy should be measured, and it should be based on facts. How we respond could have far reaching consequences for the Gulf and the Nation. There's simply too much at stake to get this wrong.

[The referenced letters follow:]



12th May 2010

Honourable Robert Menendez
U.S. Senator
528 Senate Hart Office Building
Washington, DC 20510
United States of America

Dear Sir

**RE: PROPOSAL TO AMEND THE OIL POLLUTION ACT 1990 (OPA 90) AND
THE INTERNAL REVENUE CODE OF 1986**

Executive Summary

The energy insurance market has limited financial capacity for pollution. What protection it can offer, sees many terms and conditions contained in the language of the policies issued. These limitations can range from whether a policy covers pollution originating from a reservoir, the absence of a definition for environmental damage, the sharing of limits with other heads of claims, to whether there is negligence on the part of the entity making the claim.

Insurers' ability to issue an insurance certificate to provide a company with its evidence of financial responsibility under OPA 90 is similarly limited. Our current estimates point to a maximum insurance financial capacity of approximately US\$250 million for this exposure, with a further US\$1.5 billion subject to the exclusions mentioned above.

We detail below many of the areas that need to be considered carefully in this assessment. It is quite clear to us that the ability to transfer any increased risk to the insurance market is very constrained. The extent to which oil companies, other than the super majors, will be able to provide alternative security, must be questionable.

About INDECS

INDECS is an independent insurance consultancy with over 20 years' experience working across more than thirty countries including the USA. We assist global businesses to achieve a more effective insurance and risk management strategy. INDECS does not sell insurance, we are not a broker, but provide independent advice to our clients on their insurance and risk management needs.

The Proposed Bill

We understand that two bills have been drafted, in the wake of the Deepwater Horizon catastrophe:

1. To amend the limits of liability for offshore facilities under OPA 90 from US\$75 million to US\$10 billion
2. To remove the limit of US\$1 billion expenditures from the Oil Spill Liability Trust Fund, and to permit advances to be made to the Fund



Current Insurance Protection

Under OPA 90, holders of leases or permits for offshore facilities are liable for up to US\$ 75 million per spill plus removal costs.

Under Section 1016 the holder was initially required to provide evidence of financial responsibility of between US\$10 million and US\$35 million depending on whether the facility is located seaward or landward of the seaward boundary of the State. This has subsequently increased to the maximum allowed by the act of US\$150 million.

There are various methods of evidencing financial responsibility including surety bonds, guarantees, letters of credit and self insurance, but the most common and the one that is most commercially available to all is by means of an insurance certificate. The certificate issued must identify a limit not less than that required under Section 1016.

While there are certain defences under OPA 90, insurers are put in the position of being a guarantor and may not have the ability to rely on the normal general conditions of the policy. Some insurers may also consider that it imposes a more "strict liability" on the insured, and, moreover, enables claims to be made directly against the insurer in certain circumstances. They therefore treat OPA certification distinctly from other insurance that may be available for this type of risk. The potential capacity for this type of insurance, which is the broadest available specifically focusing on OPA obligations and liabilities, is approximately US\$150 to US\$250 million.

Outside the realms of strict liability and OPA, an insured will be able to obtain coverage for sudden and accidental seepage and pollution by way of its Operators Extra Expense (OEE) and Excess Liability insurances. OEE coverage provides a combined single limit for well control, well redrilling and sudden and accidental seepage and pollution and clean-up. Therefore pollution liability and clean-up cost is subject to the apportionment of this combined single limit over respective risks. In practice the limit would be made available first for control measures (i.e. hiring in specialist well control experts and, if necessary, relief well drilling), with any balance of the limit then being reserved for redrilling and pollution. It is possible to prioritise the use of the limit for compliance with OPA Financial Responsibility provisions, but this would be impractical in relation to the urgency by which oil companies will need to address the well control situation.

We consider that the OEE policy provides the widest cover and is most "user friendly" to oil companies. The pollution element of the cover responds to costs which the insured company is obligated to pay by law or under the terms of the lease/license for the cost of remedial measures or as damages in compensation for third party property damage and third party injury claims. In respect of clean-up and containment, or attempt thereat, the policy pays such costs, including where incurred to divert pollution from shore, and is not on a "liability" basis. It should be noted that there is no definition of environmental damage – claims are recoverable to the extent of damages for third party bodily injury and loss of or damage to, or loss of use of tangible property. This coverage can therefore respond on a "strict liability" basis, where the law or license agreement specifies that such remedial costs or compensation is payable if emanating from the insured's facilities, irrespective of negligence. This contrasts starkly with the coverage available under most Excess Liability policies.



Excess Liability insurance responds to all legal liabilities incurred. Sudden and accidental pollution would be included in any limit provided. In respect of pollution from wells the limit available under these policies sits excess of the OEE policy referred to above (but is subject to its own policy form insuring conditions which are not as wide as OEE policies). In respect of pollution from hydrocarbons stored or being produced from or through facilities such as fixed and floating platforms and pipelines, the limit is from "the ground-up", or in excess of a specific local general liability policy.

Excess Liability Policy forms vary but the market "standard" coverage offers quite limited pollution cover. Some actually specifically exclude pollution from wells. Basically pollution liabilities are excluded from all policies, but within the exclusion is a limited "buy-back", which requires that the pollution event is sudden, accidental and unintended and subject to strict discovery and reporting requirements. However, and significantly, the cover excludes *".... actual or alleged liability to evaluate, monitor, control, remove, nullify and/or clean-up seeping, polluting or contaminating substances to the extent such liability arises solely from any obligations imposed by any statute, rule, ordinance, regulation or imposed by contract"*.

We regard this wording as too draconian and would always counsel oil companies to include a specific "pollution endorsement" that overrides this phrasing and would provide legal and statutory liability coverage, including costs incurred under lease block obligations for removal. We think this distinction in cover is important as it will impact capacity. Our figure below of US\$1 to US\$ 1.5 billion is based upon insurers subscribing to the standard market cover. If an alternative wording is utilised, or the pollution endorsement used, it could have the effect of reducing capacity by about 25 to 35%.

As with the OEE policy, the coverage is geared to damages for compensation in respect of third party bodily injury and third party property loss or damage or loss of use. There is similarly no concept of "environmental damage" expressed in the policy.

Insurance Capacity

The immediate effect of the Deepwater Horizon loss is that capacity will, for a time, be fluid. Most insurers had not factored in to their risk aggregations that the net is spread very wide indeed in respect of responsible parties under OPA. They are now seeing the implications of multi party actions against operators, drilling contractors, cementing engineers and their various sub-contractors arising out of a single incident such as the "Deepwater Horizon" loss. This is because the insurance limits are available to each separate party, so will stack up if three different entities are sued.

In this context the lease block holders constitute one entity (their insurance policies may be separate covering their respective equity interests, but the capacity available is assessed upon 100% interest).

Inevitably the recent loss has increased the demand for higher limits, and has consequently affected the overall aggregate exposures to insurers. This will likely reduce the available limits in the immediate future. At least one insurer has let it be known that its capacity has reduced. Others are reviewing their positions and it is most likely that June renewals will be subject to some reduction in overall capacity. This could be between 25 and 30% reduction, affecting all above policies, except Protection and Indemnity entries. INDECS has close relationships with the Energy



Insurance Market including its insurers and brokers. Based on our knowledge and these relationships we would opine that the following represents the maximum per occurrence capacity in this market currently:

Operators' Extra Expense (OEE)

The available global market capacity for the OEE cover is between US\$500 million and US\$750 million per event on 100% basis. This means that the total limit purchased is shared out between the co-owners of the lease block (the licensees) according to their equity interest in the venture (as per the Joint Operating Agreement).

In addition to this capacity, oil companies who are members of the mutual, Oil Insurance Ltd (OIL), Bermuda, (which includes a number of US based E&P companies) can claim up to a further US\$ 250 million for each companies' equity interest, limited to US\$ 750 million per event, but this limit is also applied on a combined single limit basis, inclusive not only of control of well cost and redrilling, but also property damage and wreck removal.

Excess Liabilities

The global commercial market limits available are between US\$1 billion and US\$1.5 billion per event on 100% basis (meaning that the limit is effectively reduced to reflect each of the oil companies' equity interests). This would include capacity available under any specific local general liability policy (normally limited to USD50m per event). This total would be inclusive of capacity from the Bermuda reinsurance market and specifically from Oil Casualty Insurance Ltd (OCIL), which is a sister organisation to OIL. This limit operates on an Ultimate Nett Loss basis, meaning that it must also respond to injuries and fatalities to third parties (but not employees) and to third party property damage and consequential financial loss.

One final issue to consider for the commercial market is that in the event that the pollution arises from a named hurricane there would be a sub-limit agreed in the policy, which may not be more than US\$200 million per oil company, and this would be inclusive of all insurable exposures (i.e. property damage, control of well, redrilling, wreck removal and pollution).

Protection and Indemnity Clubs (P&I)

One further area that merits comment is P&I, which provides cover in respect of pollution from mobile drilling units, heavy-lift vessels, pipelaying vessels and, to the extent that they may ultimately be more widely used in the Gulf of Mexico, Floating Production, Storage and Offtake units (FPSOs).

The limit purchased is generally between US\$ 300million and US\$ 500 million, but US\$ 1 billion per event is theoretically available. However, most US drilling contractors are not insured by the P and I Clubs. US drilling contractors generally rely upon commercial marine liability insurers, whose capacity would be limited to between US\$ 500 million and US\$ 750 million per event referred to above.



Effects of increasing the OPA 90 limits

In conclusion, if the intention is to increase the limit required under OPA90 to US\$10 billion and also the required evidence of financial responsibility to something similar, then quite simply the energy insurance market will no longer be an option. Its capacity lies far below this limit and even then has a number of restrictions contained in it which we have discussed above.

Companies, with the exception of super majors and foreign state owned companies, operating in the United States are highly unlikely to be able to provide any alternative method of financial responsibility such as bonds and lines of credit. The cost of these methods or ability to self insure these risks will far exceed their capabilities, preventing their management from fulfilling their fiduciary liability and presenting a barrier to acquiring new or even servicing existing permits in the future.

If we have understood the proposals correctly, then it would appear to us that the proposed Bill will not act as "Big Oil Bailout Prevention Liability Act of 2010", rather making it impossible for anyone other than "Big Oil" to operate.

Yours sincerely,

Paul King
Director

CC: David Sharp, INDECS

Honourable Barbara Boxer
Chairman Senate Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

Honourable James M. Inhofe
Ranking Member
Senate Committee on Environment & Public Works
456 Dirksen Senate Office Building
Washington, DC 20510

Honourable Jeff Bingaman
Chairman Senate Committee on Energy & Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

Honourable Lisa Murkowski
Ranking Member
Senate Committee on Energy & Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510



JOHN A. RATHMELL, JR.
President, Marine & Energy

May 13, 2010

Honorable Robert Menendez
U.S. Senator
528 Senate Hart Office Building
Washington, D.C. 20510

Dear Senator Menendez:

Lockton Companies is the largest privately owned insurance broker in the world, and through Lockton Marine & Energy in Houston, we service the insurance needs of many energy companies operating in the Gulf of Mexico. Specifically, we specialize in the small to midsize independent exploration and production companies that are very active in drilling wells in the shallow and deepwater Gulf of Mexico. In fact, two of our clients are in the top 10 largest lease holders and/or most active drillers in the Gulf of Mexico; however, they are relatively small companies. Exploration and production companies are supported by thousands of workers all along the Gulf Coast from their own employees to many small to midsize service companies' employees. The Bureau of Labor and Statistics reported that there were well over 100,000 petroleum-related workers and greater than \$12 billion in total wages earned in the Gulf Coast Region alone.

Insurance is critical to our clients and all small to midsize energy companies operating in the Gulf of Mexico. All of the companies operating in the Gulf of Mexico essentially go to the same insurance market to purchase their liability insurance coverage. The insurance market for offshore operations is relatively small, and prior to the Macondo well incident, we estimate the total market capacity for third-party pollution liability to be \$1.3 billion to \$1.6 billion. Following the Macondo well event, we estimate the capacity has dropped to \$1 billion to \$1.2 billion. Furthermore, the cost for the insurance coverage has increased substantially.

The market for Oil Pollution Act (OPA) coverage is an even smaller market, with total capacity of \$200 to \$300 million. While large exploration and production companies are able to certify on the basis of their balance sheet, most small and midsize companies are dependent on purchasing OPA coverage in the commercial insurance market.

We understand there is legislation under consideration which could significantly increase the liability cap for economic damages from the current level of \$75 million. Given the limited capacity in the energy insurance market, a material increase in the cap will eliminate insurance as an option for many exploration and production companies. Without insurance, many of the active exploration and production companies would be unable to operate in the Gulf of Mexico. This decision will affect thousands of people, their families and their local economies.

LOCKTON COMPANIES, LLC
5847 San Felipe, Suite 320 / Houston, TX 77057-3183
713-458-5200 / FAX: 713-458-5299
www.lockton.com



We respectfully request you give this issue careful consideration, and we are more than happy to provide supporting information on the energy insurance market providing insurance for the Gulf of Mexico.

Sincerely,

John A. Rathmell, Jr.

JAR:msk

cc: Honorable Barbara Boxer
Chairman
Senate Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

Honorable James M. Inhofe
Ranking Member
Senate Committee on Environment & Public Works
456 Dirksen Senate Office Building
Washington, DC 20510

Honorable Jeff Bingaman
Chairman
Senate Committee on Energy & Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

Honorable Lisa Murkowski
Ranking Member
Senate Committee on Energy & Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

Senator BOXER. Thank you so much.
I am sorry. I thought you were through.
Senator INHOFE. No, that is all right.
Senator BOXER. Senator Lautenberg.

**OPENING STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator LAUTENBERG. Thank you, Madam Chairman.

What a difference in perspective, because I was up in Alaska the third day that the *Valdez* was foundering, and I saw people crying. I didn't see people celebrating. I saw people brokenhearted about what was happening to the wildlife and to the fish supply and to the life that people had experienced before.

And we shouldn't start any hearings here without extending our condolences to the families who lost loved ones. They paid a price for mismanagement that is irreparable.

We saw, as the Chairman so eloquently explained, what happened with Exxon with their \$5 billion punitive damage fine. And they whittled it away, spent the money for the lawyers, and 20 years later they got the \$5 billion fine down to a \$500 million fine. Incredible, when in years since then they have earned billions and billions of dollars in a quarter.

And let's look at this thing realistically. Fishermen, crabbers, boaters, they don't want a check or a handout. They want to continue a way of life that in many cases has gone on for generations so they can work to take care of their families. And that is why I want to make one thing clear. I will not stand for offshore drilling anywhere that can affect my State of New Jersey or my nearby States because the spillover is obvious.

We have to pass energy legislation that prevents spills from happening by making the polluters pay. Pretty simple. Impose tighter regulations on existing drilling, placing a moratorium on offshore drilling in new areas, and investing in clean energy. But I am never going to stand silently on the beaches of my State that contribute \$50 billion to our State's economy and watch the funeral march of oil bearing down on my home State of New Jersey.

And that is why I will not support any bill that puts New Jersey at risk by allowing drilling in the Atlantic, and in order to do that we have to make sure that companies large or small, if they make big mistakes, big management mistakes, as BP has, that they pay the price, regardless of the size of their company.

And I look forward to hearing our witnesses and hear what they say about the results of this.

Thank you.

Senator BOXER. Thank you, Senator.
Senator Vitter.

**OPENING STATEMENT OF HON. DAVID VITTER,
U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator VITTER. Thank you, Madam Chair.

This oil spill liability issue is extremely important, so thank you for the hearing on that. But as you know, this hearing has been styled specifically on one precise bill, S. 3305, by Senator Menendez and others, and I have no problem talking about that bill.

But when I understood this, I immediately wrote you and requested that as a member of the Committee from the single most affected State by the ongoing disaster—and it is an ongoing crisis and an ongoing disaster—I wrote and said I have a bill directly on point that lifts all liability caps on BP for this event, but also sets up an expedited claim process. And Senator Murkowski was instrumental in that portion of the bill. And I requested that this hearing and discussion be broadened to include that bill, S. 3461.

After making multiple attempts to reach out to you following up on that letter, we finally talked last night, and you agreed it would be appropriate and appropriate for me to make the UC request so that I can join Senators Menendez and Nelson in the first panel and also present S. 3461, which would lift the entire liability cap on BP for this disaster and also set up an expedited claim process.

This, by the way, has been completely cleared on the Republican side, so we could literally move on this as it pertains to this ongoing disaster and ongoing crisis immediately if we can get it cleared through the Senate. So I would make that unanimous consent request so that we can have that fuller discussion.

Senator WHITEHOUSE. I am sorry. I didn't understand the unanimous consent request.

Senator BOXER. Do you want to repeat it?

Senator VITTER. It is simply that I be allowed to join our colleagues in the first panel so that I can also present S. 3461, which is my bill to completely remove the liability cap on BP for this event and to set up an expedited claim process for this event. This bill has been cleared on the Republican side and could actually be passed immediately.

Senator WHITEHOUSE. The UC is just to present that?

Senator VITTER. Correct.

Senator WHITEHOUSE. OK.

Senator BOXER. Senator, I am going to slightly amend your request because as you know, we just got your bill this morning. Our staff just got a copy of it. It is 40 pages, and I haven't seen it. It hasn't been noticed. So what I am going to suggest is that I ask unanimous consent that any and all members of this Committee have the opportunity today to discuss any and all legislation relevant to the Menendez bill.

Senator VITTER. I have no problem with that if I can join my colleagues at the table to be able to present 3461. Assuming that is incorporated in your request, I certainly agree.

Senator BOXER. Let me reiterate. It is definitely incorporated. People can sit here or sit there.

Do you have a problem with where people sit? We don't. So I will just reiterate to be clear.

This hearing is about the Menendez bill, but any and all members have the right to discuss their legislation or any relevant legislation to the Menendez bill.

Senator LAUTENBERG. Within the time constraints, Madam Chairman?

Senator BOXER. Within the time constraints, that is correct.

All right. Now, we are going to move forward.

I believe Senator Cardin is next. Yes.

**OPENING STATEMENT OF HON. BENJAMIN L. CARDIN,
U.S. SENATOR FROM THE STATE OF MARYLAND**

Senator CARDIN. Thank you, Madam Chair. Let me thank you for this hearing.

I know you pointed out yesterday was World Ocean Day. I know my friend from Rhode Island is fully aware of that, but we really do celebrate the importance of our oceans for seafood, for recreation, for sea lanes for transportation. And all of that has been brought into real question as a result of the Deepwater Horizon spill.

I agree with our Chair that our first obligations must be to stop the spill and to do the mitigation, and that has got to be our first priority. You also need to hold BP responsible, as they said they would be, but to make sure that they are full held accountable for all the damages that are caused to small businesses that have been disadvantaged or put out of business, to landowners who have been damaged, and to taxpayers who otherwise would have to foot the bill.

I agree with Senator Lautenberg that we need to put a moratorium on drilling until we are sure we have in place a regulatory structure that will protect the public as far as any future problems are concerned. And we need to take off the table those areas of the Nation where it is just too sensitive to drill, including the area that Senator Lautenberg and I represent.

But this hearing is basically about the regulatory structure to make sure this doesn't happen again. And I appreciate the Chairman mentioning the Supreme Court decision which I find to be very disappointing and shocking, telling Exxon that their punitive damages are limited to a little over \$500 million, rather than the \$2.5 billion.

As we are trying to talk about, trying to put incentives in law to prevent this type of behavior, \$500 million seems like a lot of money to most of us, but to an oil company such as BP Oil, which produced \$6 billion in profits the last quarter. That is \$6 billion in profits, not revenues, that these types of damages could be easily handled as just expenses on their books and no real discouragement against irresponsible behavior.

That is why I particularly want to thank our colleagues, Senator Menendez and Senator Nelson, for bringing forward legislation. I am proud to be a cosponsor of that bill that would make our laws make sense as far holding the oil companies fully responsible for the damages that they cause through their irresponsible behavior. And this legislation should be enacted quickly, and I applaud my colleagues for doing it.

One last point, Madam Chairman. Many of these people say that these are so-called black swan events that were unpredictable. I heard the CEO of BP Oil said they couldn't have predicted what was going to happen in this type of circumstance.

Well, that is not what they said when they presented their plans to the Government for their permit. They said they understood exactly what the risks were, and they were minimal, and if a spill occurred they had the proven technology in order to prevent any catastrophic or any significant damage to our environment. The truth of this matter is that such an event was entirely conceivable.

BP officials simply did not want to spend the money necessary to reduce the likelihood of it happening or to have on hand the resources in order to contain it, and they weren't forced to do it.

As a result, we have the ensuing damages. It is our responsibility to make sure that we have the right structure in place, and the Menendez bill needs to be part of that structure. I want to see less black swans and more snowy egrets. And I think that is our responsibility to make sure that happens.

[The prepared statement of Senator Cardin follows:]

STATEMENT OF HON. BENJAMIN L. CARDIN,
U.S. SENATOR FROM THE STATE OF MARYLAND

Madam Chair, yesterday was World Oceans Day. It's an opportunity to celebrate the world's oceans and the products and amenities they provide, including seafood, recreational opportunities, and sea lanes for international trade. It's also a time to appreciate oceans for their intrinsic value. I regret to say that I think all of these values are coming into sharper relief as we struggle to comprehend what's happening—and what will happen—in the Gulf of Mexico and beyond as a result of the British Petroleum (BP) Deepwater Horizon spill.

I think the spill in the Gulf does two things: first, it brutally underscores the need for our Nation to develop and implement an energy policy that weans us off oil as quickly as possible. We need to do that for our national and economic security, and we need to do it to protect human health and the environment. Second, because we cannot end our oil addiction overnight, we need to revamp our regulatory and legal frameworks so they prevent this sort of accident from happening again.

We already know that the existing regulatory framework—replete with inherent conflicts of interest at the Minerals Management Service (MMS)—is inadequate, and we are beginning to address those problems. The catastrophe unfolding in the Gulf of Mexico as a result of the BP Deepwater Horizon accident suggests that the legal framework needs to be revamped, too, and indicates what's at stake. This accident claimed 11 lives and is well on its way to becoming the worst accidental oil spill in history, if it hasn't already surpassed the 140 million gallons released in the 1979 *Ixtoc 1* spill. The natural resource and economic damages are significant now, and the well may not be capped for another 2 months. Oil is killing marine wildlife, destroying some of America's most important commercial fisheries, and fouling fragile barrier islands, crucial wetlands, and previously pristine beaches along the Gulf Coast. It threatens to be swept by the so-called Loop Current around Florida and up the south and even mid-Atlantic coast.

Yesterday the Senate Judiciary Committee held a hearing on whether liability caps and recent Supreme Court decisions undermine the legal framework meant to act as a deterrent to inappropriate cost cutting and risk taking behavior on the part of oil and gas companies and other entities involved in offshore drilling. It appears that recent decisions by the Supreme Court—especially the 2008 Exxon Shipping decision—have lessened the efficacy of threatened litigation as a deterrent to bad corporate behavior. As the organization People For the American Way (PFAW) notes, the Roberts Court gave Exxon-Mobil a \$2 billion gift by reducing a punitive damages award from \$2.5 billion to \$507.5 million for the 1989 *Exxon Valdez* oil spill. The majority's willingness in that decision to invent a rule capping punitive damages against Exxon-Mobil does not bode well for those hoping to hold BP and the other potentially responsible parties such as Halliburton, Transocean, and Cameron accountable for this most recent disaster.

Today's hearing here in the Environment & Public Works Committee focuses exclusively on liability caps. The \$75 million liability cap on damages established two decades ago and unchanged since then is a trifle compared to big oil companies' enormous profits and the burgeoning costs associated with containing and responding to a catastrophic deepwater oil spill. We need to lift the liability cap on damages to \$10 billion at least—something S. 3305 will do. While BP officials have claimed that the company won't be bound by the existing cap, the fact remains that under current law BP is only responsible for up to \$75 million in damages, including injuries to natural resources, unless the accident is caused by gross negligence, willful misconduct, or violation of an applicable Federal regulation under certain circumstances. It's worth noting that BP's first quarter profits—not revenue, but profits—were almost \$6 billion. The existing \$75 million liability cap is equivalent to less than 1 day of BP profits. I congratulate Senator Menendez for introducing S. 3305. I am proud to co-sponsor the measure.

I have heard that the Credit Suisse Group AG estimate of stopping and mitigating the spill could be as high as \$37 billion. So it's clear that a spill of this magnitude could overwhelm a responsible party's ability to pay, in which case funds would have to be withdrawn from the Oil Spill Liability Trust Fund. As Chairman of the Environment & Public Works Subcommittee on Water & Wildlife, I particularly appreciate that S. 3305 eliminates the \$500 million per incident cap on natural resource damage claims that can be paid out by the Trust Fund. That is the right thing to do. And while we will hold all responsible parties' feet to the fire when it comes to paying claims for damages of all kinds, we need to ensure that the Trust Fund, if it needs to be tapped, will have adequate revenues for the task at hand, too. That's why I am heartened the House-passed version of H.R. 4213, the so-called extenders bill currently on the Senate floor, more than quadruples the current assessment on domestic and imported oil from 8 cents per barrel to 34 cents per barrel.

It is a constant challenge to assess risks and benefits accurately. And it is a constant challenge to strike the right legal and regulatory balance to protect human health and the environment in the most cost effective, least burdensome way possible. This task is further complicated because more and more we also need to be aware of—and do a better job planning for—so-called “black swans”—namely, low probability events that have absolutely staggering consequences. The September 11, 2001, terrorist attacks, the breached levees following Hurricane Katrina in 2005, the housing market meltdown in 2007 and 2008, and now the BP Deepwater Horizon accident have all been called “black swans.”

What troubles me is that “black swan” events seem to be occurring more frequently, with even greater and greater consequences. More important, one characteristic of “black swans” is that they are supposedly unexpected. Well, the events I just mentioned were not entirely unforeseeable. For instance, an unclassified September 1999 report prepared by the Library of Congress for the National Intelligence Council entitled “The Sociology and Psychology of Terrorism: Who Becomes a Terrorist and Why?” warned that Osama bin Laden's terrorists could hijack airliners and fly them into Government buildings like the Pentagon. According to the report, “Suicide bomber(s) belonging to al-Qaida's Martyrdom Battalion could crash-land an aircraft . . . into the Pentagon, the headquarters of the CIA, or the White House.” With regard to the levees, it seems that nearly everybody anticipated the breach. The problem wasn't lack of anticipation; it was lack of preparation. And the New York Times reported that John Paulson earned \$1 billion in hedge fund fees in 2007, \$2 billion in 2008, and \$2.3 billion in 2009 by betting against subprime mortgages.

Perhaps “black swans” aren't so unanticipated after all. And if that's the case, they may be—to a certain degree—avoidable, if only we have the proper legal and regulatory frameworks and proper incentives and disincentives in place.

With disingenuousness reminiscent of officials from the previous Administration talking about 9/11 or breached levees, BP officials initially claimed that the accident was unprecedented, unforeseeable, and inconceivable. On April 30, BP spokesman David Nicholas said, “The sort of occurrence that we've seen on the Deepwater Horizon is clearly unprecedented.” On May 2, BP spokesman Steve Rinehart said, “I don't think anybody foresaw the circumstance that we're faced with now” and added that the company didn't build a containment dome prior to the accident because “it seemed inconceivable” that the blowout preventer (BOP) would fail. Of course, the containment dome didn't work, either.

The truth of the matter is that such an event is entirely conceivable. BP officials simply did not want to spend the money necessary to reduce the likelihood of it happening and to have on hand the resources to respond swiftly and effectively. And they weren't forced to.

Not only did BP cut corners with regard to drilling and capping the well; it also failed to maintain adequate resources to contain and respond to a spill. On June 3, BP chief executive officer Tony Hayward finally acknowledged the obvious: the company simply wasn't prepared to deal with a deepwater spill. “What is undoubtedly true is that we did not have the tools you would want in your tool kit,” he told *The Financial Times* in an interview.

Of course, Mr. Hayward's acknowledgment last week diverges dramatically from the mendacious claims that BP officials made on the company's Deepwater Horizon drilling permit application about having “proven response technology.” That's why on May 17 I joined several members of this Committee, including Chairman Boxer and Senators Lautenberg, Gillibrand, Sanders, Klobuchar, Carper, and Merkley, in writing to Attorney General Eric Holder urging him to open an inquiry into whether BP officials violated civil or criminal laws, including 18 U.S.C. 1001, by making

false and misleading statements to the Federal Government regarding the company's ability to respond to a deepwater oil spill in the Gulf of Mexico.

Mr. Hayward argued that in the wake of the 1989 *Exxon Valdez* spill in Alaska, BP and other oil companies developed plans to contain oil on the surface of the water (even that assertion appears dubious), but BP did not have the equipment necessary to stanch a deepwater leak like the one in the Gulf. He concluded that BP—and by extension presumably the entire oil industry—will have to find ways to manage “low probability, high impact” risks in the future.

It seems apparent that the existing legal and regulatory frameworks governing offshore oil and gas exploration and development—particularly in deep waters—need to be re-worked to “help” BP and other oil companies in that task; it is unlikely that they will do so adequately of their own volition because of the cost. That's why S. 3305 is so important. For too long now BP and other oil companies have systematically understated the risks associated with offshore drilling—especially deepwater drilling. Establishing higher liability caps, reinvigorating the ability of plaintiffs to act as watchdogs, and restoring a robust regulatory regime will help to keep oil companies honest. We need to do that so we have fewer “black swans” in the Gulf of Mexico and more snowy egrets.

Senator BOXER. Thank you, Senator.

Senator Bond, followed by Senator Baucus.

**OPENING STATEMENT OF HON. CHRISTOPHER S. BOND,
U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator BOND. Thank you very much, Madam Chair, for holding this hearing today on the Senate Bill 3305 by Senators Menendez, Sanders, and others. I regret to say that this bill should be called the Big Oil Gulf Monopoly Bill, because that is what it is. The Menendez bill would make operating in the Gulf so expensive that only big oil or national oil companies could afford it, giving them a virtual monopoly in the Gulf.

There is unanimous agreement on this Committee—and I imagine in the Senate as a whole—that we need to raise the oil spill economic liability caps. The only question is how much is best. What does more harm than good?

This bill is a tragedy, and I am thankful that the witnesses from Florida, Louisiana, and Alaska have come here today to share their stories. Our thoughts and prayers are with all the victims, but especially with those families that lost loved ones in the first tragic explosion.

The public needs to know the pain of the victims of this disaster so we can make them whole, deter future bad behavior, and ensure future claims are paid. But I wonder if these victims ever thought that the reaction to their tragedy would be a proposal to reward the very big oil company that caused this mess.

The Menendez bill is a reward to big oil, including British Petroleum or British Pollution, if you want to call it that, because it would hand big oil companies like BP, Exxon, and others a virtual monopoly over future Gulf production. The \$10 billion liability cap or unlimited liabilities proposed by others would force Gulf production insurance rates to levels unaffordable to all except big oil companies, a fact that has been laid out in numerous things including by the PFC Global Risk Company.

By their very name, big oil companies are large enough just to write the check, pay any insurance premium, or even self-insure. The Menendez big oil Gulf monopoly bill would kill all competition that big oil faces. BP, Exxon, and others would be free to roam the

Gulf without competition from the smaller American drillers who have drilled successfully and without spills.

The Menendez big oil Gulf monopoly bill would turn the Gulf of Mexico into big oil's own private pond. We know that the sponsor of this legislation pulled the \$10 billion liability cap out of thin air. We know that in their rush to go public with their proposal they may not have thought all the unintended consequences. But now that we have time to reflect, I urge this Committee to be thoughtful in reviewing what will work best to compensate victims and not give an unfair advantage to big oil in the future.

There have been some thoughtful proposals like expanding the existing oil spill trust fund so that all users of oil pay more for the risk they are causing. Others propose a Price-Anderson-type model that the nuclear industry uses to ensure against nuclear accidents. That model would have us raise the cap for those that caused a spill, say, to \$1 billion, and spread the cost of damages above that amount across the entire industry. There may be other solutions we should consider.

What we do know is that America will continue to need petroleum for several more decades as we transition to cleaner home-grown transportation fuels. And we have seen that the so-called regulatory agency, the Minerals Management Service, is badly broken and obviously did not demand that the proposed driller have the kind of means in place to deal with a catastrophic oil spill.

But the bottom line is we cannot close down the Gulf without putting ourselves at hostage even further to the Venezuelans, the Chinese, Russia, and the other groups and the people in OPEC where they don't have to follow the same environmental standards that I believe that we have rightly imposed on drilling in the United States.

There are thousands of Gulf wells operating safely as we speak. Over 40,000 of those wells have been drilled and operated or are operating with no spill like this. I support the Senate's considering new drilling safety reforms, but we should all oppose the Menendez big oil Gulf monopoly bill.

I thank the Chair.

Senator BOXER. OK.

Just to be clear, that is not what Senator Menendez calls it, but you have every right to give it your nickname. OK.

Senator Baucus.

OPENING STATEMENT OF HON. MAX BAUCUS, U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Madam Chairman.

The circumstances in which we find ourselves are clearly unacceptable, and the news regrettably keeps getting worse. We are now in the midst of the worst oil spill in our Nation's history. We are all asking the same questions. What happened? How can we be sure it doesn't happen again? And today we are evaluating one proposal to address some of these questions.

We want to encourage the use of robust spill prevention and safety measures in offshore oil and gas development. That is clear. We also want to prevent the American taxpayer from subsidizing pri-

vate enterprise by absorbing environmental risk. We want to have a domestic oil and gas industry.

With these points in mind, should the liability cap under the Oil Pollution Act be increased to a \$10 billion level proposed in S. 3305? This seems to be a straightforward question with a simple answer. But in spite of our outrage we should not react in haste.

The country needs domestic oil and gas, and we should seriously evaluate each proposal that comes before us. This hearing is a good step in that evaluation. A few key questions: Should there be any Federal cap on liability at all? And if so, what is the appropriate level? How much risk is the American taxpayer absorbing on behalf of oil and gas companies as a result of this liability cap?

And is that appropriate? Does the current cap fail to provide incentive to offshore oil and gas producers to adopt appropriate safety measures? What effect does raising the cap have on our ability to develop domestic oil resources? And what are the legal implications of the retroactive application of a \$10 billion liability cap?

Madam Chairman, I look forward to hearing from the witnesses as we discuss these issues. Again, this spill is tragic. It is caused by many mistakes on the part of many, including British Petroleum, most likely Transocean, and Halliburton, and the appropriate parties listed and others who are appropriately liable and culpable should clearly bear the burden of all the costs.

Senator BOXER. Thank you, Senator Baucus.

Senator Alexander.

**OPENING STATEMENT OF HON. LAMAR ALEXANDER,
U.S. SENATOR FROM THE STATE OF TENNESSEE**

Senator ALEXANDER. Madam Chairman, thank you very much for having the hearing.

And thanks to the witnesses for coming.

I have three observations I would like to make. Some of the witnesses are from the Gulf Coast, and while this is not a hearing about the oil spill liability trust fund, which is funded by a 6 cents per barrel fee on industry to help pay for clean up and to compensate those hurt by the spills, one of the questions I am going to be asking is whether those from the Gulf Coast think the money that is collected by that fund to clean up oil spills ought to be spent to clean up oil spills.

They might be surprised to learn there is a proposal in the House and in the Senate to raise the tax on the fund to clean up oil spills and spend it on more government instead of cleaning up the oil spills. And people must be wondering what is Washington thinking about that, and that is a question that I will have. Should the money raised to clean up oil spills be used to clean up oil spills or spent on some other form of government?

A second observation has to do with the need for new laws and new regulations. Before we pass new laws and new regulations on this whole subject, I would hope the Committee would carefully look at the laws that have already been passed. The Chairman mentioned the Oil Pollution Control Act, which was passed in 1990 after the *Exxon Valdez* spill. One of the provisions of that Act says that the President shall "ensure the clean up of an oil spill and have the people and equipment to do it."

One might ask: What was President Obama's cleanup plan? And where were the people and equipment to clean it up? Now, if the answer is that the Federal Government can't clean up an oil spill, or that President Bush had the same plan, or that President Clinton had the same plan, then perhaps we should change the law. But what the law says, and it has for 20 years, is that the President of the United States shall ensure that it is cleaned up and shall have the people and equipment to do it, instead of effectively delegating the clean up to the spiller.

The third thing, and final observation I would like to make, is along the lines of one suggested by Senator Bond as well. We might learn a lesson from other successful regulatory actions that the Government now has, especially with the nuclear industry. I mentioned at an earlier hearing, for example, the accountability in the nuclear Navy is pretty impressive. If there is a problem on a Navy reactor, the captain might lose his job and his career.

And we have regulating oil a multiplicity of agencies. Some have suggested 14 instead of 1, which is the Nuclear Regulatory Commission in the case of nuclear power. So accountability and multiplicity of regulators is something that might be looked at.

In terms of the increase in liability, I think almost everyone in the Senate believes there ought to be an increase in liability, but the question would be: Should it be from the current model that we now have? I would suggest we ought to consider the Price-Anderson model that the nuclear industry uses. In that case, the entire nuclear industry is responsible for any accident. The industry is forced by law to insure itself for the first \$12.6 billion in damages related to a nuclear accident. Each reactor must carry \$375 million in private liability insurance. Each reactor may be assessed up to \$111 million more for any accident.

In other words you have all of the operators and all of the reactors very interested in what might be happening at any other reactor. There are incentives to cooperate with best practices, to share technology and information, and to assist each other if there were to be an accident. So you wouldn't have the prospect of Chevron or Exxon sitting on the sidelines watching BP clean up.

So I would ask the Committee seriously to consider, rather than just raising the liability limit on this model, should we not explore a model like Price-Anderson. It wouldn't be exactly the same. We would assign liability per reactor, but the oil industry might be apportioned differently, possibly by risk, by well, or by volume of production. The Price-Anderson has been very successful with the nuclear industry. It might be helpful as we look forward in the oil industry.

Thank you, Madam Chair.

Senator BOXER. Thank you.

Here is what we have: Senators Merkley, Whitehouse, and Carper.

**OPENING STATEMENT OF HON. JEFF MERKLEY,
U.S. SENATOR FROM THE STATE OF OREGON**

Senator MERKLEY. Thank you, Madam Chair.

Oregon's beaches and continental shelf fishing grounds contribute an enormous amount to the economy of our State through

harvesting of salmon, through harvesting of ground fish, through crabs, oysters and other shellfish, and certainly through tourism.

We take great pride in our beaches. In fact, Oregonians are one of only two States where the citizens own the beaches. All the beaches are public. There is no private access only. And I can tell you that the citizens of Oregon through their legislature have banned the drilling to the degree they can off the coast of Oregon to the 3-mile boundary, and is it OK to drill within those three miles? No, and the legislature has spoken, and I think contains the wisdom of the State. Is it OK to drill 70 miles off the Oregon coast? The answer is no. That oil, if leaked, would wash up. It would affect the salmon and the shellfish and the tourism and the coastline we so dearly love.

In fact the West Coast Senators as a whole—and I am proud to have joined Senator Boxer in this—have come together, all six of us, and proposed not a moratorium but a permanent ban on drilling off the Pacific Coast because the value of the oil that would be extracted is very small, would have no impact on the international price, and it puts at peril a huge number of jobs and a huge valuable ecosystem that serves us so well.

We currently have a liability cap that creates a moral hazard, a moral hazard because companies drilling say we don't need to be thorough and careful. We can take shortcuts. And if we make a mistake, the public will pay. We will shift our costs to the U.S. citizen. This is not all right for Wall Street, and it certainly isn't all right for oil drilling.

And we have seen the sorts of shortcuts that occur from this moral hazard. We have seen that equipment placed at depth often hasn't been tested at depth. We have seen equipment placed at a depth that wasn't designed to shut off and shear off the very thick pipes used 5,000 feet under the ocean. We have seen carelessness in regard to the hydraulic system. We have seen carelessness in regard to the charging of batteries.

We have seen claims for equipment ready to go to clean up and respond to a spill that was not ready to go. We have seen a container placed over the top of the spill that had never been tested and was filled with ice and didn't work. We have seen point after point in which shortcuts were taken because BP knew it could shift the cost to the American citizen, and that is not OK for the pocket-books of the American citizen, and it is not OK for the thousands of folks who depend on the Gulf for their living that have been affected by this terrible disaster.

So I applaud you for bringing this bill forward, Senator Menendez and Senator Nelson, and I am proud to be cosponsor of it.

Thank you, Madam Chair.

Senator BOXER. Thank you so much.

Senator Whitehouse.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,
U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Thank you, Madam Chair.

Rhode Island considers itself our informal name, the Ocean State, and so I can't help but note the context in which this spill has taken place. Our oceans presently are populated by massive

dead zones. In the Arctic we see melting ice caps. In the tropical seas we see collapsing coral reefs. And we see vast plastic and waste out in our farthest oceans.

We see marine mammals so poisoned by human release of various chemicals and poisons that they are now swimming toxic waste, and one of the lead scientists who studies marine mammals predicts their extinction.

We see ocean acidification at its highest level in 800,000 years, portending a sea in which the baseline creatures in the food chain become soluble in their environment. We see 90 percent and more losses of major pelagic species. We see stresses in shore from warming waters and changing habitat. And this is sort of the last call that we cannot ignore our oceans. We do so at our peril.

Madam Chairman, our energy legislation needs to attend to this. It needs to attend to the effects of our energy use on coastal States and on the oceans. It is not enough to treat coastal States as if they were land-bound terrestrial States. There is no great constituency for the oceans in Congress, but we will find to our peril very soon that if we don't take better care of them, the cost will be high.

I submit that we need to improve the Outer Continental Shelf Lands Act and the liabilities under that Act. And I have put legislation in to that effect. We need to lift the cap on punitive damages that the Supreme Court protected Exxon with, and I have submitted legislation to do that.

We need to support Senator Menendez's legislation to lift the cap on Oil Pollution Act liability, and we need to support Chairman Leahy's legislation under the Deaths on the High Seas Act to make sure that seafaring oil rig workers are treated as fairly as people involved in airline disasters.

So this is a very important hearing, but it is also a part of a larger picture that I know Senator Menendez and Senator Nelson see very clearly as representatives of States that are ocean States in their own right.

For another day is the question of what the consequences should be for regulators who are asleep at the switch when disaster and recurring indications of unpreparedness such as Senator Merkley just described take place, particularly when they are asleep at the switch having been lulled to sleep by industry lullabies.

We have a lot of work to do here, and I think this is an important step. I appreciate this hearing very much.

Senator BOXER. Thank you.

Senator Carper, followed by Senator Klobuchar, and then we want to end this and turn to our witnesses, who have been extremely patient.

**OPENING STATEMENT OF HON. THOMAS R. CARPER,
U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator CARPER. Thanks, Madam Chair.

And thanks to our witnesses who have been extremely patient.

I want to thank you for holding this hearing today on Senator Menendez's legislation. And I look forward to the opportunity to take a closer look at liability issues that are associated with our Nation's offshore oil and gas industry.

As I have mentioned before, my heart goes out to the folks that are impacted by this terrible accident, to the families of the 11 workers who died, and those that were injured. My heart also goes out to the thousands of workers, the individuals and families in the Gulf of Mexico who depend on the Gulf's waters and shores for their economic livelihood.

As a member from a coastal State I can say that I truly understand the importance of our shorelines to our own local and national economies. Our oceans and our shores give life to many, many industries, among them tourism, recreation, fishing industry, transportation, construction, research and education and real estate and many, many more.

So we need to work together to make sure that the laws that we have in place protect these critical industries from economic harm in a fair and a real way.

Today's hearing is an important step in helping Congress figure out what kinds of reforms are needed, to make sure that liability for the offshore oil and gas industry holds responsible parties accountable for their actions or for their inactions.

I look forward to hearing from our witnesses today on how we might best go about reforming liability laws for the industry and what other reforms might be needed to better protect our businesses and our environment from suffering further damage in the wake of this terrible accident.

Again, thank you very much.

Senator BOXER. Thank you, Senator Carper.

Senator Klobuchar.

**OPENING STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM THE STATE OF MINNESOTA**

Senator KLOBUCHAR. Thank you very much, Madam Chairman. Thank you, Senators, for being here.

A few weeks ago, I actually went down to the Gulf and saw first-hand the scope of the disaster, which many have since seen, and I remember flying over it and thinking this is so much worse than it looks on TV when you see the miles and miles of orange waves.

And now what we have seen since is worse, the pelicans on television hobbling around drenched in oil; the wildlife in peril. We are losing an entire ecosystem and the foundation of our Nation's Gulf Coast economy, from the fishermen across the Gulf Coast who sit idle to the hotel rooms sitting empty to the countless beaches that are now home to tar balls instead of beach balls.

It has now been over 50 days since the disaster began, and the costs have begun to increase exponentially. We still, as we all know, don't know exactly how much oil has leaked, but we do know that this is likely the worst oil spill in our Nation's history and perhaps in the world's history.

Yesterday, I joined Senators Shaheen and Gillibrand and others on a bill to give the President's Gulf Oil Spill Commission subpoena power. We also had a hearing with Senator Whitehouse and some other Members, Senator Cardin, of the Judiciary Committee, and actually heard testimony from the brother of one of the victims. That really brought it home.

At the same time, over the last few weeks we have listened to the Chairman of BP America and the leaders of Transocean and Halliburton testify before us. BP has indicated that they will pay for the spill. Now, they are spending millions of dollars on fancy television ads to talk about how they are working to make up for this disaster.

The problem for me is that the story is all too familiar. I want to bring you back to the *Exxon Valdez*. Why do I care about this? Well, a Minnesota law firm actually represented the fishermen from the very beginning to the end in that case. At the time of the *Exxon Valdez* spill CBS News reported after the disaster that Exxon executives were quoted telling fishermen, you have my word, we will make you whole again.

But for 20 years Exxon fought the Minnesota law firm, fought them for paying damages and Appeals Court decisions multiple times. They have still not paid in full. Years of fighting and court appeals on Exxon's part finally concluded with a U.S. Supreme Court decision in 2008 that found that Exxon only had to pay \$507.5 million of the original 1994 court decree for \$5 billion in punitive damages.

Twenty years later some of the original plaintiffs are no longer alive to receive or continue fighting for compensation from Exxon. An estimated 8,000 of the original *Exxon Valdez* plaintiffs have died while waiting for their compensation as Exxon fought them in court.

We cannot let the victims of the Gulf oil disaster suffer this same fate. And that is why I am so focused on the bill that Senator Menendez and others up here have worked on to lift the liability cap for offshore drilling accidents. I immediately got on that bill because I had seen what happened to the fishermen with the *Exxon Valdez*.

It is a pretty basic free market idea, an American idea, that if you take a risk you should be the one to get the rewards, but also the one to incur the costs.

I thank you, Madam Chair, for holding this hearing. I truly believe that if we hadn't had that \$75 million cap in place, perhaps different calculations would have been made. When you know that there is a \$75 million cap on damages, and you have to make a decision about whether you are going to have a backup to a blowout preventer, whether you are going to have a redundant safety system in place, you can't help the accountants, the number crunchers look at it, and go, well, it is \$75 million.

And I am not saying for a minute, for a minute that BP would have made the same decision if they had known what disaster awaited them. They wouldn't have. They would have made it safer. But the point is all they knew at that time was that there was a \$75 million cap on damages.

And that is why I feel strongly both for the victims of this disaster, for our taxpayers in Minnesota, across the country, but also for incentives going forward that we have to raise that cap.

Thank you very much, Madam Chairman; I yield the floor.

Senator BOXER. Thank you.

We have been joined by Senator Udall.

Do you have an opening statement?

Senator UDALL. No, I don't, but I would like to go to questioning in the proper order.

Senator BOXER. All right. That is fine.

We will go then to Senator Menendez.

Your bill is the focus of this hearing, and again, any Member can raise their own bills, but we are very, very grateful to you for your leadership. We want to put in the record at this time an article, White House Endorses Unlimited Liability Cap for Oil Spillers, saying we need to ensure there is no arbitrary cap on corporate responsibility for a similar major oil spill.

So congratulations, you have gotten that support.

[The referenced article was not received at time of print.]

**OPENING STATEMENT OF HON. ROBERT MENENDEZ,
U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator MENENDEZ. Thank you very much, Chairman Boxer and Ranking Member Inhofe, and distinguished members of the Committee, for holding this hearing on S. 3305, which I want to just make sure for the record is the Big Oil Bailout Prevention Liability Act. We need to act quickly to make sure oil companies are held fully accountable for all damages related to an oil spill. And we have all come a long way since I introduced this legislation with a whole host of my colleagues about a month ago.

The Administration, as you just cited, has moved to embrace the idea of unlimited liability for drilling in deep waters for all future drilling operations. Senators Vitter and Murkowski have introduced legislation that they say would hold BP accountable for unlimited damages for this incident, but it is silent on future spills.

And my proposal, with my colleagues, has changed as well. When the disaster first occurred a \$10 billion liability cap not only seemed adequate to compensate all those impacted by the spill, but it represented a sizable increase from a ridiculously low current level of \$75 million.

But this spill is larger in scale than anything we have seen in U.S. waters. It has forever changed our understanding of the potential size of oil disasters, even for someone like me who had long warned about the danger of rig blowouts. So for that reason, along with 20 cosponsors, we have amended the legislation for unlimited liability.

So we have come a long way, but there is still a ways to go. Now, I find it interesting that those who say that we need to hold the victims harmless in the process and take care of them want to keep largely the present system in place. That is the voices I hear, a system of rather limited liability, of \$75 million. BP made \$94 million each day in the first quarter of this year, so that is less than 1 day's consequence.

And I wonder at the same time—they are pursuing drilling that has unlimited risks. So I wonder whether the “drill, baby, drill” crowd ever thought about the “spill, baby, spill” consequences, because that is what we have today.

Now, one of the objections I have heard to removing the liability cap is that it will cause mom and pop drillers to go out of business. My view of this is not a question of small versus big companies. This is about safe versus unsafe companies. If you are drilling in

the Gulf and are cutting corners the way BP allegedly has, then there is no doubt that insurers will be charging you more because you are a risky company. And if you are an unsafe company I am sure regulators are going to force you to overhaul your operations and use better equipment. That will definitely cost an unsafe company some money to get its operations into compliance.

But a company with a higher safety standard should not have those same issues to worry about. The insurers and regulators alike would be able to see that you are operating safely, and in turn you should be able to continue your operations without the fear of major cost increases.

Lifting the liability cap, as we do under the legislation, also instills discipline on oil companies, as Senator Klobuchar was referring to, not to cut the corners, not to take the calculation that the cost of doing business if something goes wrong is a limit of \$75 million. And so by lifting the liability cap we make sure that the incentives are not perverse as they are under the present law.

However, if you are an unsafe company that is also small, then we should be all concerned. According to a recent analysis by Credit Suisse, BP's cleanup costs, economic damages, and other related costs could total \$37 billion. That is a shockingly high number, but one BP will likely be able to absorb since it is a company well worth over \$100 billion.

But what if a similar unsafe but smaller company had caused this leak? As you can see from the bar chart that I have brought and the report I have provided to the Committee, there is a company worth less than \$500 million drilling in over 4,000 feet of water in the Gulf. If a \$500 million company had been the operator, and a spill causing \$37 billion in costs and damages had taken place, I think it is clear that the residents of the Gulf and the American taxpayer would be holding the bag for over \$36 billion. Is that the liability standards we want? Is that the risk we want to our collective economy?

So unsafe companies that are not so big that they could pay for their catastrophic mistakes might have reason to worry, but small safe companies should be able to continue operating in the Gulf without fear.

Finally, as I have mentioned previously, I applaud Senator Vitter for embracing unlimited liability for damages stemming from this bill, but I believe we need to change the law for all potential future spills so that the American taxpayer knows all companies will pay for that which they spill.

I also don't believe that Senator Vitter's approach will survive judicial scrutiny because it attempts to form a contract without the consent of the parties and because it is an unconstitutional bill of attainder on just one company and one incident. By contrast the Department of Justice and the Congressional Research Service have both testified that our bill would survive constitutional challenge. Superfund law is an example of that. We created responsibility for polluting parties that had already polluted, and we created the liability subsequently, and that has been litigated and upheld.

So we need to pass legislation that would hold all oil companies accountable and hold up in court. It is time we finally start treat-

ing oil companies like we do everyone else, Madam Chairman. The average taxpayer does not enjoy a liability cap. The guy installing solar panels on your roof does not have a liability cap, and neither should oil companies.

The mom and pops we should be worried about are not oil companies, but mom and pop taxpayers who shouldn't have to pay for the cleanup spills of others.

Thank you, Madam Chairman, for the opportunity to testify on our bill, and I am happy to answer any questions.

Senator BOXER. Thank you very much.

Senator Nelson, to be followed by Senator Vitter.

**OPENING STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM THE STATE OF FLORIDA**

Senator NELSON. Madam Chairman, this comes down to whether or not you want to lessen the likelihood that you have these kinds of spills in the future. So that all those mistakes that were made, starting with the coziness with the Government regulator never happens again; starting with all of those backup systems on the blowout preventer that did not work, never happen again; and that all of the mistakes that are being made now, the fishermen that are being promised that they are going to be hired and they don't get paid, and they said give us a 14-day requisition and we will pay you in 14 days. That is 28 days. Where are they going to get the money to pay their crews? And it goes on and on and on.

Madam Chairman, this is NOAA's projection, and obviously you can see it, but you can go on the NOAA Web site. This is the projection for Friday. This is a 72-hour projection. And it has it now the winds are not blessing us as they have on the Florida coast, the Alabama coast, and the Mississippi coast. The winds are changing, and by Friday are sending it to the coast of Florida.

The National Park Service has already put out a warning not to go into the water on the Gulf Islands Seashore Park, and that includes part of Perdido Key as well, which is a part of Florida.

Now, it is hard for someone who has exposure to the Gulf, but for that matter, any of the Senators that have exposure to any of the oceans, not to be very emotional about this when you see as a result how your people are going to suffer.

And so we come to you with a simple little proposal, and that is that the person who makes the mistake ought to be responsible. And if the penalty is that they are going to be responsible and have to pay, they are sure going to be a lot more careful about what they are doing.

I don't think, Madam Chairman, that the Government regulator is going to make the mistake that we have for the last couple of decades, and I think that house is being cleaned, and it sure needed to be cleaned.

And so this Committee we would ask you, as you deliberate, let's don't delay this. Let's get it out there so that it sends a strong signal to the future exploration that these mistakes should not be made.

Thank you.

Senator BOXER. Thank you, Senator.

Senator Vitter.

**STATEMENT OF HON. DAVID VITTER,
U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator VITTER. Thank you, Madam Chair, and thanks for the opportunity to present S. 3461 by Senator Murkowski and myself.

This bill is very simple. You have it before you. It does two things. First of all it removes any and all liability cap on BP for this event. It absolutely does that without equivocation to give certainty on that issue to the people of the Gulf Coast who are going through an ongoing crisis.

And second it establishes an expedited claims process because it is crucial that these folks not just be made whole eventually, but they start to be made whole now because they are struggling month to month.

This bill has also been completely cleared on the Republican side, so it stands ready to move immediately.

Now, Madam Chair, as I have said several times in this Committee and sort of tried to gently remind folks, this is an important issue we are discussing, this whole event, but it is not just an important issue. It is an ongoing crisis. It is an ongoing disaster in the Gulf because the flow continues, the pollution continues, and it expands and is now hitting four States, not just mine.

And that is very much the perspective I am coming from. This is an ongoing crisis, and we need to act in certain ways. And that is why I bring this bill because we can act immediately on this to address this ongoing crisis.

Now, clearly—clearly the economic damages liability cap needs to be increased to a great extent permanently, and we all agree on that. But just as clearly, that will not pass immediately. Hopefully, it won't take extremely long, but it will not pass immediately. So that is why, again Senator Murkowski and I cleared entirely on the Republican side, have brought this bill.

And again, the bill is real simple. No. 1, it removes completely, completely any cap on BP for this event. No. 2, it sets up an expedited claims process to make these folks in the Gulf whole, not just eventually but starting right now as they struggle month to month. And finally with regard to the details of the bill, let me say, Madam Chairman, that we drafted the bill very specifically to avoid legal challenge from BP or anyone else. However, we are open to technical revision. And if Senator Menendez has a version that he would support, we are open to that. We just want this passed immediately to address this ongoing crisis and would be happy to work with him on a technical revision regarding the liability issue.

Finally, Madam Chairman, let me submit for the record and read this letter which I think sums up very well the attitude of folks facing this ongoing crisis in the Gulf. It is from four leading local elected officials who all happen to be Democrats: "Dear Senator Boxer: If there is any national policy challenge that is not and should not be treated as partisan in any way, surely it is the ongoing oil disaster in the Gulf. Although there is universal agreement about this in Louisiana, apparently that may not be the case in Washington, DC. Several weeks ago, Senator David Vitter introduced emergency legislation to completely remove the existing cap

in Federal law for economic damages as it pertains to BP and our disaster.

"The bill also includes an expedited claims process so that affected fishermen and others aren't just made whole, but are paid something immediately in an ongoing basis. When Senator Vitter tried to pass this through the Senate immediately, it was blocked by Senator Robert Menendez, Chairman of the Democratic National Senatorial Committee.

"We urge you to intervene with Senator Menendez and others so that this important legislation can be passed through the U.S. Senate and then the U.S. House. This should be made the law immediately to help us deal with this ongoing crisis. We realize that permanent revisions to OPA will require more debate, but this focused change for the BP disaster can and should be passed immediately. Thank you for focusing on this urgent request quickly."

And I will submit this for the record.

Thank you, Madam Chair, and I look forward to our discussion and hopefully quick action.

[The referenced letter was not received at time of print.]

Senator BOXER. Thank you.

Well, I regret that politics was entered into the record, but that is your choice, Senator Vitter.

Senator Vitter, let me just say I do have a suggestion. I am going to ask Senator Menendez about it. What you are saying is your State and you have decided, you have decided that you want to make sure that for this particular spill affecting your State that there be no limit on the liability of BP.

And you are not willing to at this stage at least, and maybe we can move you toward it, to admit that once something happened on the Atlantic coast, and Senator Lautenberg found himself in the same position as you, but it is a different company, he wouldn't have the same protection. That is the constitutional question. Why should one State and one spill get treated a different way?

So I am wondering, Senator Menendez, if Senator Vitter took his bill and basically said all other spills that will occur from this day forward with different companies will be treated the same way, unlimited liability. That would be a technical change, I suppose you could call it. Would that be something that you could work with, if he agreed that all other spills be treated the same way with different companies at different places?

Senator MENENDEZ. Madam Chair, first let me just say my opposition had nothing to do with being the Chairman of the Democratic Senatorial Campaign Committee. It had everything to do with that proceeding with one incident and one company and saying, yes, you have unlimited liability and no one else has, is bad public policy, and I think is also illegal.

So the answer to your question is yes.

Senator BOXER. Good.

Senator MENENDEZ. If in fact we have unlimited liability across the board for the future, that is in essence what we are trying to accomplish. And I would hope that since the Republican Caucus has cleared, according to Senator Vitter, the proposition that unlimited liability should exist for this incident, then the precedent and the principle is set for any other.

Senator BOXER. Right. And I would recommend, Senator Menendez, that you work with all of us and Senator Vitter to try and make this proposal on the floor of the U.S. Senate today, that we amend this bill to ensure that any other spill with different companies, that the people in that region, the fishermen, the recreation industry, the tourism industry, they be made whole as well. And then we can come together as Democrats and Republicans because that is my goal is to get this thing done.

Senator VITTER. Madam Chairman, may I respond?

Senator BOXER. Yes, and then Senator Nelson.

Senator VITTER. OK, thank you. Because it is obvious that—

Senator LAUTENBERG. Madam Chairman, forgive me, but we have in front of us a bill to be considered. And I think that we ought to do that business and not let it be diverted even if it sounds right.

Senator VITTER. Madam Chair, I would refer to your unanimous consent which was passed which clearly allows this discussion.

Senator BOXER. Yes, but what I am going to do is ask the people, I want to have answers. So I guess I want to ask Senator Nelson a question here.

Senator VITTER. Madam Chair, since you clearly—

Senator BOXER. Senator, when you want to come back up here. I am asking a question to specific Senators. I have 2 minutes remaining.

Senator VITTER. Which have everything to do with my proposal, and I can't respond—

Senator BOXER. I will be glad to give you as much time as you want, but these two have to leave. So I would like to get the benefit of their time.

Senator VITTER. OK. I will be happy to wait to respond until they have responded.

Senator BOXER. Well, after they leave.

Senator Nelson, and I would ask to have 30 seconds added back on because I am losing my time here.

The Price-Anderson model, which has been suggested by Senator Alexander, I have asked for a review of that. And what happens there is that the taxpayers are on the hook when the liability goes over \$10 billion, and then the taxpayers have to come in and fund it. The reason I like Senator Menendez's bill, which is broad, I like Senator Vitter, the fact that he holds BP accountable, but I like the Menendez approach better because it includes all companies, is because taxpayers will never have to bail out.

And your point I thought was so well made. We are looking at preventing this type of thing from happening. And if there is a situation where, like Price-Anderson, where taxpayers are on the hook above a certain amount, won't they do what Senator Klobuchar said they did with the \$75 million, which is to take into account what the rules are, and maybe they will cut corners because they feel they can rely on taxpayer bailouts.

Could you respond to that?

Senator NELSON. Yes, and you already have taxpayer participation with regard to the trust fund. And the trust fund is for clean-up expenses, and it is at a limited amount of 6 cents per barrel. You ought to consider raising that to 25 cents because it is only a

matter of something in excess of \$1 billion in the trust fund, and obviously you can see these cleanup expenses are going to be enormous. So you have already got taxpayer participation.

This is a question of liability for the overall economic damages, and that is where this artificially low limit of \$75 million is completely unrealistic. And if you want to make people all the more responsible, they need to understand they are going to suffer the economic consequences of paying for the damages as a result of their malfeasance and misfeasance.

May I also say, Senator, when you are considering the legislation, you may want to take a good example from the Act of 1990 that set up a citizens oversight panel that then looked at the implementation of all the clean up and the damages over time, and that citizens oversight panel has become most effective with regard to the *Exxon Valdez*. I am going to file legislation on that in the next few days and would ask that you all consider that as you approach this whole program since you are the Environment Committee.

Senator BOXER. My time has run out.

Senator Inhofe.

Senator INHOFE. OK. First of all, let me clarify something, and I think it speaks well of both of us, Madam Chairman.

You mentioned that you were kind enough to let Senator Vitter be heard, and I would point out that we didn't know about Senator Menendez until Monday at 5 o'clock and Nelson until 7:20 last night. And so we didn't object to that, and I don't object now.

But I would like, since Senator Vitter does want to respond to many of the things that have been said, for you to go ahead and take my time as you see fit to respond.

Senator VITTER. Thank you, Senator, very much.

And just to respond to the Chair, my entire point seems to be lost on some folks. The point is that we need a permanent revision of the law, but there is clearly disagreement about how to do that. And that is clearly not happening this week or next week. We should have that debate. We should move it along as quickly as possible. And I have a proposal which, by the way, increases the liability cap on BP to \$20 billion, which is double the original version that Senator Menendez introduced which is before us.

But in the meantime, I would again urge us and plead that we can act to address the ongoing crisis in the Gulf through a focused bill. Now, I don't think it hurts Senator Menendez's effort at all. In fact I can make an argument that it helps build momentum for it, so I don't understand the tremendous opposition to it. But again I urge and plead that we come together in a bipartisan way, do that immediately, and continue to have this debate not for years, but continue to have this debate to come toward a permanent solution. And that is all I am urging with my bill.

Senator INHOFE. Madam Chairman, I won't even use the remaining 3 minutes that I have, but my staff tells me that it was an understanding that we were not going to have questions of the Members, and we do have several witnesses that we would like to hear from. In fact, they would have answers to a lot of these questions, so I would like to move on, if I could, to the panelists as soon as possible.

Senator BOXER. That is fine.

Senator LAUTENBERG. Madam Chairman.

Senator BOXER. Yes.

Senator LAUTENBERG. If I may, you were very generous in permitting this intrusion into the discussion of the bill at hand. And it is obtrusive, and the fact that we had a political introduction, DSCC, it shows you the tone, the sincerity with which this is delivered.

Madam Chairman, I want to comment my colleague, Senator Menendez, who is diligent about everything he does; excellent testimony. I was quick to join him once we saw what the liability situation was going to be there.

And it is customary, is it not, for these Committees to generally excuse the Senators after their testimony. And I move that we get on with that and get the regular discussion going.

Senator BOXER. I apologize. I was just wanting to see if we could come together here, and I think we may have found a way. A friendly amendment to the Vitter bill so that everybody is protected is something that I am going to be working on with you, Senator Vitter, and you, Senator Menendez. And I apologize.

Senator VITTER. Madam Chair, let me just apologize to Senator Lautenberg. As a member of the Committee coming from the most affected State by this ongoing crisis, for having the gall to have legislation to try to address it now.

Senator BOXER. That is not what Senator Lautenberg said.

We are going to move on now. We thank Senators very, very much.

And now we are going to go to our panel: Mr. D.T. Minich, Executive Director of Visit St. Petersburg-Clearwater, which promotes tourism for key portions of the western coast of Florida; Captain Mike Frenette, a professional tournament angler and guide and is the owner and operator of the Red Fish Lodge located in Venice, Louisiana, which caters primarily to anglers. He is also the President of the Venice Charter Boat and Guide Association and a member of the Board of Directors of the Louisiana Charter Boat Association.

Mr. R.J. Kopchak. Mr. Kopchak has been a commercial fisherman for over 35 years in Prince William Sound, the Cooper River Delta, and Northern Gulf of Alaska. In 1989, when the *Exxon Valdez* ran aground, he played a key role in the local response to the spill. He is a Board Member of the Cordova District Fishermen United, a local fishermen's organization, and is the Development Director of the Prince William Sound Science Center.

Mr. Kenneth Murchison is a Professor of Law at the Paul M. Hebert Law Center at Louisiana State University, where he has been a member of the faculty at the Law Center since 1977 and taught environmental law since the early 1980s.

Mr. Barry Hartman, a Partner with the law firm of K&L Gates and a former Acting Assistant Attorney General. Mr. Ron Baron is Executive Vice President of Willis Global Energy Practice.

We want to welcome this distinguished panel, and we are going to start with Mr. Minich, Executive Director of Visit St. Petersburg-Clearwater.

**STATEMENT OF D. T. MINICH, EXECUTIVE DIRECTOR,
VISIT ST. PETERSBURG-CLEARWATER**

Mr. MINICH. Good morning. I thank you all for calling this hearing today.

I am the Executive Director of Tourism for the St. Petersburg-Clearwater area, which is on the Gulf Coast. When you take in Tampa Bay as a whole it is the largest tourism area really on the Gulf Coast of Mexico.

Tourism is the No. 1 industry in the State of Florida, \$61 billion a year; almost a million people are employed in tourism. And the reason that for over 100 years many, many people have been coming to our State and enjoying our State is because of the tremendous beaches and pristine waters that we have. And all of that is currently at risk.

My area alone is a \$6 billion industry, tourism, for just my county, and there are over 80,000 people directly employed in tourism in Pinellas County alone. So you can see that it is a very, very big industry, and it is currently at risk.

You might wonder why I am here talking today because right now there is no oil, and for the short term there doesn't look like there will be oil on our beaches, but I will get to that in a minute.

We have had experience in Pinellas County with an oil spill. In 1993 three tankers collided right at the mouth of Tampa Bay, and oil was spilled, and oil ultimately affected 14 miles of our 35 miles of beach. Now, let me tell you this number, and let me tell you it slow. Those three boats and this oil spill was 362,000 gallons. That is coming out of there every couple of hours, 362,000 gallons. So in terms of gallons, in terms of barrels, it was a very minor spill.

We saw cancellations of 40 percent to 60 percent, and it took us 2 years to recover from a relatively small spill that was cleaned up in a relatively short amount of time.

So the effects of this spill are huge and tremendous, and no one knows where we are going. This is so uncharted. We don't even know how long this is going to affect us.

I also, because of our concern, have met with some of the folks in Alaska tourism, and I have been told some things that astounded me. First of all the Valdez was a very small area of Alaska. It was concentrated. It was pretty predictable where this was going to effect and how it was going to effect, unlike the current situation. It took Alaska tourism 5 years of advertising, of very, very aggressive advertising to get in people's minds that Alaska still was not covered with oil, to also understand that this was a very small part. This wasn't where the Alaska cruise ships go or anything like that. As you have heard, 20 years to get claims back, and they told me no tourism entities received any of those claims.

What it means to us right now is that we are seeing 25 percent reduction in reservations right now for the summer months. We are getting families that are calling in that have been coming to St. Pete-Clearwater for years and years and years, and they are saying we don't want to risk it. Our hotels have all removed the cancellation policies, that they will refund the money if they check in and there is oil. But they don't want to risk it because they don't want to buy for a family of five, five airline tickets that are non-refundable for August, and then when August comes around, and

they discover there is possibly oil on the beach where they plan to vacation, they are not going to get that money back.

We met with the Governor Monday, and I have a family, the Hubbard family, fifth generation operating a marine and fishing charter and restaurant on John's Pass, and she was almost in tears. The creditors were flying down Tuesday from Des Moines to talk to her, and their business is in jeopardy, and they have been there five generations, and this business is in jeopardy.

We have been through hurricanes. We have been through wildfires. We have been through all kinds of economic ups and downs, and this is the worst thing and the scariest thing that we have seen in Florida tourism because it is so unpredictable and because it has the potential to affect, if it gets in the loop current, as Senator Nelson was showing earlier, it gets in the loop current, it could affect the Keys. It could affect the East Coast. It is already affecting the west coast, and \$75 million is nothing. BP is spending \$50 million, two-thirds of that on a public relations campaign for their own benefit right now.

We have to lift this cap. We have to remove this cap because we don't know where this thing is going. This could affect us for 20 years or more.

[The prepared statement of Mr. Minich follows:]

**Committee on Environment and Public Works
U.S. Senate**

**Written Testimony
"The Big Oil Bailout Prevention Liability Act of 2010"
Wednesday, June 9, 2010**

**D.T. Minich, CDME
Executive Director
St. Petersburg/Clearwater Area Convention & Visitors Bureau**

Thank you for the invitation to testify at today's hearing. I have been asked to address three pertinent issues in my remarks this morning – first, the economic value of tourism in Florida; second, the potential impacts of the Deepwater Horizon oil spill on tourism-related businesses; and third, the need for raising the caps to ensure any damages associated with this or future spills are compensated.

Let's start with the economic value of tourism to Florida. There's no doubt that tourism is big business in our state. One look at numbers from VISIT FLORIDA, the state's official tourism marketing corporation, validates the enormous contributions that tourism makes to the Sunshine State.

In 2009, Florida hosted 80.9 million visitors. That's almost the combined populations of New York, California and Texas. These visitors generated nearly \$61 billion in travel spending and \$3.65 billion in sales tax collections. They account for 21 percent of the state's total taxable sales. Moreover, tourism industry employment represents 968,400 Florida jobs, so every 85 visitors support one Florida job.

Last year's figures are indicative of the economic impact of tourism on the state in recent years. For 2008, VISIT FLORIDA reported that tourism generated 84.2 million visitors, \$65.2 billion in travel spending, \$3.9 billion in sales tax collections, and just over 1 million Florida jobs. In 2007, tourism accounted for 84.5 million visitors, \$65.5 billion in travel spending, \$3.9 billion in sales tax collections, and 991,300 Florida jobs. Without a doubt, tourism consistently is vitally important to the state's economy.

But what about the specific economic contributions of Florida's beaches? For more than a century, the state's 825 miles of beaches have been an important engine for economic development. Florida's economy is strongly tied to its waters through tourism and recreation, and there are many facets of the state's economy that are dependent on its coastline.

According to the Florida Oceans and Coastal Council, Florida's coastal shoreline counties contributed almost \$562 billion in direct revenue to the state in 2006, the most recent year for which statistics are available. That represents a whopping 79 percent of Florida's economy! In addition, shoreline counties contributed more than 75 percent of Florida's GDP, wages, employment and establishments on only 56 percent of Florida's total land area. This takes into account tourism and recreation, the fishing industry, marine transportation, coastal construction, marine research and education, and real estate.

Tourism Expenditures at Florida's Beaches

Another measure of the beaches' importance to the state can be found in a report prepared by the Catanese Center at Florida Atlantic University in July 2005 that chronicles tourism spending. While the report's statistics are dated, they give us another quantifiable picture of just how valuable the beaches are to Florida's economy.

The Florida Atlantic University report revealed that out-of-state beach visitors spent \$19.1 billion in 2003, an amount that was equal to 3.8 percent of the gross state product. These beach visitors paid about \$600 million in state sales taxes and created more than 500,000 jobs. At that time, 77 percent of Florida's population lived in coastal areas, and 80 percent of the personal income received by the state's residents came from coastal areas. Plus, 79 percent of the state's payrolls were earned in Florida's coastal areas.

Even more relevant is that the report broke down the economic impact of Florida's beaches by region, including the northwest region. That area encompasses the beaches in the state's Panhandle that began witnessing tar balls from the Deepwater Horizon spill wash ashore on their coastline late last week. The report indicates that the northwest beach region accounts for \$5.7 billion in contributions to Florida's economy and \$2.8 billion in tourist spending; and 85 percent of tourists to the area visited its beaches. One can just imagine what those numbers would look like today, given the overall growth in Florida tourism over the last seven years and the opening last month of the \$318 million Northwest Florida Beaches International Airport. It's the first commercial-service international airport to be built from the ground up in the past 15 years.

My area -- St. Petersburg/Clearwater on the Gulf Coast of Florida -- is a prime example of how tourism drives the local economy of a beach destination. From 2002 to 2009, visitors to the area contributed more than \$42 billion to our local economy. Each year, we host more than 13 million visitors, making us the most popular vacation destination on Florida's West Coast. These visitors generate more than \$6.1 billion in total revenues, which means tourism is the number one industry and number one employer

in our area. And consumer research shows that our beaches are one of the most influential factors for those who chose our area for their vacation. In 2009, 93.5 percent of our visitors said the beaches influenced their trip decision-making.

But tourism revenues are only part of the story. Not only do people benefit from the economic impact of the travel industry in dollars and cents, but they also benefit from the quality of life to which it contributes. So, the industry's impact is actually measured in two ways.

The "value in exchange" measurement considers expenditures, jobs, taxes and the like; AND the industry's "value in use" takes into account the quality of life that tourism gives not only to visitors but also to residents who reap the rewards of tourism expenditures on local infrastructure. This latter measurement of tourism's impact reframes the industry's purpose from an ends – meaning the dollars spent – to a means – meaning what is done with those dollars locally. In essence, tourism is a tool for enhancing what residents love about their region.

From performing arts to low cost travel, tourism affords a better quality of life. It also impacts parts of the community that are far beyond the obvious. The Penny for Pinellas program in Pinellas County, for example, would suffer without tourism. Visitors contribute approximately 35 percent of Penny for Pinellas revenues, which equals roughly \$40 million annually. This program adds value to the county by funding roads, bridges, parks, drainage and other capital improvement projects.

All of this paints a clear picture of the contributions that tourism makes to every community in Florida that it impacts and the trickle down benefits of visitor expenditures.

First-Hand Experience

Given the staggering economic impact figures I've just shared, it doesn't take much to surmise the potential impact of the Deepwater Horizon oil spill. While no one can say with certainty exactly how this slow-motion calamity will affect us in the future, I can share with you some relevant experiences.

Pinellas County, Florida – with 345 miles of shoreline, 35 miles of white sandy beaches, and 11 barrier islands -- has first-hand experience with an oil spill. In 1992, our local convention and visitors bureau hired a Tampa firm, Research Data Services, to study how a major oil spill would affect Pinellas County. At that time the company's founder, economist Dr. Walter Klages, estimated a major spill could cause a 45 percent decrease in visitors over two years. He also projected that it also could result in the loss of 7,392 tourism-related jobs in the county.

His predictions rang true one year later, when in August 1993, the beaches of southern Pinellas County suffered a minor oil spill that nonetheless caused major headaches for beach hoteliers. The spill occurred after two barges and a freighter collided in the shipping channel west of the Sunshine Skyway Bridge south of Mullet Key in Tampa Bay, Florida. After the accident, as tar balls littered the shore, a few of our area's large resorts reported that their occupancy rates fell by double digits when compared with the previous year.

Furthermore, the environmental impact not to mention the clean-up efforts for what would be considered a "minor spill" were significant. Systematic shoreline surveys were conducted and oil was found buried by two to eight inches of clean sand deposited during high tide. Cleanup crews focused on manually removing the band of surface oil high on the beach. A plan was developed to remove the subsurface oil without generating large volumes of sediment for handling, disposal, and replacement. The plan called for mechanical removal of the heavy buried layers, manual removal of moderately oiled sediments, and mechanically pushing stained sand onto the lower part of the beach for surf washing.

Meanwhile, cleanup crews were contending with very thick oil that had been deposited around some mangrove islands. Tarmats formed when sediment was mixed with oil along the shallow flats surrounding the islands. Large thick mats coated mangrove roots, oyster and seagrass beds, and tidal mud flats, which are favored breeding and feeding grounds for a vast array of wildlife.

Roughly 14.5 miles of fine-grained sand beach from St. Petersburg Beach north to Redington Shores Beach were affected by this spill. Sand beaches on Egmont Key at the entrance to Tampa Bay were also oiled. Additionally, four mangrove islands inside the entrance to Boca Ciega Bay at Johns Pass and two small areas of Spartina Marsh were oiled. Jetties, seawalls, and riprap within the bay and at Johns Pass and Blind Pass were also oiled to varying degrees. It is estimated that more than 30 miles of residential seawalls were oiled within Boca Ciega Bay. Some impact also occurred on the northern side of Mullet Key at Bonne Fortune Key in fringing mangroves.

Our research in the aftermath of the incident showed its long-term effects on our area. In addition to the cost of extensive clean-up efforts, it took our hotels two years from the time of the spill to return to the level of business they had enjoyed prior to the accident.

Lessons from Exxon Valdez

All of this resulted from just a minor spill that is absolutely dwarfed by what we are facing in the Gulf today. The current-day spill is closer in nature to that of the Exxon Valdez when it struck a reef in March 1989. The tanker subsequently lost almost 11

million gallons of crude oil that eventually covered 1,300 miles of coastline and 11,000 square miles of ocean in Prince William Sound, Alaska. While the Exxon Valdez spill was smaller and more geographically confined than the Deepwater Horizon spill, it gives us clues as to what we might expect from today's much larger disaster.

In 1990, a study examining the impacts of the Exxon Valdez oil spill on Alaska's tourism industry found that 43 percent of businesses in the spill-affected areas felt that their business had been significantly or completely affected by the oil spill; and 59 percent reported spill-related cancellations. The same study found that visitor spending in the summer following the oil spill dropped by 35 percent in the most spill-affected regions and lost \$19 million in direct visitor spending statewide.

Despite the extensive cleanup attempts in Prince William Sound, less than 10 percent of the oil was recovered; and a study conducted by NOAA determined that, as of early 2007, more than 26,000 gallons of oil remained in the sandy soil of the contaminated shoreline, declining at a rate of less than 4 percent each year.

Both the long- and short-term effects of the oil spill have been studied extensively. Thousands of animals died immediately; the best estimates include 100,000 to as many as 250,000 seabirds, at least 2,800 sea otters, approximately 12 river otters, 300 harbor seals, 247 bald eagles, and 22 orcas, as well as the destruction of billions of salmon and herring eggs. The effects of the spill continued to be felt for many years afterwards. Overall reductions in population have been seen in various ocean animals, including stunted growth in pink salmon populations. Sea otters and ducks also showed higher death rates in following years, partially because they ingested prey from contaminated soil and from ingestion of oil residues on hair due to grooming.

Almost 20 years after the spill, a team of scientists at the University of North Carolina found that the effects are lasting far longer than expected. The team estimates some shoreline Arctic habitats may take up to 30 years to recover. While Exxon Mobil cites studies that conclude the spill will not cause any long-term ecological impacts, a study from NOAA scientists concluded that the contamination can produce chronic low-level exposure, discourage subsistence where the contamination is heavy, and decrease the wilderness character of the Prince William Sound area.

I recently spoke with Ron Peck, President and CEO of Alaska Travel Industry Association. He told me that, even though the Exxon Valdez spill impacted a relatively small part of the state, public perception was that the spill had affected the entire state. Moreover, the state had to run advertising for the next five years to combat negative public perceptions regarding the viability of an Alaska vacation, long after the spill clean-up had ended. Plus, he lamented that it took 17 years for resulting lawsuits to be settled through the courts. And, while fishing and other industries affected by the spill eventually received some compensation, tourism businesses ultimately received no

compensation whatsoever for their losses. Let me repeat that: tourism businesses received not one dime of compensation from Exxon for the Valdez disaster, which simply boggles the mind.

Environmental Disaster

The Deepwater Horizon oil spill is quickly becoming one of the biggest environmental disasters our country has ever faced. As I said before, its full impacts are still unclear and will likely remain so for decades to come. But it remains certain that the travel industry in Florida will suffer sharp declines if adequate steps are not taken immediately to stop the spread of oil to the coastline and mitigate the environmental damage already caused by the spill. Any decline – no matter how small – in travel to the Gulf Coast region of Florida will have significant economic impacts.

Early signs already indicate this very fact. The Florida Restaurant and Lodging Association estimates that occupancy rates along the Florida Panhandle beaches, between Pensacola and Panama City, already are down by 30 percent from 2009. In my area, a study we conducted last month indicated that 18 percent of potential visitors to Pinellas County said the Deepwater Horizon oil spill has impacted their vacation choices away from beach destinations that could be impacted by the spill.

And other Florida beach destinations are predicting similar impacts. Nicki Grossman, President of the Greater Fort Lauderdale Convention & Visitors Bureau, was recently quoted as saying that oil on area beaches could cost Broward County businesses up to \$15 million a day.

In the bigger picture, Nathaniel Karp, chief U.S. economist for the Birmingham-based BBVA Compass Bank, released a study in early May estimating the total economic impact of the Deepwater Horizon oil spill to be \$4.3 billion. He is working on new numbers and said the estimate will surely rise. He further explained that the impact will be huge on the Florida Panhandle, if the situation worsens because of its dependence on tourism. He said the region will suffer, and he was particularly concerned about long-term perception issues the area will face moving forward. And I quote: "Even if you manage to clean what your eyes can see in front of you, if people don't feel safe, it's going to be very difficult to bring them back."

Karp's estimates are mirrored by the Harte Research Institute for Gulf of Mexico Studies, which conducted an early analysis of the impact last month that put the annual damage at \$1.8 billion. The center is working on a new estimate now.

Compensation Funds

Clearly, compensation funds are needed to fight the spill and its long-term impacts. But, funds also are badly needed to mount marketing efforts now to mitigate potential business losses and in the future to attract travelers back to a region after a spill-affected property or natural resource has been restored.

Although the Oil Pollution Act of 1990 holds responsible parties liable for the loss of profits or earning potential, I've shared today that there are often intangible impacts of an oil spill that can be hard to measure or document. As in the case of the Exxon Valdez spill in Alaska, overly negative or inaccurate media coverage can lead to public misperceptions about the actual impacts of an oil spill. As a result, people may choose not to book travel to a destination they wrongly perceive to be threatened or impacted by an oil spill. Such losses of travelers and business are hard to accurately assess and document. Additional challenges to claiming economic damages under the Oil Pollution Act include lengthy processing times for claims and the per incident caps on economic damages.

It makes no sense, given the facts I have presented today, to place any cap on claim damages resulting from this or any other major oil spill. When we face such an uncertain yet undoubtedly staggering economic and environmental impact, why place a specific cap on damages? Who will cover these costs once that cap is reached for the responsible party? And what do we tell those who have suffered irreparable losses when claims reach that cap?

Put very simply, it's about fairness: if BP is unable to cap their well, then why should we be forced to put a cap on the damages they are responsible for paying? This is not a rhetorical question---it's a very serious, real world question whose answer will have far reaching consequences for years to come.

To wrap up my remarks this morning, I want to hit one last important point. Florida is home to some of our most unique and iconic environmental treasures. To place any cap on damages to protect and/or restore those national treasures is a travesty that we really don't want to write into the history that our grandchildren will one day read. I certainly do not want that on my shoulders, and I hope that none of you here today want to leave *that* as our legacy.

Visit St. Petersburg/Clearwater

U.S. Senate Committee on Environment and Public Works

Senator Barbara Boxer

The BP Deepwater Horizon spill in the Gulf of Mexico has been ongoing for weeks and could continue many weeks or even months more. Mr. Minich, in your testimony you highlight that impacts will continue well after the oil spill ends. Can you describe what impact the tourism industry would experience if economic and natural resource damages remain capped at \$75 million under the Oil Pollution Act?

- This is an environmental and economic disaster that is simply unprecedented in its scope, and our industry will undoubtedly feel the impact of this for years to come. Tourism is a \$6 billion a year industry in our county alone, so a \$75 million cap is simply unacceptable. Therefore, there should be no cap.



Visit St. Petersburg/Clearwater

U.S. Senate Committee on Environment and Public Works

Senator Thomas R. Carper

1. As you all know, under the Oil Pollution Act of 1990, Congress capped liability for damages for individual oil and gas companies at \$75 million, but spread liability across the entire oil and gas industry through the Oil Spill Liability Trust Fund. Under Senator Menendez's bill, he significantly raises the liability limits on the individual company. Can you each comment on what the implications might be if we significantly raised the liability across THE ENTIRE offshore oil and gas industry versus raising liability for just individual companies? Should we be looking at raising both?

- Since we now know that the exact same kind of accident occurred in the Gulf in 1979 and was treated with the same unsuccessful measures to try to stop the flow, the liability cap should be raised across the entire industry---particularly after last week's testimony from the heads of all the major oil companies showed that they all have the same "cookie cutter" emergency response plans BP is using.

2. Based on your experiences as business owners being negatively impacted by the oil spill in the Gulf of Mexico, do you think that the Economic Development Administration has the right tools and processes in place to deal with the economic damages claims that it has and will receive?

- I am not qualified to respond to this question and lack the knowledge to address this query.

3. How are you receiving information about the clean-up? How could communication be better?

- Our concern is not about communication regarding clean up---we have no oil on our shores, and we hope to remain that way. But the truth is that, in the realm of public opinion, that does not matter: the perception exists worldwide that the entire Gulf of Mexico is awash in oil, and our tourism industry is suffering because of that perception. So our concern about communication is that we communicate our "business as usual" status to potential visitors.

4. What might Congress do to ensure that economic damages claims are processed in a fair and timely manner and that those impacted receive proper compensation for their losses?

- The \$20 billion President Obama secured from BP for claims is a very good start, and it demonstrates a serious commitment to make things right on behalf of BP. Also, the experience that Kenneth Feinberg brings to the role of Claims Administrator is extensive. We hope for this process to continue in a proactive and professional manner until all claims have been addressed.



250 W. Coventry Court . Milwaukee, WI 53217 . 414.228.1990

Senator LAUTENBERG [presiding]. Thank you very much.
Mr. Frenette.

**STATEMENT OF MIKE FRENETTE, CAPTAIN,
VENICE CHARTER FISHING**

Mr. FRENETTE. As you can see, there will be some pictures that will be scrolling with my testimony here.

First of all, I would like to thank everyone on the Committee for the opportunity to express my comments relative to the modification of caps on liability in the Oil Pollution Act of 1990. We are all aware of BP's tragic accident that occurred April 20, 2010. At this time I would like to extend my sincere condolences to the 11 families who immediately saw the effects of these lost 11 lives. I think that is very important.

Twenty-nine years ago I pursued my dream, turning a passion into a business, and today I own a lodge located in Venice, which is in the heart of the Mississippi Delta, the area where the impact of this oil spill hit immediately and is affecting us until this day. It will continue to affect us.

The rich estuary feeds into the Gulf of Mexico and creates life for more than 400 marine and coastal fish in addition to wildlife species. The near-offshore waters of the Gulf as well as the intricate inshore waters incorporate a complex system of bays, bayous, canals, and marshland that are the breeding grounds for the majority of these species.

The delta is the spawning grounds for countless numbers of marine life, mammals, and birds. Included in this beautiful one of a kind estuary the ecosystem is brought to a full circle. It all begins in this estuary, starting from the plankton and the invertebrates, to the eggs and larva of numerous marine lives, to the delicious seafood that the entire country, as well as the rest of the world, enjoys. Yes, this estuary is home to 30 percent of the seafood that is cultivated for the United States and is the area where 70 percent of Louisiana seafood is cultivated.

This is the home for jumbo shrimp, oysters, blue crabs, and more fish than I have time to mention. Within this delta region thousands of commercial fishermen, charter fishermen and guides, recreational fishermen have a strong economic impact on Louisiana's economy.

Let's put this into perspective. The following industries which are directly impacted by this disaster contribute the following sums annually to the local economy: oyster industry, \$317 million; the shrimping industry, \$1.3 billion; blue crab industry, \$293 million; Louisiana's charter boat and guide industry, \$419 million; recreational fishing alone in Louisiana, over \$1 billion. And again the area that is affected the most was Plaquemines Parish, where I am from, where 70 percent of the seafood is cultivated and harvested.

At this point oil covers many miles of the estuary, and quite honestly a large part of it is dying daily as a result of the spill. Vegetation that was once green is now covered with oil, and more and more areas are dying as I speak. As the oil saturates the delta area it is saddening to see the devastation that I have personally observed. Oiled birds, oiled crabs, and dead fish floating in oil satu-

rated areas are sights that quite honestly have brought tears to my eyes.

This devastation is not a natural disaster. This disaster—and it truly is a disaster of great magnitude—was created by man, a disaster that I truly feel could have been avoided. Oil companies at this time have the opportunity to hide behind a veil of a \$75 million liability cap, a cap that obviously would not cover the economic losses that the hard working people of this beautiful part of the United States are currently experiencing and will continue to experience for quite some time.

I am sure that there will be arguments from the oil industry side as to how they will be affected if the \$75 million cap is lifted. But I ask: Should corporations that net billions of dollars annually be allowed to hide behind a protective veil of liability cap even while their actions devastate thousands of lives?

The possibility truly exists for many livelihoods to cease, livelihoods that have existed for generations, and now are on the brink of financial disaster because of poor decisions by a super-corporate entity that has created the worst oil spill in the history of the coast of Louisiana.

Profits in the oil industry can be tremendous, and of course I understand for super-corporate companies to make great profit they need to take a great financial risk as well. But the risk should be just that, financial. Why should our environment, our way of living, our livelihoods be included in those risks? Our industry as well as other industries that I have previously mentioned have come to a halt.

Fishing, both commercial as well as recreational, is shut down. Our estuary, or I should say your estuary, is under siege at this moment by chemicals that could have permanent devastating results not only to the fisheries but catastrophically to humans in the form of a collapse of a strong economic catalyst that drove not only Plaquemines Parish but unfortunately stretches across the Gulf and now in a rippling effect that covers the United States.

At a minimum BP or any other oil company that is deemed responsible for damages to wetlands, wildlife, and fisheries and for the economic damages to individuals and businesses should be held accountable for these damages. The wetlands, wildlife, and fisheries should be returned to their original condition or even better that existed prior to any spill.

It is impossible to clean these wetland areas, and BP should be held accountable for restoring the productivity, vibrancy, and reintroducing the water and sediments of the Mississippi River that can make these areas sustainable. Additionally, every human being or business that was affected as a result of the oil spill and governed under the OPA should be compensated for every current and further loss that is attributed to this accident.

Please do not allow my dream and that of many others, including my two sons, to vanish. BP, including Mr. Tony Hayward himself, has stated on many occasions that they will restore the wetlands, wildlife, and fisheries back to the original condition, in fact, if they can, even better than before, and they will make every individual or business who has been affected and experienced a loss as a result of this tragedy whole no matter what.

If Mr. Hayward stands by this statement, then I say to each and every one of you, it is time to lift the \$75 million liability cap and truly hold any company that recklessly creates such a disaster responsible for their actions.

Thank you.

[The prepared statement of Mr. Frenette follows:]

Testimony of Captain Michael A Frenette

Owner/Operator of the Redfish Lodge of Louisiana

www.venicefishing.net

Professional Tournament Angler/Guide

President: Venice Charter Boat and Guide Association

Board of Directors: Louisiana Charter Boat Association

President: CCA Chapter of Plaquemines Parish Louisiana

Before the

U.S. Senate Committee on Environment and Public Works Committee

Legislative hearing to consider S. 3305, Big Oil Bailout Prevention Liability Act of 2010

June 9, 2010

First of all, I would like to thank everyone on the committee for the opportunity to express my comments relative to the modification of caps on liability in the Oil Pollution Act of 1990.

We are all aware of BP's tragic accident that occurred April 20, 2010, specifically the explosion that occurred on the Deep Water Horizon drilling platform owned by Trans Ocean America, which was located approximately 50 miles from the mouth of the Mississippi River, south of Venice, Louisiana. That being said, I would like to extend my sincere condolences to the 11 families that were immediately affected as a result of that explosion which tragically took 11 men's lives.

Twenty-nine years ago I pursued my dream, turning a passion into a business and today I own a lodge, located in Venice, which caters to anglers from all over the world pursuing their dream of experiencing the best fishing that the United States has to offer.

Twenty-nine years ago Venice was virtually unknown, other than to the citizens of the surrounding New Orleans area. Venice is located in Plaquemines Parish, in the heart of the richest estuary that the United States has, an area called the "Mississippi Delta."

This rich estuary feeds into the Gulf of Mexico and creates life for more than 400 marine and coastal fish, in addition to wildlife species. The near off shore waters of the Gulf as well as the intricate inshore waters, incorporate a complex system of bays, bayous, canals, and marsh land that are the breeding grounds for the majority of these species.

The Delta is the spawning grounds for countless numbers of marine life, mammals, and birds. Included in this beautiful, one of a kind estuary, the ecosystem is brought to a full circle. It all begins in this estuary, starting from the plankton and the invertebrates, to the eggs and larva of numerous marine lives, to the delicious seafood that the entire country—as well as the rest of the world—enjoys.

Yes, this estuary is home to 30% of the seafood that is cultivated for the United States and is the area where 70% of Louisiana's seafood is harvested. This is home for the jumbo shrimp, oysters, blue crabs, and more fish than I have time to mention.

Within this delta region thousands of commercial fishermen, charter fishermen and guides, and recreational fisherman, have a strong economic impact on Louisiana's economy. Let's put this into perspective, the following industries which are DIRECTLY impacted by this disaster, contribute the following sums annually to the local economy:

- The Oyster industry, \$317 million (Louisiana supplies 70% of the oysters to the entire United States);
- The Shrimping industry, \$1.3 billion;
- The Blue crab industry, \$293 million;
- Louisiana's Charter Boat and Guide industry, \$419 million.

Venice's Charter Boat and Guide industry was the first to be impacted by this oil spill. Today virtually all waters inshore or offshore south of Venice are closed and will be closed for an indefinite period for all types of fishing. The severity of this is that Venice, Louisiana, has earned the right and is duly noted as the number one fishing destination in the continental United States. It is considered to be in the top five fishing destinations in the world. Over 400,000 anglers are licensed, creating a total economic impact to the state, just in saltwater fishing of over \$1 billion.

Also keep in mind that 70% of Louisiana's seafood harvest comes from Plaquemines Parish, the area that has been hit the hardest from the Deep Water Horizon oil spill, affecting again, what was the richest estuary that existed in the United States.

At this point, oil covers many miles of this estuary and quite honestly a large part of it is dying daily as a result of this spill. Vegetation that was once green, are now covered with oil and more and more areas are dying as I speak. As the oil saturates the Delta area, it is saddening to see the devastation that I have personally observed. Oiled birds, oiled crabs, and dead fish floating in oil saturated areas are sights that quite honestly have brought tears to my eyes.

This devastation is not a "natural" disaster, this disaster, and it truly is a disaster of great magnitudes, was created by man. A disaster that I truly feel could have been avoided.

Oil companies at this time have the opportunity to hide behind the "veil" of a \$75 million liability cap, a cap that obviously will not cover the economic losses that the hard working people of this beautiful part of the United States are currently experiencing and will continue to experience for quite some time. I am sure that there will be arguments from the oil industry side as to how they will be affected if the 75 million dollar cap is lifted. But I ask: should corporations that net billions of dollars annually be allowed to hide behind a protective "veil" of a liability cap, even while their actions devastate thousands of lives?

The possibility truly exists for many livelihoods to cease, livelihoods that have existed for generations and now are on the brink of financial disaster, because of poor decisions by a super corporate entity that has created the worst oil spill in history off the coast of Louisiana. Profits in the oil industry can be tremendous and of course I understand for super corporate companies to make great profits, they need to take great financial risks as well. But the risks should be just that, financial. Why shouldn't our environment, our way of living, our livelihoods, not be included in their risks?

Our industry, as well as the other industries that I have previously mentioned, have come to a halt. Fishing, both commercial as well as recreational is shut down, our estuary and I should say YOUR estuary is under siege at this moment by chemicals that could have permanent devastating results not only to the fisheries but catastrophically to humans, in the form of a collapse of a strong economical catalyst that drove not only Plaquemines Parish, but unfortunately stretched across the gulf coast, with a continuing ripple effect that covers the entire United States.

We are also concerned about the chemicals contained within the dispersant that BP is using, which has saturated our area of the gulf. It is now present in our estuary, as well, and by way of

currents. Large plumes of toxic contamination aimlessly drift off Louisiana's coast, further exemplifying the "state of emergency" that our Delta region is in.

Why should any super corporate oil company, or for that matter any oil company, be allowed to operate and not be responsible for their actions? Their actions are causing As a result of their actions, could cause again, total devastation to the environment as well as total economic loss to humans?

At a minimum, BP, or any other oil company, that is deemed responsible for damages to wetlands, wildlife and fisheries and for the economic damages to individuals and businesses, should be held accountable for these damages. The wetlands, wildlife and fisheries should be returned to their original condition, or even better than what existed prior to any spill. It is impossible to clean these wetland areas, and BP should be held accountable for restoring their productivity and vibrancy by re-introducing the water and sediment from the Mississippi River that can make these areas sustainable. Additionally, every human being or business that was affected as a result of the oil spill and governed under the OPA should be compensated for every current and further loss that is attributable to the accident.

Please do not allow my dream and that of many others, including my two sons to vanish.

BP, including Mr. Tony Hayward himself has stated on many occasions that they will restore the wetlands, wildlife and fisheries back to its original condition, in fact if they can, even better than before and they will make every individual or business that has been affected and experienced a loss as a result of this tragedy WHOLE, NO MATTER WHAT.

If Mr. Hayward stands by his own statements, then I say to each and every one of you, it's time to lift the 75 million dollar cap of liability and truly hold any company that recklessly creates such a disaster responsible for their actions.

Questions for Frenette

Questions from:

Senator Barbara Boxer

1. *Mr. Frenette, your testimony described the impact this oil spill could have on the people in Louisiana who depend on the Louisiana marshes and coastal waters for their livelihoods. Your heartfelt testimony explained the harsh reality that fisherman in the Gulf are already facing and could confront for many more years.*

What would happen to the livelihoods of all those that live on the coast if those responsible for this spill aren't held fully liable for the economic damages that it may cause?

Senator Boxer, if in fact the responsible party is not held fully liable for the economic damages that it has incurred on individuals or businesses that have been truly impacted by the oil spill, the results will in turn be catastrophic. It will be devastating to the fact that many will lose their homes, personal assets, and certainly their businesses including business assets would be lost. Take just a couple concerns that are directly impacting my life at this time; I only have 61 12 years to pay for my house that I bought as an investment for part of my retirement. This is a property that is worth over \$600,000.00 and one that I owe less than \$150,000.00 for. Certainly foreclosure would be devastating to my family. I am responsible for vehicles for my two sons, my wife as well as myself. Health insurance for my family, education for my two sons and I could go on and on but I think you understand. I have worked extremely hard over the years to develop my business, one that truly exemplifies "The American Dream" and truly I have a chance to lose all that I have worked for. My business as well as my life is at "ground zero" and I am losing it because a company and the individuals that work for this company (BP) made horrible decisions that created this disaster. This is not a "natural" disaster but it is "man made." Certainly you and I are responsible for our actions and without a doubt BP should as well. If BP does not step up and correct the financial devastation that they have brought to my area, then in turn you will see a rippling effect that will begin to affect many other businesses as well. Banks, mortgage companies, schools, grocery stores, insurance agencies, gas stations, as well as many more will shortly see delinquent accounts, which eventually are just going to create further economic damages to the entire Gulf Coast as well as the rest of the nation. This cannot be allowed to happen. I understand that the clean up efforts are imperative, but compensation to the victims (we truly are victims) whose livelihoods and way of life have been halted need to be addressed IMMEDIATELY! Our industry is completely shut down and quite honestly, especially in my area and our industry will probably be lost forever.

Questions from:

Senator Thomas R. Carper

1. As you all know, under the Oil Pollution Act of 1990, Congress capped liability for damages for individual oil and gas companies at \$75 million, but spread liability across the entire oil and gas industry through the Oil Spill Liability Trust Fund. Under Senator Menendez's bill, he significantly raises the liability limits on the individual company. Can you each comment on what the implications might be if we significantly raised the liability across THE ENTIRE offshore oil and gas industry versus raising liability for just individual companies? Should we be looking at raising both?

My answer would simply be stated: that if a company large or small cannot afford the potential risks involved with the undertaking of drilling in deep water, then affording permits for drilling should not be allowed to any company. I am not in favor of banning drilling as I understand how valuable it is not only to our entire country but to Louisiana as well. That being said, why should a company be able to enjoy the financial rewards of a great "find" in deep water exploration but not accept the responsibility for its actions. Simple, if you cannot afford the entire costs of doing business and part of that cost of business is being responsible for your actions, then you should not be allowed to conduct business.

2. Based on your experiences as business owners being negatively impacted by the oil spill in the Gulf of Mexico, do you think that the Economic Development Administration has the right tools and processes in place to deal with the economic damages claims that it has and will receive?

I would have to follow up the second question with a similar answer to number one. The responsible company for the disaster should be the party responsible for the economic losses. Why should the tax payers be responsible for the careless actions of any one, much less a super corporate company? I have very little knowledge of the Economic Development Administration and would have to search further to answer the part whether or not they have the right tools in place to handle the claims that exist as well as further claims.

3. How are you receiving information about the clean-up? How could communication be better?

I receive the information about the clean up on the news like I am sure most do. Unfortunately I am not sure we have a better source. Maybe a panel constructed of local, state and federal agencies, as well as individuals that are directly impacted by this disaster to review, critique and possibly help with suggestions that pertain to the clean up could be beneficial. It just does not seem like there is anyone that is in total control. Each area that is and will be impacted should have someone in command from that area that is not afraid to make decisions.

4. What might Congress do to ensure that economic damages claims are processed in a fair and timely manner and that those impacted receive proper compensation for their losses?

Good question. Personally I feel that our government needs to hold BP totally accountable. BP has already agreed that they will make everyone "whole." What they have not stated, is when they will do this. The government should issue some parameters as to when this will take place. Set up, what I would call a "tier" system. Start with the individuals and businesses that are impacted the most such as charter fisherman/guides and your commercial fisherman that are shut down completely and some have permanent losses. These should be addressed immediately as it is just as important as the clean up.

Then from there you address other industries that have some sort of economic loss. Depending on the percentage of loss, would dictate the time it needs to be paid by BP.

Senator BOXER. Thank you very much. And I might thank you for providing these photographs, and thank you for your heartfelt testimony.

Mr. R.J. Kopchak is a commercial fisherman for over 35 years in Prince William Sound.

Mr. Kopchak.

STATEMENT OF R. J. KOPCHAK, CORDOVA DISTRICT FISHERMEN UNITED AND PRINCE WILLIAM SOUND SCIENCE CENTER

Mr. KOPCHAK. Thank you, and again our hearts go out to those who lost their lives and to our fellow fishermen and their families and assorted businesses in the Gulf.

In 1989, when the *Exxon Valdez* ran aground, I was the Vice Mayor of Cordova. I organized the Cordova Oil Spill Response Center to coordinate immediate community-based response and also incorporated the Prince William Sound Science Center where I served as their President.

The Center is home for the Oil Spill Recovery Institute, which was created in OPA 90 to complement State and Federal efforts over the long timeline of oil spill recovery. I have served on the Public Advisory Committee of the Oil Spill Trustees and organized and chaired the Herring Recovery Planning Team in an effort to better understand why Pacific herring have yet to recover from the spill.

I was an owner and board member of the Copper River Fishermen's Cooperative, a small fisherman-owned processor. I am a board member of and active in the local fishermen's organization, Cordova District Fishermen United, and recently rejoined the Science Center as their Development Director.

My background offers unique perspectives, but I speak today on my own behalf and represent no organization.

I share with you a real life example of the potential impact to the Gulf fisheries from the long-term oil damage and what level of liability might arise from the loss of just one fishery to just one community if in fact we were to make fishermen whole.

Like the timing of the Gulf of Mexico spill, the *Exxon Valdez* spill coincided with the spring reproductive season. Like the shrimp in the Gulf, our herring were about to spawn. Herring eggs were laid on oiled beaches, and emerging herring larva drifted with the chemical soup that was a result of the spill, the dispersants and the recovery operations.

Studies following the oil spill revealed that fish eggs and developing embryos and larva could be damaged at exposures to oil as small as parts per billion, not in the parts per million as we previously thought prior to Valdez. Herring mortality skyrocketed over the next 4 years, resulting in the collapse of the herring population. Twenty-one years later, herrings are still listed as damaged and not recovering from the spill.

Once over 1,100 people directly participated in our herring fishery. Small and mid-sized family fishing vessels with between two and five crewmen harvested herring and herring egg-covered kelp for special markets in Japan. In addition to 500 herring harvest permit owners, who operated about 300 vessels, about 40 spotter

pilots and about 300 folks who picked kelp and harvest by hand participated in the fishery. Fish processors employed another 200 in shoreside jobs that depended on the herring fishery as much as the commercial fishermen.

The value of the herring permits that were owned in 1989 by commercial fishermen exceeded \$34 million. Today those permits are worth nothing, zero. Since 1994, the year litigation ended and the Exxon appeals began, herring fishermen have lost over \$166 million. No compensation for these losses, they were post-litigation.

In addition to what fishermen were not paid, the impact to the regional seasonal economy is estimated at over \$650 million. That is about a 4-time multiplier. They use 10-times multipliers in the Great Lakes region: wholesalers, retailers, packaging, shipping, local grocery stores, marine repair, restaurants and hotels, fuel distributors, longshoremen, to name a few. Lost fish tax revenue added another \$6 million of losses to my community, or if you added all of the lost fish tax, about \$18 million to all of the impacted communities.

My family is representative of those still being impacted. Our two herring permits have gone in value from \$145,000 to zero. Herring equipment once worth over \$50,000 is today of no value. As an average fisherman I wasn't a high-liner. We made about \$28,700 a year. If you count it up, over \$460,000 in lost revenues in the 16 years. If you add it all together, the equipment, the permit value, and the lost revenues, \$650,000 in lost revenues to my family.

In addition to herring we lost our fisherman-owned processing cooperative, the Copper River Fishermen's Co-op had 135 fishermen-owners and depended on the banks for financing. That is the money we needed each year to buy, process, market, and distribute our fishery products. With the interruptions in product availability, the banks withdrew their financing, and we lost our equity, over \$3 million.

Cordova used to wake up from the winter sleep in mid-March each year when the herring fishermen began to arrive to prepare for the season. It is now early May. A 6-month economic window is now only 4 and a half months long, and one of our major economic drivers is gone.

A \$75 million limit in liability is a disservice to the working class men and women most impacted by the careless and maybe perhaps criminal actions of one of the world's most profitable businesses.

One last comment. Limiting liability also affects restoration, recovery monitoring, and punitive damages. Courts could limit these awards to a percentage of liability, severely restricting the funds available for recovery and recovery monitoring.

And what about long-term liability? The herring fishermen have experienced 16 years of collapse; no compensation for those liabilities.

We encourage you to deal with this. Limiting liability in oil spills transfers economic impact from those responsible and most able to pay to those who are victimized; who have lost their way of life and perhaps their ability to make a living.

Thank you.

[The prepared statement of Mr. Kopchak follows:]

US Senate Committee on Environment and Public Works

Washington, DC

June 9, 2010 testimony (prepared June 6, 2010)

My name is RJ Kopchak, and for over 35 years I have commercially fished for Crab, Halibut, Salmon and Herring in Prince William Sound, the Copper River Delta and Northern Gulf of Alaska.

In 1989 when the Exxon Valdez ran aground I was Vice Mayor of Cordova. I organized the Cordova Oil Spill Response Center to coordinate immediate community based response, and incorporated the Prince William Sound Science Center, where I served as President. The center is home to the Oil Spill Recovery Institute, created in OPA 90 to complement state and federal efforts over the long timeline of spill recovery. I have served on the Public Advisory Committee for the Oil Spill Trustees, and organized and chaired the Herring Recovery Planning Team in an effort to better understand why Pacific Herring have yet to recover from the spill.

I am a board member of and active in our local fishermen's organization, Cordova District Fishermen United, and recently rejoined the Science Center as Development Director. My background provides me with a unique perspective on Oil Spill Liability, and I am speaking here today on my own behalf from my own perspective.

I share with you a real life example of the potential impacts to gulf fisheries from long term oil damage, and what level of liability might arise from the loss of just one fishery to one fishing community if in fact we were to make fishermen "whole".

Like the timing in the Gulf of Mexico, the Exxon Valdez spill coincided with the spring reproductive season. Like the shrimp in the Gulf, our Herring were about to spawn. Herring eggs were laid on oiled beaches, and emerging herring larva drifted with the chemical soup that was the result the spill, the dispersants, and the recovery operations. Studies following the oil spill revealed that fish eggs and developing embryos could be damaged at exposures to oil as small as parts per billion, not parts per million as was previously thought. Herring mortality skyrocketed over the next four years, resulting in the collapse of herring populations. Twenty-one years later herring are still listed as damaged and not recovering from the spill.

Once, over 1,100 people directly participated in the Herring fishery. Small and mid sized family fishing vessels, with between two and five crewmen harvested herring and herring egg covered kelp for special markets in Japan. In addition to 500 herring harvest permit owners operating over 300 vessels, about 40 spotter pilots, and 300 hand harvesters participated in the fishery. Fish processors employed another 200 or more. Other shore side jobs were as dependent on the herring fishery as the fishermen.

The value of Herring fishing permits in 1989 exceeded \$ 34 million. Today they are worth zero. Since 1994, the year litigation ended and the appeals began herring fishermen have lost over \$166 million. No compensation for these losses. In addition to what fishermen were not paid, impact to the regional seasonal economy is estimated at \$650 million - wholesalers, retailers, packaging, shipping, local grocery stores, marine repair, restaurants and hotels; fuel distributors and longshoremen to name a few. Lost fish tax revenue adds another \$6 million in losses, directly to the community.

My family is representative of those still being impacted. Our two herring permits have gone from a value of \$145,000 to zero. Herring equipment, once worth over \$50,000, is today of no value. As "average" fishermen our continuing losses accrue at about \$28,700 a year; over \$460,000 for 16 lost seasons and counting. To date, over \$650,000 in income, equipment and permit value forever lost.

In addition to Herring we lost our fishermen owned processing cooperative. The Copper River Fishermen's Co-Op had 135 fishermen owners, and depended on the banks for "pack financing", the money needed each year to buy, process, market and distribute products. With interruptions in product availability the banks withdrew financing after the spill, and lost equity exceeded \$3 million. Cordova used to "wake-up" from the winter in mid March each year, when the herring fishermen began to arrive to prepare for the season. Now it is early May. A six month economic "window" is now only 4 ½ months long, and one of the main economic drivers is absent.

A \$17 million limit in liability is a disservice to the working class men and women most impacted by the careless and perhaps criminal actions of one of the world's most profitable businesses

Limiting liability could affect restoration, recovery monitoring, and punitive damages. Courts could limit these awards to a percentage of "liability", severely restricting the funds available for recovery and recovery monitoring. What about the long term liability? The Prince William Sound Herring Fishery has experienced 16 years of collapse, and no compensation for these losses has been made.

Limiting liability in oil spills transfers economic impacts from those responsible and most able to pay for the tragedy to those who are victimized; who have lost their way of life, and perhaps their ability to make a living.

Robert (RJ) Kopchak

PO Box 1126
Cordova, Alaska 99574
503-961-3578
rikopchak@dwssc.org

The Facts about the Collapse of the Prince William Sound Herring Population

*by Richard E. Thorne (rthorne@pwssc.org) Senior Scientist
Prince William Sound Science Center – www.pwssc.org
Cordova, Alaska*

The 20th anniversary of the Exxon Valdez Oil Spill (EVOS) has again focused attention on the Prince William Sound (PWS) ecosystem and the legacy of the spill. There is increasing interest in the story behind the PWS herring population, since it is one of only two species listed as non-recovering. The official EVOS Trustee Council position is that the cause of the herring collapse is largely unknown. However, I strongly believe the facts show otherwise. After several scientific papers and numerous interviews, I think it is timely to spell out the facts on this subject so the public can be well informed about the link between the oil spill and the subsequent collapse of the PWS herring population.

It is well documented and widely accepted that the herring population was at a relatively high level in 1988, about 100,000 metric tons. During 1990-92, about 40,000 tons of herring were harvested. The population level for 1993 was forecast at 133,000 tons by the age-structured assessment (ASA) model used by management agencies. However, commercial fishers were unable to locate fishable concentrations of herring during spring 1993. Subsequent research, including surveys by the Prince William Sound Science Center during fall 1993, documented that the population had collapsed to around 20,000 tons. Indications of disease were found in the population. Lacking any other information, agencies concluded that the population had catastrophically collapsed between 1992 and 1993 as a result of a disease outbreak. The four-year interval from the EVOS appeared to remove the oil spill as a factor in this one-year collapse.

Nearly a decade later in 2002, my PWSSC colleague Gary Thomas and I began to write a paper documenting the assessment technology that we had initiated in fall 1993 and had applied annually since that time to monitor the herring population. As we developed the paper, including comparisons with other indications of herring abundance, we noted that one relatively obscure index of herring abundance showed excellent agreement with our 10-year data set. The index was an aerial survey of the extent of herring spawn (specifically milt) along beaches that had been conducted by the Alaska Department of Fish and Game every year since 1973. When we looked closer at the index, we noted that it began to decline in 1989 and declined consistently from 1989 to 1994, in contrast to the official description of the collapse, a one-year event between 1992 and 1993. Further, we noted that the aerial survey index and the estimates from the ASA model differed substantially only during 4 years over a nearly 30 year span. Those years were 1989, 1990, 1991 and 1992. The most likely explanation for a divergence is an undetected increase in the mortality of adult herring, which would cause the ASA model to overestimate the herring abundance.

We had not previously challenged the timing of the collapse, although we, like many others, found the coincidence of an oil spill and a subsequent herring collapse to be suspicious. Further, we were aware of a potential mechanism for damage to herring. In

1990, Gary Thomas and I had published a paper that described surfacing behavior by herring. At the time, the paper did not seem to apply to oil spill consequences in PWS, since the herring population collapse had not been detected. After the discovery of data indicating a 1989 initiation of the decline, we went back and examined this surfacing behavior in more detail. We discovered that several other scientists had subsequently described the behavior in more detail. It had become well documented that herring needed to come to the surface to replace air lost from their swim bladders, probably on a daily basis. One especially elegant experiment had blocked herring access to the surface, with the result that herring progressively lost air and subsequently sank to the bottom and died. We were aware from other data that the oil spill covered the surface of most of the typical adult herring distribution in PWS during March. Consequently, there were only two possibilities: either herring came to the surface and directly encountered toxic oil concentrations, or they were blocked from the surface by the oil, lost gas from their swim bladders, and eventually sank to the bottom and died. Even without the evidence that the herring population decline began in 1989, it is inconceivable that herring could have avoided serious damage from the oil spill under these circumstances.

In subsequent journal-published research we described other arguments that supported the linkage and timing with respect to the oil spill. These include the simultaneous decline in the numbers of Steller sea lions, a major predator on herring, in PWS during the winters of 1989-93 and the unlikely circumstance that 1.5 billion herring could have died from disease in one year without any observed corpses. The bottom line, in my opinion, is that the evidence is overwhelming that the Exxon Valdez Oil spill damaged the PWS herring and initiated a substantial decline in the population. Reasons for the lack of subsequent recovery are less apparent. It is very possible that the population, once damaged and reduced to less than 20% of their previous abundance, have been unable to escape the consequences of a still intensive predation by marine mammals, seabirds and other fishes.

Herring losses based on historic average value/Prince William Sound

Dollar values from the State of Alaska Commercial Fisheries Entry Commission website

VALUES THROUGH 2010 SeasonsInflation Adjustment Calculations: <http://www.westegg.com/inflation/infl.cgi>

Lost production based on a comparative analysis of Sitka Sound herring fisheries.

	Annual Ex Vessel Average value by harvest type	
WILD KELP HARVEST	\$232,000	Using \$ 1 = \$1 for 1980-1995
POUNDED Herring	\$2,100,000	
FOOD and Bait	\$244,000	
GILLNET	\$299,000	
SEINE	\$4,600,000	
Average value per year not inflation adjusted	\$7,475,000	
16 lost seasons	\$119,600,000	Adjusted 1995 \$ to 2009 \$ 166,738,706

Each individual permit holder lost the following revenues-by permit

	Inflation Adjusted
Adjusted for Inflation for 1995-2005	
Gillnet 24 permits	223,853
Seine 107 permits	772,472
Pounding 129 permits	292,511
Wild harvest 263 permits average	15,848
Food and Bait 10 average	438,435

HERRING PERMIT VALUES 1989	Total Value 1989
24 Gillnet (G34E) Permits \$ 92,600	\$ 2,222,400
107 Seine (G01E) Permits \$ 245,000	\$ 25,480,000
129 Pound (L 21E) Permits \$ 48,000	\$ 6,192,000
(263 average) Hand (L12E) Not Limited	
(10 average Food/Bait) Not Limited	

Total 1989 Herring Permit Value	\$ 33,894,400	2010 value: (0)
		Losses inflation adjusted
TOTAL permit and revenue losses to date:		\$200,633,106
\$171,200,000		

SOURCES: State of Alaska Data sites for herring fisheries below:

Query Permit Data by gear-type: Seine G01E Gillnet G34E Pound L21E Hand L12E

Historic Permit Values: <http://www.cfec.state.ak.us/pmtvalue/mnuherr.htm>Herring Ex-Vessel Values and Production: <http://www.cfec.state.ak.us/quartile/mnuherr.htm>Inflation Adjustment Calculations: <http://www.westegg.com/inflation/infl.cgi>

The above table prepared by: Rj Kopchak, Cordova, Alaska, 907-424-7178

Robert (RJ) Kopchak
PO Box 1126
Cordova, Alaska 99574

Committee Response
RJ Kopchak
Po box 1126
Cordova, Alaska 99574

Senator Barbara Boxer

1. Mr. Kopchak, the Oil Pollution Act of 1990, which was enacted in response to the Exxon Valdez spill, limits liability for economic and natural resource damages to only \$75 million.

Given your experience with the damages caused by the Exxon Valdez spill, what impact do you believe this liability limit would have on the livelihoods of those in the Gulf of Mexico that depend on the oceans and the coasts? How will it impact their ability to fully recover from this spill?

RJ Kopchak responds: *Liability limits need to reflect the potential cost of impacts. These change dramatically across geographic regions. Looking at the long timeline of potential impacts from oil spills, and the potential costs to not only fishing, but other businesses, would argue for what would amount to limitless liability. Limitless liability is what commercial fishermen face for their operations.*

The difficulty comes in structuring the requirements for compliance. If an operator wants to work in a fragile area where potential liability is significant, capacity to meet the potential costs needs to be established. Perhaps this is through shared liability from industry operations in the area. The bottom line is that those responsible for damages need to pay all of the bills. This might be for decades if resources do not recover.

Senator Thomas R. Carper

1. As you all know, under the Oil Pollution Act of 1990, Congress capped liability for damages for individual oil and gas companies at \$75 million, but spread liability across the entire oil and gas industry through the Oil Spill Liability Trust Fund. Under Senator Menendez's bill, he significantly raises the liability limits on the individual company. Can you each comment on what the implications might be if we significantly raised the liability across THE ENTIRE offshore oil and gas industry versus raising liability for just individual companies? Should we be looking at raising both?

RJ Kopchak Response: *There needs to be a mechanism that ties industry together when damages from oil spills and gas development are at high levels. Individual oil companies need to meet high liability limits. The oil and gas industry in general needs to be the additional deep pocket. There should significant shared liability within the industry before the oil spill liability fund is brought into play. If not, the bean counters will figure when the risks are met by the fund, and operations will cut corners on safety because there will be no direct cost to operations.*

Senator BOXER. Thank you very much.

Mr. Kenneth Murchison, Professor of Law at the Paul Hebert Law Center, Louisiana State University.

STATEMENT OF KENNETH M. MURCHISON, PROFESSOR, PAUL M. HEBERT LAW CENTER, LOUISIANA STATE UNIVERSITY

Mr. MURCHISON. Chairman Boxer, Ranking Member Inhofe, members of the Committee, thank you for inviting me to appear before you today. As the Chairman indicated, my name is Ken Murchison. I am the James E. and Betty M. Phillips Professor at the Paul M. Hebert Law Center of Louisiana State University.

The views I express today are my personal opinions. They do not necessarily represent the views of the Law Center, the University, or the State.

I have been a member of the faculty at the Law Center since 1977, and I have regularly taught environmental law since the early 1980s.

My written statement briefly describes the liability provisions of the Oil Pollution Act. I will not repeat that summary except to note that the Oil Pollution Act creates strict liability subject to very narrow defenses for removal costs and damages, which includes damages to natural resources and property, as well as most economic losses suffered by individuals, businesses and government. The \$75 million cap that S. 3305 proposes to raise applies only to damages under the Oil Pollution Act when the damages result from a spill from an offshore facility.

S. 3305, as you know, changes the limitation of this liability damages by increasing that amount for which a responsible party can be held liable from \$75 million to \$10 billion. In my judgment, both economics and morality support the proposed change.

The economic case for increasing or eliminating caps on liability is relatively straightforward. Immunizing a commercial actor from bearing all the economic costs associated with its operation has the effect of under-deterrence. That is, the actor will engage in conduct that would not be profitable if the actor bore the full economic cost or would forego safety or environmental controls that would be cheaper than paying the costs the actor is avoiding.

The question of immunizing economic actors from full liability also has a moral dimension. If a disaster occurs the amount of damages that individuals and property owners suffer does not decline because an actor is not required to pay the full cost associated with the economic activity.

Instead some people suffering the injury are not compensated at all, or each person suffering injury recovers only a portion of the damage. In either event individuals with no connection to the economic activity suffer injury and are forced to bear the costs of the loss. The cap is, in effect, a contingent tax on a group not directly involved with the economic activity.

A basic principle of justice suggests that it is fair to make the party who experiences economic gain of the activity bear the loss, rather than the innocent bystander. This principle of fairness seems to be particularly applicable to the present spill in the Gulf of Mexico, where many thousands of innocent property owners and

businesses have suffered losses that threaten their livelihood and financial well being.

Some have expressed concern that eliminating the limits on liability will preclude smaller companies from drilling operations and lead to further domination of drilling activities by a small group of major companies. But even if one assumes the domination of drilling activities by major companies could increase because of the liability risk associated with unlimited damages, a damages cap is a particularly inappropriate way of responding to that market imperfection when other fairer methods of spreading the risk are available.

Obviously, smaller companies could establish contractual arrangements that would share the risk. If those private arrangements are inadequate, the Government could create mandatory pooling arrangements to which all participants in drilling activities contribute in proportion to their involvement in drilling activities.

Some others who oppose responding to the Gulf tragedy with an initial focus on the damage cap argue the cap is a minor aspect of the problem revealed by the Gulf release. In making this argument they emphasize the several reasons that BP's liability for the Gulf bill will greatly exceed \$75 million. These opponents of the statutory change in the liability cap are correct that the \$75 million limit is not an absolute cap on all liability for releases in the Gulf of Mexico. I think they underestimate the impact of the cap, and so I support the change proposed in S. 3305.

My comments to this point reflect my views as an environmental law professor whose career is nearer its end than its beginning, but I am also a citizen of Louisiana with deep roots in the State. I think I am like most Louisianans in my reaction to the catastrophe unfolding in the Gulf. We are dismayed by the horrific damages to one of the richest ecosystems, but we are not primarily concerned with fixing blame, and we are emphatically not looking for a hand-out.

We are interested in seeing fair compensation for the tremendous loss we have suffered and seeing meaningful reforms that will lessen the likelihood of a similar disaster and provide an improved response when the next oil spill occurs.

Thank you for the opportunity to appear today. If you have any questions regarding the matter, I will certainly be happy to try to answer.

[The prepared statement of Mr. Murchison follows:]

Statement of Kenneth M. Murchison

James E. and Betty M. Phillips Professor
Paul M. Hebert Law Center
Louisiana State University

on

S. 3305

before the

Senate Environment and Public Works Committee

June 9, 2010

I. Introduction

Chairman Boxer, Ranking Member Inhofe, members of the committee, thank you for inviting me to appear before you today. My name is Ken Murchison, and I am the James E. and Betty M. Phillips Professor at the Paul M. Hebert Law Center of Louisiana State University. The views I express today are my personal opinions; they do not necessarily represent the views of the law center, the university, or the state of Louisiana.

I have been a member of the faculty at the law center since 1977, and I have regularly taught environmental law since the early 1980s. I have been a visiting professor at the University of Richmond, the United States Military Academy, and the University of Alabama; I also spent a year as the Natural Resources Law Fellow at the law school at Lewis and Clark College. Before I entered the legal academy, I was first introduced to environmental law as a Judge Advocate in the United States Air Force; and I continued to work on environmental issues as a reserve Judge Advocate until I retired as a Colonel in 2001. I have written extensively on a variety of environmental law topics including the Clean Water Act.

The catastrophic consequences of the oil release that began on April 20 in the Gulf of Mexico have prompted all those interested in environmental protection to reconsider the legal regimes that govern deep-water oil operations. One of the most important of those regimes is the Oil Pollution Act of 1990, which was enacted following the Exxon Valdez oil spill in Alaska in 1989. Given the differing nature of the Alaska spill in 1989 and the continuing release in the Gulf of Mexico, it is appropriate for the Congress to reconsider whether existing law provides a satisfactory framework for the contemporary risks from offshore drilling activity. One important

aspect of the liability scheme of the Oil Pollution Act is a provision that limits liability for certain damages to \$75 million. S. 3305 would raise that limit to \$10 billion.

II. Brief Description of Oil Pollution Act Liability Provisions

Title I of the Oil Pollution Act (OPA), 33 U.S.C. §§ 2701-20, establishes a liability scheme for oil spills. When oil is discharged from a vessel or facility into the navigable waters of the United States, adjacent shorelines, or the exclusive economic zone, each “responsible party” is liable for “removal costs” and “damages.” OPA § 102(a), 33 U.S.C. § 2702(a). Removal costs are broadly defined to include actions that are “necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.” OPA § 1001(30), 33 U.S.C. § 2701(30). The damages recoverable under the statute are:

- Injury to, destruction of, loss of, or loss of use of natural resources.
- Injury to, or economic losses from, destruction of property.
- Loss of subsistence use of natural resources.
- Net loss of taxes and other revenue from injury or loss of property.
- Loss of profits from damage to property or natural resources.
- Net costs of governments providing increased or additional public services.

The Fifth Circuit has ruled that this specific enumeration of damages precludes the award of punitive damages under the Oil Pollution Act. *South Port Marine, LLC v. Gulf Oil Limited Partnership*, 234 F.3d 58 (1st Cir. 2000).

Modeled on Section 311 of the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act, the Oil Pollution Act explicitly adopts the standard of liability of Section 311. OPA § 101(17), 33 U.S.C. § 2701(30). As with those statutes, liability under the Oil Pollution Act is strict and responsible parties can be jointly and severally liable subject to very narrow defenses. OPA § 103, 33 U.S.C. § 2703.

The Oil Pollution Act differs from the Section 311 of the Clean Water Act and the Comprehensive Environmental Response, Liability, and Compensation Act because it imposes caps on some damages that can be recovered under the statute. For an offshore facility (other than a deepwater port), the liability limit is “the total of all removal costs plus \$75,000, 000.” OPA § 1004(a), 33 U.S.C. § 2704(a). However, the limit on liability for damages does not apply

- When the incident was “proximately caused by” the “gross negligence or willful misconduct of, “ or “the violation of an Federal applicable safety, construction, or operation regulation” by the responsible party or
- When the responsible party fails to report the incident, to provide reasonable cooperation and assistance, or – without sufficient cause – to comply with a cleanup order.

OPA § 1004(c), 33 U.S.C. § 2704(c).

The Oil Pollution Act does not provide an exclusive basis for awarding damages for an oil spill. Section 1018, 33 U.S.C. § 2718, preserves the power of states and local governments to impose greater liability for “the discharge of oil or other pollution by oil within such State” or for “any removal activities in connection with such a discharge.” In addition, Section 6001, 33

U.S.C. § 2751, provides that the Act does not affect admiralty and maritime law “[e]xcept as otherwise provided.”

III. S. 3305

S. 3305 changes the limitation of liability for damages in Section 1004(a)(3) of the Oil Pollution Act, 33 U.S.C. § 2704(a)(3), by increasing the amount for which a responsible party can be held liable from \$75 million to \$10 billion. It also makes the new limit effective on April 15, 2010, a date that would make it applicable to the ongoing release of oil in the Gulf of Mexico. Increasing the damages for which a responsible party is liable should encourage responsible parties to exercise greater care in offshore drilling activities; eliminating the cap altogether would encourage even greater care. Increasing or eliminating the cap would also reduce or eliminate the unfairness of imposing the burden of the uncovered damages on innocent victims of an oil spill or on the general taxpayers.

The economic case for increasing or eliminating caps on liability is relatively straightforward. Immunizing an economic actor from bearing all the economic costs associated with its operations has the effect of under deterrence. That is, the actor will engage in conduct that would not be profitable if the actor bore the full economic costs or will forego safety or environmental controls that would be cheaper than paying the costs that the actor is avoiding. Given the possibilities of huge economic gains, the cap in the Oil Pollution Act probably does not induce drilling that would be unprofitable without the cap on liability; the drilling would almost certainly occur with or without the cap on liability for damages. The protection from

economic loss may, however, have the unconscious effect of discouraging some additional safety and environmental protections.

A cap as low as \$75 million seems particularly inappropriate in the case of offshore oil facilities. The capital costs involved in those operations and the large potential for gain make the current cap a relatively minor aspect of the overall cost of operation even if the cap is adjusted to reflect changes in the consumer price index. (Section 1004(d)(4) of the Oil Pollution Act requires such revisions every three years, but I was away from my office while preparing these remarks and was unable to check to see whether the Department of the Interior had actually made those revisions for offshore facilities.)

The question of immunizing economic actors from full liability also has a moral dimension. If a disaster occurs, the amount of damages that individuals and property owners suffer does not decline because an actor is not required to pay the full costs associated with its economic activity. Instead, some persons suffering injury are not compensated at all or each person suffering injury recovers only a portion of the damage. In either event, individuals with no connection to the economic activity suffer injury and are forced to bear the cost of the loss. The cap is, in effect, a contingent tax on a group not directly involved with the economic activity. Alternatively, of course, the government could compensate those whose losses were not covered, but that approach would amount to taxpayers providing a subsidy to the economic activity that was shielded from complete liability.

A basic principle of justice suggests that it is fairer to make the party who experiences the economic gain of the activity bear the loss rather than the innocent bystander. This principle of fairness seems to be particularly applicable to the present spill in the Gulf of Mexico. Many

thousands of innocent property owners and business have suffered losses that threaten their livelihoods and financial well being. It is unjust to require them to subsidize an oil company that is still likely to reap huge profits from the oil field as the affected states and the people in them struggle economically and environmentally. Avoiding this injustice by governmental payments to individuals who have been harmed dilutes the unfairness by transferring the cost to all taxpayers, but it does not change the general proposition that persons not directly benefitting from the economic activity are being required to bear the cost of the damages rather than the economic actor.

At least two objections have been raised against the effort to eliminate the Oil Pollution Act's limit on liability for offshore facilities. On the one hand, some have expressed concern that eliminating the limits on liability will preclude smaller companies from drilling operations and lead to further domination of drilling activities by the small group of major oil companies. Others contend that the cap on damages under the Oil Pollution Act is a minor problem that should not be the focus of legislative response to the problems revealed by the Gulf catastrophe. Neither objection changes my view that S. 3305 is a desirable change to the Oil Pollution Act.

Initially, one might question the empirical premise that the cap on damages has allowed smaller companies to bid on projects on which they could not have bid if the cap had not been in place. Given the huge capital and operating costs involved in offshore drilling, intuition suggests that the cap on damages is a relatively small factor in the decision to bid on leases and to engage in exploratory drilling. Only the companies have the information that would support the premise that the damages cap is crucial, and they should be required to provide that information before the premise is accepted.

Even assuming that domination of drilling activity by major companies could increase because of the liability risks associated with unlimited damages, a damages cap is a particularly inappropriate means of responding to that market imperfection. As explained above, that approach amounts to a hidden tax on innocent victims of the drilling activity; and other fairer methods of spreading the risk are available. Obviously, smaller companies could establish contractual arrangements that would share the risks that were greater than they could bear individually. If those private arrangements are inadequate, the government could create mandatory pooling arrangements to which all participants in drilling activities contributed in proportion to their involvement in drilling activities. Such governmental approaches are preferable on both economic and moral grounds. If the industry as a whole has to bear risks, it will support stronger safety and environmental controls to minimize those risks. If losses do occur, they will be shared among those who benefit from the economic activity.

Others who oppose responding to the Gulf tragedy with an initial focus on the damages cap in the Oil Pollution Act argue that the cap is a minor aspect of the problems revealed by the Gulf release. In making this argument, they emphasize the several reasons that BP's liability for the Gulf spill will greatly exceed \$75 million. First, the cap only applies to "damages," not "removal costs;" and – as noted above – the Oil Pollution Act broadly defines removal costs. Second, the Oil Pollution Act does not apply at all if the company was guilty of gross negligence of the violation of a safety, construction, or operating regulation. Third, the cap only applies to damages awarded under the Oil Pollution Act, not those imposed under state law or admiralty or maritime law.

These opponents of a statutory change in the liability cap for offshore facilities are correct that the \$75 million limit is not an absolute cap on all liability for the release in the Gulf of Mexico. I believe, however, they underestimate the impact of the cap, and so I support the change proposed in S. 3305 or a complete abolition of the cap. Some victims of the release in the Gulf may avoid the cap after years of litigation regarding the definition of removal actions under the Oil Pollution Act, the applicability of the exceptions to the cap, and the reach of the savings clauses with respect to state law claims and admiralty claims. But I believe the basic idea of the Oil Pollution Act is the principle that federal law should provide a relatively prompt and certain remedy for damages to natural resources and property as well as the economic losses that individuals and governments experience as a result of oil spills.

The question of full recovery is particularly important with respect the current Gulf spill. Coastal lands and marshes have already been extensively damaged in Louisiana, and their recovery will take at least a generation. Even if individuals and property receive compensation for their direct losses, failure to restore those areas will eliminate the livelihoods – indeed, the entire way of life – for thousands of Louisiana citizens. Such a result would be equivalent to making a huge part of the state an economic and ecological dead zone. Louisiana is a small state, but it deserves fair treatment. Imagine the outcry if a similar fate threatened San Francisco Harbor, Martha's Vineyard, or the Chesapeake Bay. Reducing or eliminating the cap on damages will be a major step toward beginning the process of remediation and restoration.

IV. Additional Needed Reforms

For the reasons described above, I think I would be remiss if I did not emphasize that raising the cap on damages in the Oil Pollution Act is not a silver bullet that solves either the present crisis in the Gulf or prevents future disasters. After the Exxon Valdez spill, Congress made sweeping prospective changes regarding oil spills from tankers. The Gulf release has now demonstrated that the proper question for spills from offshore facilities is when they will occur rather than if they will occur. Thus, Congress should also consider additional reforms to reduce the risk from, and to mitigate the effects of, those spills. One might appropriately consider a variety of additional changes in the Oil Pollution Act and other federal statutes.

Desirable additional changes in the Oil Pollution Act include other provisions relating to compensation. With respect to compensation, the most obvious candidates are the other damage caps found in Section 1004, 33 U.S.C. § 2714; the economic and moral arguments applicable to the cap on offshore facilities also applies to these provisions. In addition, the savings provision for state law, OPA § 1018, 33 U.S.C. § 2718, should be amended to apply explicitly to all damage from oil pollution that occurs within the state; and Congress should consider expanding the availability of punitive damages under federal law, either by providing for them in the Oil Pollution Act or by expanding the narrow punitive damages allowed by the United States Supreme Court in *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605 (2008).

Not surprisingly, the provisions on prevention adopted by the Oil Pollution Act in response to the Exxon Valdez spill focused on improving tanker safety. A similar set of prevention requirements should be adopted for offshore facilities. At a minimum, further

environmental analysis (at least an environmental impact statement) should be required for all offshore wells now that we know what serious environmental harm is possible. Equally important, the statute should contain explicit requirements for stronger contingency plans for serious oil spills, so that initial containment of a future release will not be delayed for weeks. Congress should also give serious attention to a funding mechanism for ongoing research into remediation of oil pollution. By necessity, we are likely to learn a great deal about cleaning oil pollution from coastlines and marshes over the next twenty to thirty years. How much better it would be if we had begun that research in the 1990s.

Although I recognize that amendments to other statutes will often be beyond the jurisdiction of this committee, I would encourage committee members to support additional changes to other federal statutes when they are proposed to Congress. Chief of these reforms has to be radical changes in the Minerals Management Service. The nation has a right to expect that the regulatory agency governing oil development will protect the public interest in safety and environmental protection, and the Minerals Management Service has failed to provide that protection. Additional desirable statutory changes include amending the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1367, to make clear that citizen suits may be brought to redress oil spills and leaks and to eliminate the Outer Continental Shelf Lands Act provision that establishes a 30-day limit to complete the environmental review and act upon applications for permits to explore for undersea oil and gas reserves. *See* 43 U.S.C. § 1340. Finally, state like Louisiana that have assumed the risk (and now the reality) of environmental damages from offshore drilling operations should receive a fairer share of the royalties that those operations produce.

IV. Conclusion

This brief statement has tried to outline the liability provisions of the Oil Pollution Act and to describe the effect of S. 3305 and to describe the economic and moral arguments in favor of increasing or eliminating caps on liability. It also explains why I reject the two principal arguments against the proposed legislation. At the same time, I have tried to caution the committee against assuming that this legislation alone will solve or prevent the repetition of the current catastrophe in the Gulf of Mexico. Further revisions of the Oil Pollution Act as well as other statutes are also necessary, and I hope the Senate will pursue as many of them as possible.

My comments to this point reflect my views as a law professor whose career in environmental law is nearer to its end than its beginning. But I am also a citizen of Louisiana with deep roots in the state. I was born in Louisiana, and I have physically resided in the state for more than fifty of my sixty-three years. I think I am like most Louisianans in my reaction to the catastrophe unfolding in the Gulf of Mexico. We are dismayed by the horrific damages to one of the richest ecosystems in the world, but we are not primarily concerned with fixing blame and we are emphatically not looking for a handout. We are interested, however, in receiving fair compensation for the tremendous losses we have suffered, in seeing meaningful reforms that will lessen the likelihood of a similar disaster and provide an improved response when the next oil spill occurs, and in ensuring that we receive a fair share of the revenues generated by the environmental risks that we have taken on behalf of the nation. I support S. 3305 because it is a small step in the direction of fair compensation, but it must not be the total legislative response to disaster we have experienced.

Thank you for the opportunity to appear today. If you have any questions regarding any of the matters I have addressed, I will be happy to try to answer them.

Questions for Murchison

Questions from:

Senator Barbara Boxer

1. Mr. Murchison, your testimony states that "increasing the damages for which a responsible party is liable [under the Oil Pollution Act] should encourage responsible parties to exercise greater care in offshore drilling activities."

Could you please go into that concept in a little greater detail and describe what benefits for safety could be gained by lifting the liability limits?

A basic assumption of economics is the premise that economic actors are rational; that is, they will act in their own self interest. (This assumption is particularly powerful for corporations, which – as Senator Whitehouse pointed in one of his questions at the hearing – are created for the purpose of advancing the economic interests of their shareholders.) A rational actor will compare the benefits of a proposed action to the potential costs of the action and will undertake those actions in which the benefits exceed the costs. If the actor is immunized from some of the costs of the action, the actor will proceed if the benefits exceed the costs it is asked to bear. In the case of offshore drilling, capping the cost of damages will encourage companies to forego expensive procedures to promote safety and to protect the environment when those procedures would reduce the overall profitability of the operation. This danger seems particularly great in a high-risk activity like oil exploration where companies routinely take large risks in hopes of large rewards.

Recent news reports confirm that this danger is not merely theoretical or hypothetical. BP emails and other documents indicate that the company frequently neglected safety and environmental procedures because they were costly in terms of time or money. The result was to take the increased risks that lead to the catastrophe in the Gulf. Placing the total cost of the risks on the company would discourage those drilling in the future from taking similar risks.

Senator Thomas R. Carper

1. As you all know, under the Oil Pollution Act of 1990, Congress capped liability for damages for individual oil and gas companies at \$75 million, but spread liability across the entire oil and gas industry through the Oil Spill Liability Trust Fund. Under Senator Menendez's bill, he significantly raises the liability limits on the individual company.

Can you each comment on what the implications might be if we significantly raised the liability across THE ENTIRE offshore oil and gas industry versus raising liability for just individual companies? Should we be looking at raising both?

I believe the appropriate starting point for reforming the liability provisions of the Oil Pollution Act is the one taken in S. 3305, to eliminate the cap on economic damages for the person responsible for the spill. As I explained in my original statement and my response to the question from Senator Boxer, that approach places the economic incentive to optimize safety where it should be – on the person engaging in the drilling activity. In addition, it avoids the morally indefensible position that innocent victims should subsidize the drilling activity by denying them the ability to recover their damages from the responsible party.

Once the basic liability issue is settled, one can make a strong argument that the Oil Pollution Act could require the entire industry to fund a system that will insure adequate funds exist to pay for any damages that occur. Imposing backup liability on the entire industry should prompt the industry to support regulatory standards that emphasize safety and environmental protection and thus minimize the risk of another catastrophe.

2. As an expert in environmental law, can you please elaborate on some of the other aspects of the offshore oil and gas industry beyond liability that you think need reforming in the wake of this terrible accident?

As I noted in my original statement, raising the cap on damages in the Oil Pollution Act is not a silver bullet that solves either the present crisis in the Gulf or prevents future disasters. Congress should also consider additional reforms to the Oil Pollution Act and other environmental statutes.

One can identify a number of desirable additional changes in the Oil Pollution Act. These changes include provisions relating to compensation as well as those designed to minimize the risk of future accidents and to mitigate the effects of future spills.

With respect to compensation, my answer to your previous question indicated the desirability of requiring the industry to fund a system to insure adequate funds will be available to pay for spill damages. The elimination of the cap on economic damages would provide scant comfort to an injured person or property owner if the responsible party lacked the resources to pay the damages; a more robust liability fund could preclude this tragedy from happening.

Equally important, Congress should amend the claims procedure provided in Section in Section 1013 of the Oil Pollution Act, 33 U.S.C. § 2713. The absence of a clearly delineated system for immediate payment of interim claims has placed many individuals and small business in extreme financial difficulty. Indeed, for interim claims, Congress should give consideration to

having them paid initially from an adequately funded trust fund rather than forcing the victim to wait until the responsible party has established an adequate claims procedure.

My original statement suggested other needed changes with respect to compensation, and I would reiterate them at this point. Congress should also reconsider the other damage caps found in Section 1004 of the Oil Pollution Act., 33 U.S.C. § 2714. The same economic and moral arguments applicable to the cap on offshore facilities apply to these provisions as well. In addition, the savings provision for state law, OPA § 1018, 33 U.S.C. § 2718, should be expanded to apply explicitly to all damage from oil pollution that occurs within the state regardless of where the discharge occurs. Finally, Congress should consider expanding the availability of punitive damages under federal law, either by providing for them in the Oil Pollution Act or by expanding the narrow definition of maritime punitive damages that the United States Supreme Court adopted in *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605 (2008).

As explained in my original statement, the prevention and mitigation provisions included in the Oil Pollution Act in response to the Exxon Valdez spill understandably focused on improving tanker safety. Now Congress should adopt a similar set of requirements for offshore facilities. At a minimum, further environmental analysis (at least an environmental impact statement) should be required for all offshore wells now that we know what serious environmental harm is possible. Equally important, the statute should contain explicit requirements for stronger contingency plans for serious oil spills, so that initial containment and remediation of a future release will not be delayed for weeks. Congress should also give serious attention to a funding mechanism for ongoing research into remediation of oil pollution. By necessity, we are likely to learn a great deal about cleaning oil pollution from coastlines and marshes over the next twenty to thirty years. How much better it would be if we had begun that research in the 1990s. Finally, Congress should add a citizen suit provision to the Oil Pollution Act to make certain that government bureaucrats do not ignore their new statutory responsibilities.

Further reforms would require changes to other federal statutes. The most obvious need is a radical change in, or elimination of, the Minerals Management Service. The nation has a right to expect that the regulatory agency governing oil development will protect the public interest in safety and environmental protection, and the Minerals Management Service has completely failed to provide that protection. It allowed drilling to proceed without environmental analysis, accepted inadequate remediation plans without question, and ignored its statutory duty to revise the damages cap every three years.

Additional desirable statutory changes include eliminating the Outer Continental Shelf Lands Act provision that establishes a 30-day limit to complete the environmental review and act upon applications for permits to explore for undersea oil and gas reserves. *See* 43 U.S.C. § 1340. Finally, states like Louisiana that have assumed the risk (and now the reality) of environmental damages from offshore drilling operations should receive a fairer share of the royalties that those operations produce.

Of course, each of these additional reforms will prompt disagreement and debate in Congress. Implementation of any substantial number of them will require many months of negotiation. By contrast, S. 3305 simply tries to insure that the ultimate costs of offshore spills fall on the responsible parties, not innocent victims. Congress should not, therefore, delay passage of S. 3305 until it reaches agreement on these other issues.

Senator Sheldon Whitehouse

During the hearing, we discussed briefly that at least one district court has held, whether correctly decided or not, that the bar on economic damages in federal maritime law trumped state law. We then discussed whether this case demonstrated a risk of assuming that businesses along the Gulf Coast will recover economic damages above the Oil Pollution Act's \$75 million cap. The case I mentioned (*In re Ballard Shipping Co.*) was reversed by the First Circuit. However, I am concerned, given the basis for the First Circuit's decision, that risk of nonrecovery remains. The First Circuit began its analysis with the three prong test in the Supreme Court case *Southern Pacific Co. v. Jensen*: that state legislation affecting maritime commerce is invalid "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." The Court then commented that "[w]here substantive law is involved, we think that the Supreme Court's past decisions yield no single, comprehensive test as to where harmony is required and when uniformity must be maintained. Rather, the decisions however couched reflect a balancing of the state and federal interests in any given case."

1. There does not appear, then, to be a bright line rule in Supreme Court jurisprudence, where a state law related to maritime law would not be considered preempted by federal maritime law. Given the lack of a bright line, is it fair to say that some risk remains in litigants seeking damages under a state law that are not allowed to be recovered under federal maritime law?

I generally agree with your analysis of the current law. The First Circuit approach in *Ballard* is a good one, but I am less than completely confident that the current Supreme Court would embrace it. Moreover, resolution of the issue is likely to take many years. The Supreme Court did not resolve the punitive damages issues in the Alaska oil spill until nineteen years after the spill occurred. If injured individuals and businesses in Louisiana and other Gulf Coast states were forced to wait a similar time to resolve the economic damages issue under maritime law, they would lose even if their attorneys prevailed in the litigation.

2. When conducting the state-federal balance of interests, the First Circuit stressed Rhode Island's interest in avoiding pollution in its navigable waters and on its shores. The spill at issue was a spill of home heating oil that occurred when the oil tanker MV World Prodigy ran aground just off of Newport, Rhode Island. The current oil spill, on the other hand, began 48 miles off shore, in federal waters. Do you agree that this factual distinction could create some risk for litigants seeking to invoke state statutes to recover economic damages, whether as to their claim surviving at all, or as to the extent of damages they can recover? Why or why not?

Certainly, the cases are factually distinguishable, and one can expect BP's attorneys to press those distinctions. Moreover, the case for deferring to state law is arguably greater when the actual discharge occurs within the state. Once again, the distinctions create uncertainty and

the potential for years of litigation. Ultimately, the litigation might be resolved in favor of the victims, but they would lose regardless.

3. The Oil Pollution Act did not apply to the First Circuit case, because the spill had occurred in 1989, prior to the Oil Pollution Act's enactment. However, the Court observed that "we think that the statute is compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce."

If after the \$75 million cap was reached under the Oil Pollution Act, plaintiffs sought additional economic damages under a state statute, is there some risk that a Court would rule that Congress struck a balance by capping economic damages under federal law, and that recovery under state law in excess of this amount might either "contravene the essential purpose" expressed by the Oil Pollution Act, or "interfere with the proper harmony and uniformity" of federal maritime law? Why or why not?

If one looks to the Oil Pollution Act as support for a new maritime rule allowing recovery of economic damages, one might also look to the same statute for the principle that those damages should not be unlimited. One might contend that the "essential purpose" of the Oil Pollution Act is to allow limited recovery of economic damages and that providing uncapped damages based on state law would interfere with the "proper harmony and uniformity" of federal maritime law. My own judgment would reject those arguments and describe the "essential purpose" of the Oil Pollution Act to provide a prompt recovery of economic damages without proof of fault from an actor with resources to pay at least \$75 million of damages. However, one must acknowledge the issue as uncertain with the prospect that resolution might be delayed for years while litigation continued.

Senator BOXER. Thank you so much, Mr. Murchison.

Mr. Barry Hartman, a Partner with the law firm of K&L Gates and former Acting Assistant Attorney General, welcome.

STATEMENT OF BARRY M. HARTMAN, PARTNER, K&L GATES

Mr. HARTMAN. Thank you very much, Madam Chairman, Ranking Member Inhofe, and members of the Committee. I appreciate the opportunity to be invited here today. I will keep my remarks very brief.

My perspective on the cap issue comes from my experience, and I speak today only of my personal experience, not my clients' views or my firm's view.

In 1989 when I was at the Justice Department, I was responsible for overseeing and ultimately negotiating the final plea and civil and criminal agreements in the *Exxon Valdez* case. Since that time I have had the privilege of representing the Rhode Island Lobstermen's Association in Senator Whitehouse's State in connection with the North Cape oil spill back in 1996, so I have seen this from the viewpoint of the victims as well.

I have also represented individuals and companies who are on the receiving end of civil and criminal charges. So I will try to provide you with a perspective of seeing this from many different views.

The purpose of my testimony is to briefly provide you with my views on the question of whether the current cap on liability under OPA should be changed, and if so by how much. Needless to say, this is an important issue. The liability scheme under OPA and other laws is extraordinarily complicated and detailed, and you must carefully consider how changing that liability scheme and the cap affects other provisions of the law because I am sure nobody wants to change one provision and have an unintended bad effect on another. So I will simply raise the following issues that should be taken into account.

First of all, is the existence of this cap under OPA the real issue given the many other bases for liability that exist under the law? What is the relationship of the cap to the current trust fund which has, I believe, \$1.6 billion available to back up a party who may not be available to pay for its own damages?

If the purpose of the liability cap is to ensure there is a source of payment for damages, some suggest that it would create a disincentive if the cap were removed to engage in conduct that would be risky. My experience is that under current Federal laws there are extraordinarily more effective civil and criminal remedies that already provide a much greater financial and personal incentive, not the least of which is the Alternative Fines Act. And those things are the things that are going to cause companies and individuals to act properly, I believe, as opposed to a liability cap that might or might not be real in the first place.

Is the reason for increasing the cap because it doesn't cover most spills? That is something I think the Committee should look at very carefully. The Coast Guard did a study from 2004 to 2009 which I read to say that there were no spills that resulted in damages where they were not paid as a result of the cap being exceeded. It

is not to say the cap shouldn't be changed. It is simply a fact that I think you should take into account.

What is the relationship between the cap and the current financial assurance requirements that exist under OPA? Under OPA, a company must show that it can pay what the cap is. If there is no cap, what will be the financial assurance requirement? I learned in law school my first day in civil procedure that you can't get blood from a stone. So you can have unlimited liability, but if the people who are responsible don't have the money to pay and don't have financial assurance, I am not sure what that gets you. A study by Resources for the Future suggested this as well.

The OPA liability limits are part of a much more complex structure, as I mentioned. There are civil and criminal remedies available. There are State law remedies available.

In the current Gulf situation, I would submit the following observation. I think that the OPA statute and the liability cap have been rendered kind of irrelevant. I believe there have been over 6,000 lawsuits filed so far in State courts, and I think some Federal courts along the Gulf States where there are no limits on liability.

So the question is if you want to increase the liability limits under OPA, it might be a good idea, but do you want people to get into the OPA compensation process which was designed to get compensation for people more quickly? And are there going to be incentives created to cause people to want to go into that process rather than simply going to court? If they are just going to go to court, it kind of doesn't matter that there is an OPA at all because there is no liability limit there.

Thank you very much for the opportunity to testify. I am happy to provide any answers to questions, and as others have said, my heart goes out to those in Louisiana and other places who have been impacted by this.

[The prepared statement of Mr. Hartman follows:]

Senate Committee on Environment and Public Works

**Legislative Hearing on S. 3305 and Issues Relating to Modifications on
Caps on Liability in the Oil Pollution Act of 1990**

June 9, 2010

406 Dirksen Senate Office Building

**Testimony of Barry M. Hartman
Partner, K&L Gates LLP
Washington, DC**

Good Morning,

My name is Barry Hartman and I am a partner with the firm of K&L Gates LLP. I am here today to provide the Committee with information that may assist it in connection with its consideration of S. 3305, including issues relating to the modification of caps on liability in the Oil Pollution Act of 1990. I understand I have been asked to testify because I previously served as Acting Assistant Attorney General, at which time I oversaw the Exxon Valdez civil and criminal prosecutions and represented the Department of Justice with respect to the development of Oil Pollution Act ("OPA"), and because since that time I have represented various interests in oil spills that involved OPA.

Please note that the views I am giving you today are based on my past experience in this area. I am not representing any clients on this matter nor do my views reflect those of my firm.

Summary

Everyone would like the world to be free from all risks associated with any activity, be it providing medical care, building a house, driving a car, or producing oil. But none of us is perfect, nor can we guarantee that there will never be an accident or mistake made that will harm innocent persons, and after all, most of us benefit in some way from these activities. As a result, we create liability regimes that are designed to assure, for example, that businesses interested in benefiting from the production and transport of oil in our waters are ready, willing and able to be fully responsible for damages and harm that might be caused by their business activities.

Currently, there are multiple mechanisms available for addressing liability from oil spills. These include federal, state, civil, criminal, private, and administrative regimes. These various mechanisms are complex and interrelated in subtle ways, so changing one could impact the effectiveness of another.¹ In addition, there are very different kinds of entities that would be potentially subject to these regimes, including domestic and international vessels, and domestic and international fixed platforms. I am familiar with many of these but by no means an expert in all of them. For example, I am not addressing international liability schemes that might be relevant to your consideration.

I respectfully suggest that before adding additional liability structures, changing current ones, or removing any, there must be a thorough examination of whether the existing ones work. One must also define the criterion for what it means to "work." Sadly, there have been a number of spills since enactment of OPA, and so a solid assessment based on actual

¹ For example, increasing liability limits could impact the bidding process for offshore leases by vastly reducing eligible bidders.

experience should be possible. GAO Report 04-114R, "Oil Spill Liability Trust Fund Claims" (2003) might provide a starting point on some aspects of this issue. For the most part, I think it is just too early to make an informed decision with regard to how these various regimes will work with respect to the Gulf Spill. It would be unfortunate to make changes without the necessary information and unwittingly impact this regime in unintended ways.

Background

My experience regarding the U.S. liability regime surrounding oil spills is several-fold. My c.v may be found at <http://www.klgates.com/professionals/detail.aspx?professional=856>.² I have represented the federal government, companies, and individuals in connection with oil spills. For example:

- From 1989 to 1992, I served as Deputy Assistant Attorney General (DAAG) and then Acting Assistant Attorney General (AAAG) for the Environment and Natural Resources Division at the United States Department of Justice. Among other things, during my tenure I was responsible for overseeing and managing the civil and criminal cases arising from the *Exxon Valdez* oil spill. In addition, in my capacity as DAAG and AAAG, I led the DOJ group that advised the Administration regarding the development of the Oil Pollution Act of 1990.
- In 1996, my partner Tom Holt and I represented the over 100 businesses, mostly in the lobster industry, seeking damages as a result of the *North Cape* Oil Spill off Pt. Judith, Rhode Island. These claims were initially processed under the system established by the Oil Pollution Act.
- In 2006, I was named to serve on a group established under the Federal Advisory Committee Act by the Department of Interior to review issues relating to the assessment of natural resource damages ("NRD"). While that Committee focused primarily on NRD issues arising under the Superfund law, the same issues exist with respect to NRD issues under OPA.

² K&L Gates LLP comprises nearly 2,000 lawyers who practice in 36 offices located on three continents: Anchorage, Austin, Beijing, Berlin, Boston, Charlotte, Chicago, Dallas, Dubai, Fort Worth, Frankfurt, Harrisburg, Hong Kong, London, Los Angeles, Miami, Moscow, Newark, New York, Orange County, Palo Alto, Paris, Pittsburgh, Portland, Raleigh, Research Triangle Park, San Diego, San Francisco, Seattle, Shanghai, Singapore, Spokane/Coeur d'Alene, Taipei, Tokyo, Warsaw and Washington. For more information, please see www.klgates.com.

- In 2008, my partner Jeff Bornstein and I represented the pilot of the *Cosco Busan* in connection with the criminal prosecution resulting from the allision of the vessel with the Oakland Bay Bridge. Capt. Cota was named in multiple proceedings.

Overview of Liability Issues Arising from Oil Spills

This hearing is focusing on S. 3305, which would increase the liability cap under the Oil Pollution Act from \$75,000,000 to \$10,000,000,000. That law addresses one of the many liability regimes that currently exist. I define “liability regime” to include all available legal processes through which responsibility, compensation and punishment for the spill might be determined. Defined this way, the liability regimes are multi-dimensional, and many of these dimensions overlap. One way to list them might be as follows:

- **Liability under federal law**
 - Civil liability to the government (“regulatory liability,” such as OPA);
 - Criminal liability (e.g., Clean Water Act, Migratory Bird Treaty Act, Refuse Act, Endangered Species Act, Title 18);
 - Civil liability to “victims” of the spill under OPA.
- **Liability under state law**
 - Civil liability to the government;
 - Criminal liability;
 - Common law liability (to private parties);
 - Commercial liability involving other business entities (insurers, contractors).

The scope and extent of remedies available under these liability regimes is also multi-dimensional. They include:

- requiring response and removal action by the responsible party to address immediate effects of the spill;
- obtaining financial recoveries to ensure that those damaged by the spill are compensated for their losses;
- obtaining restoration of natural resources damaged by the spill either through projects to restore or replace resources, and providing financial payments or other compensation to mitigate for interim losses, until the resources can be restored or replaced;

- punishing those responsible for the spill by imposing civil and or criminal sanctions.

To fully assess whether the liability scheme (or caps) works, one must understand the scope of remedies that those liability schemes cover. In the case of OPA, that scope is not necessarily clear to those unfamiliar with it. An example best illustrates the many-layered nature of the remedies issues. These layers are both vertical and horizontal. Suppose a fish was killed. That fish represents several values of “vertical” losses. Most obviously, it represents lost profits to fishermen. But the same fish may have a different, intrinsic value as a natural resource. That value is lost to the trustee of that resource, which may be a state, the federal government, an Indian tribe, or all three. Further, that fish may also have cultural value to particular groups. Each of those groups may be victims entitled to recover separate damages equal to the lost value of that resource to each of them. Monetization of those differing losses is difficult. While the lost profits for the fisherman (pure economic losses) are well understood, the lost natural resources value is more complex. In many cases it is measured by the cost of replacing the resource.

However, the person causing the loss is not only liable for replacing the value of that fish as a natural resource and for compensating the victims for the interim losses suffered until the resource is replaced or restored. Depending on the nature of the damage, there could be generations of fish that are lost. (For example, the *North Cape* spill damaged a very large and valuable lobster nesting area that impacted not just catchable lobsters, but juveniles, eggs, and nesting areas, meaning that several generations (and seasons of fishing) would be impacted before the population returned to its pre-spill levels.)

There are also “horizontal losses” associated with the dead fish. Obviously, the fishermen lost profits when the fish died as a result of the spill. But what about the bait and fuel shop because the fishermen could not fish? What about the restaurants that fed the fishermen? What about the municipality and state that collected sales tax on these transactions? Many of these economic losses are compensable under OPA.

Prior to OPA there really was no established way to assess some of these losses and quantify them. Many people (including the trustees of natural resources) were frustrated by the slowness of the compensation process. Essentially, they had to file suits and go through a formal legal process to be compensated. Lawsuits are slow, and rarely address immediate needs arising from direct losses. They require proof of liability. In addition, those seeking natural resource damages had to determine how to present these claims in ways that would be acceptable in court, under formal rules of evidence. The government, meanwhile, wanted to make sure there was a clear responsible party who was financially able and ready to respond to a spill and to claims for damages.

How the Oil Pollution Act addresses these issues

For purposes of this discussion, in its broadest sense, OPA was in part designed to create a mechanism that would (a) assure that those responsible for oil spills had the financial ability to pay the damages; (b) make it easier and quicker for persons suffering these losses to obtain recovery of losses, by eliminating the need to prove negligence (or some other theory of liability) and by lessening the evidentiary burden that exists in a court for documenting losses; and (c) identify the responsible party and assure its financial soundness, so that neither the government nor anyone else has to chase after multiple parties in order to ensure that someone is responsible for liability issues. This last point is key. The theory behind the designation of a responsible party is to give the government and others a single clear and viable target. Prior to OPA, that did not really exist. Under OPA, it may be possible for a responsible party to be reimbursed by others, but that does not delay its responsibility to the government, to victims, and to the public.

Under OPA, a process was also set up to address certain compensation concerns through use of the Oil Spill Liability Trust Fund ("Fund"). The National Pollution Funds Center is the entity that was created to administer this. Basically, the responsible party sets up a claims process for people to file claims for losses. The documentation requirements are less stringent than required by a court and provide for immediate and interim payments for immediate losses. If the claimant is unhappy, he or she can proceed to the Fund for consideration. (If the Fund pays, the Fund may then seek recovery from the responsible party.) In exchange for that presumably easier process, the law also provides that if a person decides to go to court, they cannot take advantage of this process, and if they settle their claims in this process, they cannot then go to court. Also, in exchange for this quicker and easier process, the OPA process through the Fund does not pay nonfinancial losses such as punitive damages.

The Fund has been in place for almost 20 years. As I understand it, it has been used for a number of oil spills. In 2003, the GAO did a report concluding that it was functioning effectively but needed controls to reduce the risk of improper payments. ("GAO-04-114R Oil Spill Liability Trust Fund Claims").

Must current laws be amended because the current liability regime does not work right?

An assessment of the current liability regime requires that several questions be answered, including:

1. Have there been instances in which responsible parties have not adequately addressed claims for damages?
2. To what extent are those who have pursued claims under the OPA structure satisfied with the results?

3. Has there ever been a prosecution or other enforcement action arising from a spill that has been lost or declined because of the lack of adequate legal remedies?
4. Does the current system, which allows for multiple federal and state civil and criminal claims, and private civil claims, need additional liability mechanisms?

Without answers to these questions, it would difficult to make an informed decision on whether the system needs to be changed, and if so, what kinds of changes would be appropriate.

While there is some existing research addressing some of these questions, findings are far from conclusive. Some studies criticize caps for (at least in theory) allowing companies to avoid full liability for their activities and, as a result, for providing incentives for risky or dangerous behavior.³ Other researchers suggest that the cap is irrelevant because of the various alternative mechanisms for imposing liability listed above.⁴ Still others argue that without a reasonable cap, liability may be so high that it will bankrupt companies—leading to little or no compensation at all—or unreasonably increase the costs of insurance or render it unavailable.⁵ A study by Resources for the Future points to the OPA's financial assurance provisions, which require companies to show that they can meet the liability obligations within the cap, as a model for international lawmakers, because those provisions allow compensation for victims without allowing or encouraging responsible parties to avoid

³ See Michael Faure & Hui Wang, *Financial Caps for Oil Pollution Damage: A Historical Mistake?* (Maastricht Working Papers No. 2007-6, 2007), available at <http://www.unimaas.nl/bestand.asp?id=9883>; Inho Kim, *Who Bears the Lion's Share of a Black Pie of Oil Pollution Costs?* 41 OCEAN DEV. AND INT'L L., 55–76 (2010), abstract available at <http://www.informaworld.com/smpp/content~content=a919332913~db=all~jumtype=rss>.

As the Committee knows, under Section 1004(c) of OPA, the current cap can be pierced if, among other things, the responsible party or its agent violates any applicable Federal safety, construction, or operating regulation or fails to provide all reasonable cooperation and assistance requested by a responsible official. These provisions would seem to be a counterweight to the theory that caps create incentives for risky behavior.

⁴E.g., NATHAN RICHARDSON, *DEEPWATER HORIZON AND THE PATCHWORK OF OIL SPILL LIABILITY LAW* (Resources for the Future, 2010), available at <http://www.rff.org/publications/pages/publicationdetails.aspx?publicationid=21163>.

⁵ See generally Richard R.W. Brooks, *Liability and Organizational Choice*, 45 J. OF L. AND ECON. 91-125 (2002), available at www.sfu.ca/~allen/brooks.pdf.

liability through bankruptcy.⁶ These studies and others illustrate the enormous complexity of this issue and underscore the need for careful and thorough analysis in order for informed judgments to be made.

There is one area in which it appears that OPA may not be working the way it should be. One purpose of OPA was to create an administrative mechanism to ensure prompt and complete settlement of claims for damages, and avoid the spectre of years of litigation. Unfortunately, there have already been hundreds of lawsuits filed as a result of the Gulf Spill, potentially rendering those plaintiffs essentially ineligible for the OPA fund process.⁷ One cannot help but wonder whether they were advised of the consequences of following this route. I raise this issue because if the OPA cap is increased, one should also consider whether there should be greater incentives to have damage claims processed through the OPA system rather than through typical civil litigation.

The other question that should be considered is more fundamental: OPA requires that anyone subject to liability demonstrate financial assurance that it can meet its liability. Under the proposed legislation, that would mean demonstrating the ability to pay \$10,000,000,000. Current regulations impose specific requirements for demonstrating that financial ability. 33 C.F.R. Part 138. What will be the impact on competitive bidding for off-shore leases if there are few entities that can qualify financially to meet higher liability caps? Will there be concern that only foreign companies can qualify?

I hope this information has been helpful. Please let me know if you have any questions.

⁶ JAMES BOYD, GLOBAL COMPENSATION FOR OIL POLLUTION DAMAGES: THE INNOVATIONS OF THE AMERICAN OIL POLLUTION ACT (Resources for the Future, Discussion Paper No. 04-36, 2004), *available at* <http://www.rff.org/Publications/Pages/Global-Compensation-for-Oil-Pollution-Damages.aspx>.

⁷ Section 1013(b)(2) of OPA provides, “No claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim.”

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Senator Thomas R. Carper

1. As you all know, under the Oil Pollution Act of 1990, Congress capped liability for damages for individual oil and gas companies at \$75 million, but spread liability across the entire oil and gas industry through the Oil Spill Liability Trust Fund. Under Senator Menendez's bill, he significantly raises the liability limits on the individual company. Can you each comment on what the implications might be if we significantly raised the liability across THE ENTIRE offshore oil and gas industry versus raising liability for just individual companies? Should we be looking at raising both?

Answer: *As a legal matter, I am not sure the questions I raised regarding raising the "liability cap" of \$75,000,000 would be relevant to an across-the-board increase in the tax paid by the industry for the Trust Fund. However, as I did note, both of these matters are relevant to the extent injured parties seek damages under OPA. If claimants do not seek damages through the OPA process, and instead pursue more conventional litigation, then neither the "cap" nor the Fund is implicated. If the cap and the Fund were to be increased, it would seem logical that there would be some effort to encourage damaged parties to seek recovery through this process since these funds are only available for OPA claims.*

2. Do you think that the \$75 million liability cap adequately reflects the economic damages that will result from the oil spill in the Gulf of Mexico?

Answer: *I have no basis for guessing what the economic damages will be as a result of the oil spill. As I understand it, BP has already paid out far more than the \$75 million.*

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Senator Sheldon Whitehouse

During the hearing, I mentioned that at least one district court found that the bar on economic damages in federal maritime law trumped state law. I asked you whether this decision, whether correctly decided or not, demonstrated the risk of assuming that businesses along the Gulf Coast will recover economic damages above the Oil Pollution Act's \$75 million cap.

Following the hearing, you sent my office the First Circuit decision that overturned that case, and implied that you felt that circuit court case settled the law.

The First Circuit began its analysis with the three-prong test in the Supreme Court case *Southern Pacific Co. v. Jensen*: that state legislation affecting maritime commerce is invalid "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." The Court then commented that "[w]here substantive law is involved, we think that the Supreme Court's past decisions yield no single, comprehensive test as to where harmony is required and when uniformity must be maintained. Rather, the decisions, however couched, reflect a balancing of the state and federal interests in any given case."

1. There does not appear, then, to be a bright line rule in Supreme Court jurisprudence, where a state law related to maritime law would not be considered preempted by federal maritime law. Given the lack of a bright line, is it fair to say that some risk remains in litigants seeking damages under a state law that are not allowed to be recovered under federal maritime law?

Answer: *Given my other obligations and the limited time available to respond, I cannot comment on whether the bright line you refer to is an accurate assumption. I am not aware of claims arising from an oil spill since the enactment of OPA 1990 that have been brought under state law and then preempted by maritime law. In the case we handled for some victims of the North Cape spill, Rhode Island law was not preempted.*

Of course, all litigation is fraught with risk. That is one reason, I understand, OPA was enacted -- to give claimants a way of recovering economic damages while reducing the usual risks and delays from litigation.

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2. When conducting the state-federal balance of interests, the First Circuit stressed Rhode Island's interest in avoiding pollution in its navigable waters and on its shores. The spill at issue was a spill of home heating oil that occurred when the oil tanker *MV World Prodigy* ran aground just off of Newport, Rhode Island. The current oil spill, on the other hand, began 48 miles off shore, in federal waters. Do you agree that this factual distinction could create some risk for litigants seeking to invoke state statutes to recover economic damages, whether as to their claim surviving at all, or as to the extent of damages they can recover? Why or why not?

Answer: *I have not had sufficient time to research this question. As a result, I have no basis for agreeing or disagreeing that the referenced facts create the risk described in the question.*

3. The Oil Pollution Act did not apply to the First Circuit case, because the spill had occurred in 1989, prior to the Oil Pollution Act's enactment. However, the Court observed that "we think that the statute is compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce."

If after the \$75 million cap was reached under the Oil Pollution Act, plaintiffs sought additional economic damages under a state statute, is there some risk that a Court would rule that Congress struck a balance by capping economic damages under federal law, and that recovery under state law in excess of this amount might either "contravene the essential purpose" expressed by the Oil Pollution Act, or "interfere with the proper harmony and uniformity" of federal maritime law? Why or why not?

Answer: *As I understand it, if the \$75 million cap is reached, parties can still look to the \$1.7 billion (approx.) Trust Fund for recovery of damages, rather than going immediately to court. OPA provides very specifically that settlement of these claims does not preclude obtaining other recoveries for other losses. In addition, I believe Sections 1013 and 1018 of OPA address this question, at least in part.*

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4. In your testimony, and when answering questions, your main point was that Congress should think through all the consequences of changing federal maritime law. But you otherwise did not state a position. Are you categorically against any change to the Oil Pollution Act's cap on damages?

Answer: *I have not taken a position for or against any change to the cap on damages. As I indicated in my testimony, I offered my views to assist the Committee in being as fully informed as possible, so that its ultimate actions do not create unintended adverse consequences to those it intends to benefit.*

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Senator James M. Inhofe

1. The Oil Spill Liability Trust Fund currently holds about \$1.7 billion. In light of the BP oil spill, it's very clear that the fund is not being capitalized at an adequate level. The tax extenders bill currently on the Senate floor would increase the tax the oil and gas industry pays into the fund from 8 cents to 41 cents per barrel which would grow the fund to \$15 billion by 2020.

We've heard that without unlimited strict liability the American taxpayer and those suffering injury from a spill would pay the price for damages in excess of the liability caps. Doesn't this ignore the fact that one of the main purposes of the Oil Spill Liability Trust Fund, which once again is funded by a tax on the oil and gas industry, serves as a backstop to the liability caps which then kicks in and pays both damages and clean up costs? Couldn't a very robust trust fund coupled with higher yet sensible liability caps ensure that liability damages are paid to those affected?

Answer: *As with my other answers, I have had very little time to evaluate this. The premise of the question does seem logical. It is my understanding that the current structure for the nuclear industry under the Price Anderson Act has this kind of approach.*

2. There seems to be an awful lot of confusion about the relationship between the way the current claims process is operating and the current liability cap. Would this bill as written or any other bill that simply raised or removed the liability cap all together have any effect on the claims process?

Answer: *I do not think the bill that I reviewed would have an impact on the claims process.*

3. Under the current system as I understand it, the trust fund is a backstop if a claimant does not get full payment of their claim from BP. For example, if a fisherman was to file a claim documenting losses of \$20,000 and BP was to deny all or part of the claim, the claimant could then turn to the trust fund for full payment of that claim.

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- a. Does this properly describe the claims process as you understand it? And

Answer: Yes. A claimant also has the option of going to court if he or she is dissatisfied with the Trust Fund decision. Those that have already gone to court may not be able to use the OPA process at all.

- b. Could you please elaborate on where the money in the trust fund originated from as well as the subrogation principles that allow the fund to recover any compensation paid by any claimant?

Answer: As I understand it, the Fund is funded by a tax on barrels of oil produced. I assume that this tax is considered a cost of doing business and is passed on to consumers who buy oil products as well. I am only generally familiar with the subrogation principles contained in OPA, but in plain language they seem to provide that if the Fund pays compensation to a claimant, then the Fund assumes that claimant's rights to sue others for the reimbursement of the damages paid to the claimant, to the extent the claimant had rights against that third party.

Senator BOXER. Thank you so much, sir.

Mr. Ron Baron, Executive Vice President, Willis Global Energy in Texas.

Correct, sir?

Mr. BARON. Yes.

Senator BOXER. Welcome, sir.

**STATEMENT OF RON BARON, EXECUTIVE VICE PRESIDENT,
WILLIS GLOBAL ENERGY, WILLIS OF TEXAS, INC.**

Mr. BARON. Good morning, Madam Chair Boxer, Ranking Member Inhofe, and members of the Committee. On behalf of Willis I would like to thank the Committee for inviting me to testify.

My testimony is focused on the energy insurance market capacity for two kinds of risk related to offshore exploration and production activities. They are third party liability, including pollution and control of well risk.

There is a worldwide insurance market for offshore energy risk. The traditional leading market is Lloyds of London. There is a finite amount of capacity available from the market which varies depending on the type of insurance coverage being provided as well as other factors. Generally speaking third party liability insurance provides coverage for property damage and bodily injury liability arising from a company's operations. Control of well insurance provides coverage for costs and expenses in controlling a well, re-drilling, pollution clean up, and containment.

Another product offered by the market is oil spill financial responsibility certification. This product is typically backed by corporate indemnities and/or control of well and excess liability insurance maintained by the company.

When talking about capacity, I will use two descriptive words: theoretical and working. Theoretical capacity is the maximum dollar amount that the market could commit to any single risk. Working capacity is the dollar amount that the market would actually commit to any single risk.

For working capacity the third party liability insurance coverage offshore of the United States is in the range of \$1.25 billion to \$1.5 billion. The theoretical capacity for third party liability is close to \$1.9 billion. The working capacity for well risk is in the range of \$600 million to \$750 million. Theoretical capacity for these risks is closer to \$1 billion.

It is important to note that here is a standard provision in both the third party liabilities and control of risk policies that reduces the limits of coverage provided by the insurance market. That provision spells the limit of coverage to the percentage interest that the insured has in a well.

As an example, if a company has a 50 percent interest in a well, and their policy provides \$400 million of limit, then the limit of coverage for that well under their policy would scale down to \$200 million. The working capacity for all spill financial responsibility certification is even more limited, and I would estimate the top range to be no more than \$200 million.

As a consequence of the Macondo well incident, there was a reduction in the capacity being offered by the insurance market to third party liability and control of well coverage. Also, the cost for

this coverage has increased. The magnitude of increased premiums has and will vary dramatically on the profile of the particular insured, which would include their exposures, operating areas, and loss experience.

We have begun to see some new capacity coming to the market due to the higher premiums that are being charged. In particular we know of one insurance company who has provided some pricing indications to a number of interested buyers for additional limits of excess third party liability. And we understand those amounts are in the range of \$500 million to \$1 billion.

We have heard that another insurance buyer has given their broker an order to secure coverage in the amount of \$1 billion overall limit for their control of well coverage. But to date that placement has not been completed due to lack of capacity.

In addition to the capacity available from the commercial insurance market, there is an oil industry association in Bermuda. There are 54 member companies, half of which are engaged in exploration and production activities. The coverage provided by OIL includes property damage or loss, control of well, and pollution risk. However, OIL membership is restricted to companies with a minimum of \$1 billion of gross assets, and some companies are not comfortable with the mutual concept.

The actual working capacity in the insurance market as of today is in a state of flux. And although increased premiums could attract additional capacity over a period of time, it will not be sufficient to satisfy the liability and financial responsibility limits being proposed under Senate Bill 3305.

Thank you.

[The prepared statement of Mr. Baron follows:]

**Testimony of Ron Baron
Executive Vice President
Willis, Global Energy Practice**

**Energy Insurance Market Capacity for Third Party Pollution Liability and Control
of Well Risks in Respect of Offshore Exploration and Production Activities**

**Before the Senate Committee on Environment and Public Works
June 9, 2010**

Good morning Chairman Boxer, Ranking Member Inhofe, and Members of the Committee. My name is Ron Baron and I have over 39 years of work experience in the insurance industry. I am currently an Executive Vice President of Willis' Global Energy Practice. On behalf of Willis, I would like to thank the Committee for inviting me here to testify today. Willis is a major global risk management and insurance intermediary with an integrated network of about 400 offices in over 120 countries. Our Global Energy Practice services hundreds of energy client programs worldwide and those clients include Integrated Oil companies as well as Exploration and Production companies. My testimony is focused on the energy insurance market capacity for control of well risks and third party pollution liability in respect of offshore exploration and production activities.

Testimony

There is a worldwide insurance market for offshore energy risks with the traditional leading market being Lloyds of London. I would advise that there is a finite amount of capacity available from the market which varies depending on the type of insurance cover being provided as well as other factors. Generally speaking, third party liability (TPL) insurance provides coverage for property damage and bodily injury liability arising from a company's operations. Control of well (COW) insurance provides coverage for costs and expenses in controlling a well that is out of control as well as redrill, restoration, recompletion, pollution clean up and containment. Another insurance product offered by the market is Oil Spill Financial Responsibility Certification but they typically are backed up by indemnity agreements from the assured (Operator) and/or by evidence of TPL and/or COW insurance. A summary of these types of insurance covers can be found in the Appendix.

When talking about capacity I will use two descriptive words being theoretical and working. Theoretical capacity is the maximum dollar amount that an insurer can commit to any single risk. Working capacity is the dollar amount that an insurer will typically commit to any single risk as insurers seldom commit their maximum capacity to any single risk.

The working capacity for third party liability (TPL) including pollution coverage offshore the United States is in the range of \$1.25 billion to \$1.5 billion. Theoretical capacity for TPL is closer to \$1.9 billion and for risks not subject to U.S. jurisdiction the theoretical

capacity is closer to \$2.4 billion. A number of insurance companies either do not entertain risks subject to U.S. jurisdiction or offer less capacity for same.

The working capacity for control of well (COW) risks is in the range of \$600 million to \$750 million on a stand alone basis. Theoretical capacity for stand alone COW is closer to \$1 billion.

It is important to note that there is a standard provision in both the TPL and COW covers that actually reduces the limits of coverage provided by the insurance market. That provision scales the limit of coverage to the percentage interest that the assured may have in a well. As an example, if a company has a 50% interest in a well and their policy(ies) provides \$400 million of limit then the limit of coverage actually provided by the insurers for that well would scale down to a \$200 million limit.

The working capacity for Oil Spill Financial Responsibility Certification is even more limited and I would estimate the top range to be no more than \$200 million.

As a consequence of the Macondo well incident we initially saw a contraction of the capacity being offered by the insurance market for TPL and COW coverage. The insurance market is also quoting higher premiums for these products since the incident. The magnitude of increased premiums has and will vary dramatically depending on the profile of the particular assured which would include their exposures, operating areas and loss experience.

More recently, due to the increased premium that is being charged for certain of these risks we have seen some insurance companies considering offering more capacity. In particular, we know of one insurance company who has provided pricing indications to a number of interested buyers for additional limits of excess third party liability in the amounts of \$500 million and alternatively \$1 billion (a portion of this "additional" limit already formed a part of the theoretical capacity noted above). Also, we are aware of an insurance buyer who is looking to purchase overall limits of \$1 billion for their control of well coverage but to date that placement has not been completed.

In addition to the capacity available from the commercial insurance market there is an oil industry mutual insurance company domiciled in Bermuda called Oil Insurance Limited (OIL). As of January 1, 2010 there were 54 member companies of which about half were engaged in exploration & production activities. OIL provides a limit of \$250 million per occurrence to its members. The coverage provided by OIL includes property damage or loss, control of well and sudden & accidental pollution risks. Although this cover is typically used to cover property damage loss to the extent the limit of cover is not exhausted by a single event the balance of the limit would be available to fund costs and expenses arising from a control of well event and or a sudden and accidental pollution event. However, OIL membership is restricted to companies with a minimum of \$1 billion of gross assets and a number of companies are not comfortable with the mutual concept, which requires sharing losses of the group amongst the members.

The actual working capacity available in the insurance market as of today is in a state of flux and although increased premiums should attract additional capacity over a period of time it will not be sufficient to satisfy the liability/financial responsibility limits being proposed under S. 3305.

Appendix

A. Third Party (Excess) Liability Policy - Summary

General Information:

- This summary is based on XL-004 which is a stand-alone indemnity Excess Liability Policy which is not subject to the terms and conditions of any other insurance.
- Coverage applies, subject to the terms, conditions and exclusions of the policy, only if Notice of Occurrence is first given to the Company during the policy period.
- Defense costs are included within and are not in addition to the limits of liability.

Insuring Agreements - Coverage:

- Indemnifies the Insured for Ultimate Net Loss the Insured pays by reason of liability imposed by law, or of a person or party who is not an Insured assumed by the Insured under contract or agreement,
- For Damages on account of Personal Injury, Property Damage, Advertising Liability,
- Encompassed by an Occurrence, provided, notice of the Occurrence is first given by the Insured during the Policy Period in accordance with the Notice provisions of the policy.

Limits of Liability:

- Limits available on this policy form are in the area of \$1 billion to \$1.25 billion per Occurrence and in the annual aggregate. However, in joint venture situations these limits will usually scale down (be reduced) based on the percentage interest of the Insured in the liability of the joint venture.

- The limits of this policy are excess of the greater of the amounts indicated as the limits of the underlying insurances or the per Occurrence retention amount.

Pertinent Definitions (Including but not limited to):

- **“Personal Injury”** means Bodily Injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation, and libel, slander or defamation of character or invasion of rights of privacy.
- **“Bodily Injury”** means physical injury to the body of a person including death at any time resulting there from.
- **“Property Damage”** means:
 - (1) physical damage to or destruction of tangible property, including the loss of use thereof at any time resulting there from;
 - (2) loss of use of tangible property which has not been physically damaged or destroyed arising from physical damage to or destruction of other tangible property; or
 - (3) losses consequent upon evacuation arising from actual or threatened Bodily Injury or destruction of tangible property.
- An **“Occurrence”** exists if, and only if:
 - (a) except with respect to actual or alleged Personal Injury or Property Damage arising from the Insured’s Products, there is an event or continuous, intermittent or repeated exposure to conditions which event or conditions commence on or subsequent to the Inception Date, or the Retroactive Coverage Date, if applicable, and before the Termination Date of Coverage A, and which cause actual or alleged Personal Injury, Property Damage or Advertising Liability.
 - (b) actual or alleged Personal Injury to any individual person, or actual or alleged Property Damage to any specific property, arising from the Insured’s Products takes place on or subsequent to the Inception Date, or the Retroactive Coverage Date, if applicable, and before the Termination Date of Coverage A.
- **“Ultimate Net Loss”** means the total sum which the insured shall become obligated to pay for Damages on account of Personal Injury, Property Damage and/or Advertising Liability which is, and/or but for the amount thereof would be, covered under this Policy less any salvages or recoveries.

- **“Discharge”** means discharge, emission, dispersal, migration, release or escape (or any series of such of a similar nature at the same site) but does not include any discharge, emission, dispersal, migration, release or escape to the extent that the Pollutants involved remain confined within the building or other man-made structure in which they initially were located.
- **“Pollutant”** means any solid, liquid, gaseous or thermal irritant, contaminant or toxic or hazardous substance or any substance which may, does, or is alleged to affect adversely the environment, property, persons or animals, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and Waste.

Pollution Exclusion and Limited Give Back:

This Policy does not apply to actual or alleged:-

POLLUTION

- (1) (a) liability for Personal Injury, Property Damage or Advertising Liability arising out of the Discharge of Pollutants into or upon land or real estate, the atmosphere, or any watercourse or body of water whether above or below ground or otherwise into the environment; or
- (b) liability, loss, cost or expense of any Insured or others arising out of any direction or request, whether governmental or otherwise, that any Insured or other test for, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants.

This Exclusion applies whether or not such Discharge of such Pollutants:

- (i) results from the Insured’s activities or the activities of any other person or entity;
 - (ii) is sudden, gradual, accidental, unexpected or unintended; or
 - (iii) arises out of or relates to industrial operations or the Waste or by-products thereof.
- (2) Paragraph (1) of this Exclusion does not apply to:
 - (a) Product Pollution Liability; or
 - (b) (i) liability of the Insured for Personal Injury or Property Damage caused by an intentional Discharge of Pollutants solely for the purpose of mitigating or avoiding Personal Injury or Property Damage which would be covered by this Policy; or

- (ii) liability of the Insured for Personal Injury or Property Damage caused by a Discharge of Pollutants which is not Expected or Intended, but only if the Insured becomes aware of the commencement of such Discharge within seven (7) days of such commencement;

provided that the Insured gives the Company written notice in accordance with Section D of Article V of this Policy of such commencement of the Discharge under Subparagraphs (2)(b)(i) or (ii) of this Exclusion within forty (40) days of such commencement. Such notice must be provided irrespective of whether notice as soon as practicable otherwise would be required pursuant to Section A of Article V of this Policy.

B. CONTROL OF WELL INSURANCE

1. Combined Single Limit over three (3) main coverage sections:
 - A) Control of Well
 - B) Redrill / Restoration / Recompletion
 - C) Pollution Clean-up and Containment
2. Limit typically "scales to interest"
3. A brief description of the basic coverages provided by this policy follows below:

Control of Well

Reimburses costs and expenses incurred for attempting to regain control of any well insured which gets out of control, including any other well that gets out of control as a direct result of a well insured getting out of control. Subject always to the combined single limit provided under the policy.

Redrilling/Restoration/Extra Expense

Reimburses costs and expenses incurred to restore or redrill a well which has been lost or otherwise damaged as a result of an occurrence which would be recoverable under the Control of Well section of the policy. Coverage can be extended to cover a well which has been lost or damaged as a result of physical loss of or damage to the drilling and/or work-over and/or production equipment resulting from specific named perils.

In respect of drilling wells, Underwriters liability ceases when the well is restored to a condition comparable to that existing prior to the occurrence, subject to the combined single limit provided under the policy.

Seepage and Pollution/Clean-up and Contamination

This section indemnifies the insured against:

All sums which the insured shall be liable to pay for the cost of remedial measures and/or as damages for bodily injury or damage to property caused directly by pollution above the surface of the ground and arising from a well insured;

The cost of, or attempt at, removing or cleaning up pollution emanating from a well insured including the cost of containing and/or diverting and/or preventing the pollution from reaching the shore;

Costs and expenses incurred in the defense of any claim resulting from actual or alleged pollution arising from a well insured.

The pollution incident must meet the sudden and accidental definition of the policy. Subject always to the combined single limit provided under the policy.

C. OIL SPILL FINANCIAL RESPONSIBILITY

The operator is required under OPA to maintain financial responsibility either in the form of self-insurance, bonds, letters of credit or stand-alone pollution insurance with liability limits that are adequate to meet its maximum statutory liability.

The pollution insurance liability coverage offered by the insurance market is not true risk transfer as the operator typically agrees to indemnify the insurer for claims paid out under such covers. These indemnifications are backed up by a guarantee letter from the corporation as well as evidence of control of well insurance and/or third party liability insurance.

**Environment and Public Works Committee Hearing
June 9, 2010
Follow-up Questions for Written Submission**

Questions for Baron

Questions from:

Senator Thomas R. Carper

- 1) As you all know, under the OIL Pollution Act of 1990, Congress capped liability for damages for individual oil and gas companies at \$75 million, but spread liability across the entire oil and gas industry through the Oil Spill Liability Trust Fund. Under Senator Menendez's bill, he significantly raises the liability limits on the individual company. Can you each comment on what the implications might be if we significantly raised the liability across THE ENTIRE offshore oil and gas industry versus raising liability for just individual companies? Should we be looking at raising both?

I believe that this subject is not in my area of expertise and I would defer to the oil producers to respond to what the effect would be.

- 2) Do you think that the \$75 million liability cap adequately reflects the economic damages that will result from the oil spill in the Gulf of Mexico?

No, I think the economic damages will exceed this amount.

Senator BOXER. Thank you so much.

I want to read to the panel what BP said on its permit application when it applied to get a permit for this particular well. It said the following: "In the event of an unanticipated blowout resulting in an oil spill, it is unlikely to have an impact, based on the industry-wide standards for using proven equipment and technology for such responses and implementation of BP's regional oil spill response plan which addressed available equipment and personnel, techniques for containment and recovery and removal of the oil spill."

That is what they said. They said they had the ability to respond with proven equipment and technology.

Then after it happened, this is what they said: "All the techniques being attempted or evaluated to contain the flow of oil on the sea bed involves significant uncertainty because they have not been tested in these conditions before."

So before they got their permit they said everything was fine. They had proven "equipment and technology" for such responses. I quote them.

Eight Members of the Senate—I think all on this Committee—sent a letter to the Justice Department asking for an investigation, criminal and civil investigation, into whether these were false statements. I want to know if any member of the panel disagrees that there ought to be an investigation into whether or not BP told the truth in the permit. Does any member of the panel disagree that there ought to be an investigation into this?

OK. Thank you.

Mr. MINICH, the size and importance of the tourism industry to Florida's economy is remarkable. In my home State of California, coastal tourism, recreation, and fishing generate \$23 billion in economic activity and 388,000 jobs. Now, I just have a simple question because frankly I am married to a lawyer. My father is a lawyer. My son is a lawyer. Will they listen to Mr. Hartman and all the technicalities?

I would like to strip that away and ask a direct question so we keep our eye on what we should be doing here, in my opinion, and that is, again, do you think that those who caused the disaster should be held accountable?

Mr. MINICH. Absolutely, 150 percent, they should be held accountable.

Senator BOXER. OK. Then you think they should be held accountable whoever they are if they did this damage.

Mr. MINICH. Absolutely. There is no question.

Senator BOXER. Does anybody have a disagreement with that on the panel?

Well, then I think we are speaking, I mean the panel is basically saying by your silence to this that we ought to move and hold people accountable. And I guess I am going to try, Mr. Hartman, in an attempt to understand better what you were saying.

Don't you think it would be a good idea to simplify what we are doing here because if there is a lot of confusion surrounding it, you wind up 21 years in court? Now, I know you have represented Halliburton in the past. Are you representing them, your company, in this particular matter?

Mr. HARTMAN. Madam Chairman, my firm does not represent anybody involved in this spill at all.

Senator BOXER. OK. That is good. We had your client list. They were on it, but you don't represent them in this, so that is good. So you don't have any conflict, so I am going to ask you this question.

If we had a very straightforward bill that simply said to the oil companies who undertake this, or gas companies, that you are responsible not only for the full clean up, which they are now under law, the clean up they are responsible for, but also to make whole the Mike Frenettes, the R.J. Kopchaks. Don't you think it is cleaner to just say you caused the damage, you pay the damage, period, end of quote.

And don't you think it will be, as the panel so testified, because we would have that simple approach, a way to avoid this from happening in the future? Because don't you agree, because you are an attorney who has represented people, you said yourself, who get sued, that many times, and we learned this from a lot of the automobile crash tests, that companies put into their balance sheets what the costs are if there is an accident?

If they have no limit, and they just have to step up and pony up to make people whole, won't that be a deterrent from what happened?

Mr. HARTMAN. Well, Madam Chairman, as somebody who is related to many lawyers, I am sure you will appreciate that I am going to say it is a complicated question. But fundamentally I think that is what the laws currently do. Do they all work right? No. Are they complicated? Yes. There have been issues for years and years about should you preempt State laws and make one simple Federal remedy. Twenty years ago when I was involved with OPA, for the Justice Department these were the same issues. And they are legitimate questions. They are just complicated.

Senator BOXER. OK. Well, let me just finish by asking Mr. Murchison how he feels. Because in my view if you say that is what the law is supposed to do, and 21 years later in Alaska they still haven't cleaned up the mess, and people got \$15,000, people who lost \$650,000. Do I remember that right? That did not resolve. The current law did not resolve anything. That is why we changed it, but it still has problems.

And I would just close and ask Mr. Murchison to respond to whether or not a very straightforward, simple deal: you make the mess, you clean it up, and you make people whole.

Mr. MURCHISON. The short answer I would give would be yes, but I would agree that there are complications in terms of the financial responsibility that the Committee will need to deal with going forward. But I would start with the problem of saying that those who cause the injury—and not the innocent people—ought to bear the loss.

Senator BOXER. And that is what has happened in Alaska. We heard it right here.

Mr. MURCHISON. That is what is happening right at this moment in the State of Louisiana.

Senator BOXER. It can't happen in Louisiana because we are going to hold BP's feet to the fire on it, and I am going to do everything I can, with my colleagues, to make sure it doesn't.

I am going to ask Senator Inhofe to go next, and I am going to give the gavel to Senator Lautenberg because I have to be at a 12:30 meeting with the Majority Leader.

Senator INHOFE. And since I wasn't invited to the 12:30 meeting with the Majority Leader, I will go next.

[Laughter.]

Senator INHOFE. First of all, I have eight documents, four from the insurance industry, two from industry, and two from expert witnesses and ask consent that they be made part of the record.

Without objection, so ordered.

Senator LAUTENBERG [presiding]. Without objection.

[The referenced documents follow:]



May 10, 2010

Honorable Robert Menendez
U.S. Senator
528 Senate Hart Office Building
Washington, DC 20510

Dear Senator Menendez:

We are retail insurance brokers. Among our clients are offshore contractors, operators and non-operators, both small and large market cap independent entities, with interests in the US Gulf of Mexico. Our clients are involved in almost every aspect of offshore exploration and development work. We have been asked to comment upon the amount of insurance that is available from the commercial insurance market for third party pollution liability for operators and non-operators before and after the Macondo well incident. Prior to the incident, we estimate the maximum working capacity available in the commercial insurance market (i.e., the limit which could be purchased) was \$1.5 billion (for 100% interest – i.e. the limit to be shared between operators and non-operators in any common endeavor). Subsequent to the Macondo incident, we believe the available working capacity has reduced by ~15% and the cost involved in procuring this capacity is and will be significantly higher than the pricing prior to the incident.

If, as we understand, there is legislation under consideration which would materially increase the liability cap for economic damages from its current level of \$75 million, based on our experience operators and non-operators in the US Gulf of Mexico will be unable to obtain adequate protection from insurance. The increase of the liability cap will impact the economic structure of Gulf of Mexico operations. If the liability cap is increased to the levels we understand are under consideration, the fact that adequate insurance protection is not available will dramatically limit the participants in ongoing exploration and production activities – in our view only major oil companies and NOCs (National Oil Companies) will be financially strong enough to continue current exploration and development efforts.

Yours very truly,

Benjamin D. Wilcox
Executive Vice President and
Director Marine and Energy

BDW:jb

cc: Honorable Barbara Boxer
Chairman
Senate Committee on Environment & Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

Honorable James M. Inhofe
Ranking Member
Senate Committee on Environment & Public Works
456 Dirksen Senate Office Building
Washington, DC 20510

Honorable Jeff Bingaman
Chairman
Senate Committee on Energy a& Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

Honorable Lisa Murkowski
Ranking Member
Senate Committee on Energy a& Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510



One America Square
London
EC3N 2JJ

switchboard: 020 7466 6500
direct dial: 020 7466 6501
fax: 020 7466 6565
www.lloydandpartners.com

10 May 2010

To whom it may concern

Re: Deepwater Horizon / Macondo Well Incident

About Lloyd & Partners

Lloyd & Partners is a London and Bermuda based Major Account (complex risk) insurance broker specialising in onshore and offshore energy insurance with premiums placed annually in excess of USD1.5bn. Overall Lloyd & Partners employs over 200 people and our 40 plus strong Energy team is one of the largest and most respected teams in the London market. We arrange both Property and Liability Insurance for a wide range of Energy Insureds including integrated oil companies, exploration & production companies and drilling/service contractors.

Available Liability Insurance Capacity under normal insurance conditions (policies with normal terms and conditions).

Prior to the recent Gulf of Mexico drilling incident, worldwide third party pollution liability capacity for offshore energy operations was in excess of USD1.5bn for each insured on a 100% basis (meaning the limits scaled to an individual insured's working interest in a project).

Whilst the insurance market previously attempted to limit their "clash" exposures (where they could pick up a loss from more than one insured from the same loss) by scaling their limits to an operating group company's working interest, in the main they had previously thought of clashes between operators and contractors, as the Joint Operating Agreement would have given them some comfort that only the operator would be liable for a pollution loss, the concern now is that a loss of the nature we are witnessing may result in attempts to hold all the parties responsible regardless of the provisions of the JOA.

We have therefore already seen in the market a realisation that if every party involved in the loss (operating group, drilling contractor, other service contractors - such as mud or cementing contractors - and blowout preventer manufacturers) are successfully sued then the market will be exposed to a degree much larger than anticipated when committing capacity to individual Insureds.

This has already resulted in at least one major London energy liability insurance leader advising us that they are cutting back their maximum capacity for individual Insureds by a third.

Y:\EJL\LETTERS\2010\LET193C.doc

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At this stage it is really impossible to accurately predict what the exact impact of this loss will have on available capacity but we think it could result in a reduction of such capacity of around 15% to 30%

Available Liability Insurance Capacity under OPA "certificates"

Where Insurers are asked to provide full coverage under OPA (being strict liability with direct access to insurers and no defence of normal insurance policy terms and conditions) capacity is much more restricted than normal third party liability and we estimate available capacity would be no more than USD150mm - USD200mm.

Pricing

Prior to the recent incident the market was in a "soft" phase where rates were low as a result of oversupply of capacity, as not many Insureds purchased the full available capacity (typically offshore E&P companies would have purchased on average somewhere around USD 250mm to USD 500mm in limits.)

There is now likely to be pressure from both sides of the supply and demand equation, as capacity shrinks and demand for higher limits materialises (as the recent loss highlights the potential to Insureds for a loss of a magnitude higher than most are protected for) which coupled with the fact the market will be looking to recoup the loss they will have to pay out from this latest incident, is likely to result in a significant increase in offshore liability insurance premiums.

Proposed changes to legislation.

Currently OPA provides operators of offshore facilities a limitation of USD 75mm for "Economic Claims" (loss of earnings rather than clean-up costs or property damage caused by pollution). Any significant increase in this limit will cause Insureds operating in US Waters to face the prospect of significant self insurance, since (depending on the amount) the insurance market will not have sufficient capacity to provide cover for this in addition clean-up costs and third party properties damage suits)

Yours sincerely

 A handwritten signature in black ink, appearing to read "John Lloyd".

John Lloyd
Chairman and CEO

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Monday, June 07, 2010

The Honorable Barbara Boxer, Chair
Environment & Public Works Committee
410 Dirksen Senate Building
Washington, DC 20510

The Honorable Jim Inhofe, Ranking Member
Environment & Public Works Committee
456 Dirksen Senate Building
Washington, DC 20510

Dear Senators Boxer and Inhofe,

This Wednesday, the Environment and Public Works Committee will hold a hearing on S. 3305, the "Big Oil Bailout Prevention Liability Act," in response to the current oil spill crisis in the Gulf of Mexico (GOM). The Independent Petroleum Association of America (IPAA) is opposed to the proposal in its current form.

It is important to note that the tragic events surrounding the Deepwater Horizon incident in the GOM will have a significant impact on American offshore oil and gas exploration and production for years to come. Our thoughts and prayers go out to the families and communities affected by the tragedy in the Gulf of Mexico and we stand ready to help them as we move forward.

Independent producers have operated responsibly in the GOM for decades and hold roughly 90 percent of the leases, producing about 30 percent of GOM oil and more than 60 percent of GOM natural gas. GOM production represents a significant amount of energy supply for consumers all across America, and it remains an essential component of America's energy portfolio. The entire industry is dedicated to working together to protect the environment and to contain the damage from the spill. Many of our member companies have offered supplies and services; others are directly helping with the clean-up efforts.

Controlling the well and protecting the environment are the main priority of the industry today. We support President Obama's independent commission investigating the Deepwater Horizon incident. It is important that a thoughtful, thorough and timely investigation and analysis of the incident is conducted to fully understand what caused the accident and to ensure the proper, improved safety measures are identified and put into practice to prevent incidents in the future. IPAA supports the following principles to address this important issue:

1. Any company operating offshore or onshore should be fully responsible (financial and otherwise) for all clean-up efforts.
2. There must be a fund to ensure that those affected by such incidents (i.e., fishermen, tourism, local businesses, etc.) will be able to fairly recoup lost costs without being caught in fierce litigation with large corporations.
3. The oil industry, collectively, should contribute to this fund and ensure its long-term viability.

These principles are already a part of federal law in the Oil Pollution Act of 1990 (OPA 90) and the Oil Spill Liability Trust Fund (OSLTF). Changes may be needed to update out-of-date OSLTF limits with additional industry funding. However, we are strongly opposed to S. 3305 and other legislative proposals being discussed in Congress that would have negative consequences for independent producers. These changes include increasing offshore liability limits to unrealistic levels that will preclude nearly every company operating in the U.S. offshore from getting insurance to cover their operations. Without the proper insurance coverage, there will not be independent producers with offshore exploration and production – it is that simple. These consequences are not justified based on the performance of independent producers operating in the offshore, who have an outstanding safety and environmental record.

The Congress should not make hasty decisions and advocate legislative and regulatory initiatives that will result in severe limitations to offshore drilling in the United States – consequences that can further harm the Gulf Coast economy. IPAA looks forward to working with the Committee and the entire Congress to find solutions that will allow American producers to continue to operate in the U.S. offshore and explore for the oil and natural gas that is vital to our nation's energy security.

A significant aspect of OPA 90 was the creation of a trust fund filled by crude oil taxes that is intended to be used by injured parties to compensate them for economic damages instead of requiring lengthy litigation. We support the expansion of this industry-wide fund to ensure that future costs and claims are covered and urge the Committee to work within the framework of OPA 90 before taking other actions that will impact American energy production.

The Obama Administration also recently announced a six month moratorium on any offshore drilling in water depths greater than 500 feet. The moratorium includes wellbore sidetracks and bypasses; spudding of any new deepwater wells and is designed to allow the presidential commission investigating the spill to prepare its recommendations. While we understand that many Americans are rightfully concerned about the environmental risks and the safety of offshore drilling, the federal government should methodically review this matter and follow the facts in the incident before taking actions that could impact oil and natural gas production from the offshore for years to come.

A recent analysis conducted by Wood MacKenzie predicted that the moratorium and new regulations will push back into later years 80,000 barrels a day of production scheduled for 2011. The impact of the spill becomes harder to ignore further into the decade. By 2015, Wood MacKenzie predicts stiffer federal offshore permitting and safety regulations will result in more than 350,000 barrels a day of production forecast for that year to be delayed. It is important to note, however, that these predictions assume available capacity for production in the GOM after the current moratorium is lifted. That is an issue that could be in serious jeopardy if rigs currently in the GOM are sent to various parts of the world to begin operations on other projects, and then are not available to return once the moratorium is lifted.

Congress must continue to recognize the importance of energy development in the United States. Rather than enacting legislation such as S. 3305 that will destroy the ability of independent, American oil and gas companies from exploring for energy resources in our nation's offshore areas, we need Congress to create a forward-looking, balanced energy policy that recognizes the role oil and natural gas will continue to play in our nation for years to come. Offshore oil and natural gas production creates jobs, revenues and helps stabilize energy prices for American consumers and helps reduce our reliance on energy supplies from unstable regimes across the globe.

As the facts and information surrounding the Deepwater Horizon incident come forward, our nation must develop a reasonable regulatory program that will allow further offshore oil and gas exploration and

production in the United States. Offshore oil and gas production must continue to be an integral part of America's energy portfolio and IPAA is dedicated to finding answers that will help us achieve that goal.

Unfortunately, the implementation of S. 3305 into law would dramatically hinder American production of oil and gas. Thank you for your attention to this matter.

Sincerely,

Bruce Vincent
Chairman



**NATIONAL
OCEAN
INDUSTRIES
ASSOCIATION**

1120 G Street, NW
Suite 900
Washington, DC 20005
Tel 202-347-6900
Fax 202-347-8650
www.noia.org

Tuesday, June 08, 2010

The Honorable Barbara Boxer, Chair
Senate Environment & Public Works Committee
410 Dirksen Senate Building
Washington, DC 20510

The Honorable Jim Inhofe, Ranking Member
Senate Environment & Public Works Committee
456 Dirksen Senate Building
Washington, DC 20510

Dear Senators Boxer and Inhofe,

Tomorrow, the Environment & Public Works Committee will be conducting a legislative hearing on S. 3305, the "Big Oil Bailout Prevention Liability Act of 2010." The National Ocean Industries Association opposes this legislation in its current form.

In the wake of the immense economic and environmental impacts still developing in the Gulf, we understand the desire of some in Congress to take immediate action, whether it be to re-impose outright drilling bans or raise liability caps on the offshore industry. As Congress and the Administration continue to investigate the Deepwater Horizon accident, it is very apparent that until we firmly understand what went wrong, it is premature to dictate broad and possibly counter-productive solutions.

There are numerous hearings and investigations underway to delve into the root causes of the tragic explosion on the Deepwater Horizon and resulting loss of well control. This week alone, various Committees in Congress are conducting nine separate hearings. Clearly, new information is pouring in.

In the meantime, an unprecedented response and cleanup effort is underway involving over 17,000 people and thousands of private and government vessels. The offshore industry is participating fully and is also hard at work to stem the flow of oil and protect the shorelines and natural resources of the Gulf of Mexico. NOIA member companies are assisting BP in its response efforts, and stand ready to cooperate in hearings and investigations.

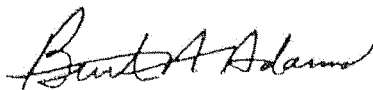
In addition, the Administration has initiated investigations through several avenues, which should allow the federal government and the American people to put all the pieces of the puzzle together for a complete picture. Once complete, this picture will provide valuable information on strategic, targeted measures for possible reforms in planning, permitting, inspections, regulatory and statutory regimes.

The companies involved in the Deepwater Horizon tragedy have indicated their intent to pay for damages and economic impacts beyond the current liability cap of \$75 million, so calls for limitless liability may be a solution in search of a real problem. One thing that is clear is that raising the liability caps as high as \$10 billion or beyond will drive most non-international producers out of the Gulf of Mexico. This means less domestic energy production and more imports of oil from politically unstable regions, along with increased transportation of oil. The resulting concentration of domestic offshore energy production will be in the hands of a few multinational or nationalized companies.

In addition, I encourage our policy makers to remember that, despite this tragedy, America's need for domestic energy has not changed and OCS development remains a vital part of our overall national energy picture. Nearly a third of our domestic oil comes from the Gulf of Mexico. No one can argue the fact that demand for energy will only continue to increase for the foreseeable future.

We should resist the impulse toward knee jerk reactions and proceed carefully when making decisions that affect the future of our nation's energy supply.

Sincerely,

A handwritten signature in black ink, appearing to read "Burt Adams". The signature is fluid and cursive, with the first name "Burt" and last name "Adams" clearly distinguishable.

Burt Adams
Chairman
National Ocean Industries Association

**Testimony of Rawle O. King
Analyst in Financial Economics and Risk Assessment
Congressional Research Service**

S. 3305, The Big Oil Bailout Prevention Liability Act of 2010

**Before the Senate Committee on Environment and Public Works
June 9, 2010**

Chairman Boxer, Ranking Member Inhofe, and Members of the Committee, on behalf of the Congressional Research Service (CRS) I would like to thank the Committee for inviting me to testify here today. My name is Rawle King. I am an analyst in financial economics and risk assessment. You have asked CRS to provide testimony on the effects of raising the liability limit for damages to \$10 billion and to review the amount of insurance that is likely to become available from the commercial insurance market for third-party pollution liability damages facing operators of offshore energy facilities in the aftermath of the *Deepwater Horizon* accident. I should note that CRS does not advocate policy or take a position on specific legislation.

Introduction

In recent weeks, Congress has been called upon to address issues surrounding what has been characterized as the worst oil spill disaster in U.S. history in the aftermath of the *Deepwater Horizon* oil rig platform explosion, fire and sinking. The oil spill incident will likely result in costs associated with environmental liability, bodily injury and property damage liability claims, capping the well and clean-up, lost revenue, damage to marinas, vessels, and to property ashore. Early estimates of total insured losses are about \$1.5 billion and actual losses could be much higher. Importantly, the future of offshore oil and gas exploration and production in the Eastern Gulf of Mexico and the Atlantic seaboard, an important source of energy for the nation, will be affected. Given the magnitude of the recent oil spill, parallels could be drawn between the *Deepwater Horizon* incident and the 1969 oil spill in Santa Barbara, California that led to the closing of much of the Outer Continental Shelf (OCS).

S. 3305, the Big Oil Bailout Prevention Liability Act of 2010, would amend Section 1004(a)(3) of the Oil Pollution Act of 1990 (OPA)¹ to increase the limit of liability on responsible parties for environmental liability from an oil spill from the current \$75 million to \$10 billion. Liability limits would not apply if the incident was “proximately caused” by “gross negligence or willful misconduct” or “the violation of an applicable Federal safety, construction, or operating regulation....” If one of these circumstances is determined to have occurred, the liability would be unlimited.

A key oil spill liability and insurance public policy challenge stemming from the *Deepwater Horizon* catastrophe involves reconciling two points of contention: (1) the desire to increase the limitations of liability for operators of offshore energy facilities from \$75 million to \$10 billion or more for economic losses caused by oil pollution damage and raise the criteria for demonstrating oil spill financial responsibility (OSFR); and (2) the limited capacity of offshore energy insurance and reinsurance to cover loss of well control, cost to redrill a blowout well and pollution liability facing operators of offshore energy facilities.

¹ P.L. 101-380, primarily codified at 33 U.S.C. 2701, et seq.

With capacity in the offshore energy insurance market now at about \$1.5 billion, there has been uncertainty about offshore facility operator's ability to obtain insurance certificates to demonstrate evidence of financial responsibility under Section 1061 of the OPA. Underlying this issue is the unique low-frequency, high-severity nature of oil spill catastrophe risk exposures and the difficulties insurers and reinsurers have in raising capital to insure such risks. Congress may wish to consider the feasibility of alternatives to traditional insurance and reinsurance products designed to spread catastrophe risks among capital market investors. The development of innovative catastrophe-linked securities and other alternative risk transfer (ART) instruments that transfer income received in the form of insurance premiums to the capital market for their assumption of risk is one proposed alternative to traditional offshore energy insurance and reinsurance.

The Deepwater Horizon Oil Spill Incident

On April 20, 2010, the ultra-deepwater, semi-submersible mobile offshore oil rig *Deepwater Horizon* experienced an explosion and fire and sank in the Gulf of Mexico off the coast of Louisiana. The rig was owned and operated by Transocean, a Swiss offshore drilling contractor, and leased to British Petroleum (BP). The explosion and fire, which resulted in 11 fatalities and several injuries, is currently being investigated but is believed to have been caused by the failure of specialized oil spill prevention equipment called a blowout preventer (BOP).² The failure of the BOP left the well unsecured and leaking from the marine riser. The amount of oil and gas escaping from the subsurface well is a matter of dispute but an interagency federal panel of scientists led by the U.S. Geological Survey estimated the spill's size at 12,000 to 19,000 barrels of oil a day, making the recent incident the largest oil spill in U.S. history.³

Oil Spill Financial Responsibility and Insurance Requirements

Congress passed the OPA to strengthen the safety and environmental practices in the oil and gas exploration and production business and to create a system of financial responsibility laws and compulsory liability insurance combined with strict liability standards. The financial responsibility and compulsory insurance requirements provided funds to pay for damages; the strict liability rules allow third-party claims to be made directly against the insurer, irrespective of negligence. This regulatory structure was designed to avoid time-consuming and costly litigation and the need for oil spill victims to prove negligence as the primary test of liability for oil pollution damage. Operators of offshore energy facilities are held strictly liable and thus cannot argue that disaster victims contributed to the injury by their own negligence. Strict liability theories eliminate the necessity of establishing intent. The presumption is that oil pollution victims are incapable of protecting themselves against the exposure to oil pollution. Strict liability is therefore intended to distribute the economic burden of environmental-related damages while enhancing the speedy compensation of third-party oil pollution damages, property losses and bodily injury irrespective of fault or the defendant's solvency.

Under Section 1016 of the OPA, oil and gas exploration and production (E&P) leases issued by the U.S. Minerals Management Services for operation in the Gulf of Mexico must establish and maintain oil spill financial responsibility (OSFR) capability to meet their liabilities for removal

² Blowouts occur during offshore drilling operations when pressure exceeds the weight of the drilling fluid in the well which results in an uncontrolled flow of oil. The blowout and subsequent oil flow could result in loss of the property at the drill site.

³ Tom Zeller Jr., "Estimates Suggest Spill is Biggest in U.S. History," *New York Times*, May 27, 2010, located at: <http://www.nytimes.com/2010/05/28/us/28flow.html>.

costs and damages caused by oil discharges from an offshore facility and associated pipelines.⁴ OPA established a \$75 million cap on the responsible party(s) for economic damages unless the damages were the result of acts of gross negligence or willful misconduct.⁵

Lease holders of a covered offshore facility (COF) must demonstrate a minimum amount of OSFR of \$35 million per 35,000 barrels of “worst case oil-spill discharge” up to a maximum of \$150 million for COF located in the OCS and \$10 million in state waters. As an illustration, a worst case oil-spill discharge volume of 35,000 barrels (bbls) requires \$35 million in OSFR while a volume of 35,001 bbls requires \$70 million. The MMS calculates the worst case oil-spill discharge volume for a facility. An exemption to the OSFR is provided for persons responsible for facilities having a potential worst case oil-spill discharge of 1,000 bbls or less. The OSFR is demonstrated in various ways including surety bonds, guarantees, letters of credit and self insurance, but the most common method is by means of an insurance certificate. Claims above the current liability cap can be made to the Oil Spill Liability Trust Fund, which has about \$1.6 billion that can be used for cleanup costs and bodily injuries and property damage to third parties. The Fund is capitalized by a \$.08 excise tax on every barrel of domestic and imported crude oil. The Fund is limited to payouts of \$1 billion per incident and \$500 million for natural resource damages.

Offshore Energy Insurance and Reinsurance Market

Prior to 1969, liability insurance was an internal matter of the companies that owned shipping vessels, including offshore energy facilities (oil rigs). Insuring potential liabilities facing mobile offshore drilling units (MODU), a type of vessel, was not made compulsory until the advent of the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC).⁶ The triggering event was the 1969 *Torrey Canyon* incident after which shipowners’ liability insurance for oil pollution damage became commonplace. At about the same time, a specialty niche offshore oil and gas insurance market began offering insurance coverage for risks usually retained by the operator. Offshore international underwriting syndicates were expanded and began offering expanded coverage for pollution liability resulting from blowouts, costs of well control, damage to underground resources, liability to the employees of the operator, loss or damage to equipment lost while actively in use, and loss to drilling and servicing equipment from corrosive elements.

The emergence of oil spill financial responsibility (OSFR) requirements and compulsory liability insurance combined with strict liability statutes did not occur until after the 1989 Exxon Valdez oil spills and the enactment of the OPA. The imposition of strict liability for large-scale oil spills dramatically increased demand for offshore energy facility liability insurance protection. Today, the offshore energy insurance market is well-syndicated, with the insured losses spread across a broad spectrum of global insurers and reinsurers based principally in London and Bermuda.

The Marine Insurance Industry

Operators of vessels, including mobile offshore drilling units (MODU) like the *Deepwater Horizon* oil rig, face multiple property and liability loss exposures which they use ocean marine insurance to cover.

⁴ This requirement applies to the Outer Continental Shelf (OCS), state waters, and certain coastal inland waters.

⁵ CRS Report R41256, *Oil Pollution Act of 1990 (OPA): Liability of Responsible Parties*, by James E. Nichols.

⁶ See *International Convention on Civil Liability for Pollution Damage, 1969*, located at: http://www.imo.org/conventions/contents.asp?doc_id=660&topic_id=256.

Marine insurance covers vessels and their cargoes for both property and liability risk exposures. In the United States, marine insurance consists of two distinct branches: (1) inland (or “dry”) marine that includes exposures related to properties in transit such as mobile equipment and jewelry; and (2) ocean (or “wet”) marine that includes hull and cargo coverage. Ocean marine means the same as marine insurance in the global insurance market. Because of its unique loss exposures both ocean and inland marine insurance are exempt from state insurance rate and policy form filing requirements and state insurance premium tax. This allows a high degree of flexibility in modifying forms and rates to cover unique loss exposures. A vessel owner’s legal liability is subject to a specialized branch of federal law known as admiralty or general maritime law.⁷ This favorable regulatory treatment was designed to encourage the development of the U.S. ocean marine insurance industry that was being outcompeted by British marine insurers.

Marine insurance covers:

- Liability for bodily injury, illness, or death of:
 - Members of the vessel’s crew
 - Shore workers, passengers, or other persons on board
 - Persons not on board the vessel
- Liability for property damage to (and resulting loss of use of):
 - Other vessels, resulting from collision with the vessel
 - Vessel owners’ own vessel
 - Cargo or other property on board other vessels
 - Cargo or other property of others on board the at-fault vessel
 - Bridges, piers, docks, navigational locks, and other structures
- Liability for environmental impairment resulting from oil spills or other pollution incidents.

Structure and Performance of Offshore Energy Insurance Market

The offshore energy insurance market is one class of business (or sublines) within the ocean marine insurance market. The sublines within ocean marine are: cargo, hull, war, primary marine liabilities, excess liabilities, yacht, protection and indemnity (P&I), and offshore energy. Ocean marine insurance is typically purchased to cover risk exposures of shipowners (cargo and hull), marinas, wharves, ports, offshore oil and gas exploration and production firms, and onshore warehouse and retail establishments. Operators of offshore energy facilities typically self insure or purchase pollution liability coverage and excess liability limits in the surplus market or the international marine insurance market. Insurance sold in the surplus market is handled through specialized brokers.

Structure

The offshore energy insurance market is highly specialized and, because the limits of insurance are usually in excess of \$1 billion, there is no single insurer who covers the entire risk exposure. Consequently, operators of offshore drilling units, production platforms, undersea pipelines and systems for loading oil onto vessels at offshore mooring points typically insure their property and liability risk exposures on a subscription basis through specialized brokers who negotiate with

⁷ Admiralty law can be distinguished from common law that governs disputes and claims for other lines of business in that a marine dispute is tried before judges rather than juries.

underwriters in the energy field. Most subscription transactions are negotiated and placed in the London and Bermuda insurance market through, for example, Lloyds of London and scores of global reinsurance companies and intermediaries.

In the last decade, the formal organizational structure of the ocean marine industry underwent significant cultural and institutional transformation. According to Conning Research and Consulting, the ocean marine insurance market has become more concentrated with fewer, larger insurers due to overall insurance industry consolidation. In 2009, there were 106 groups underwriting ocean marine coverage compared to 189 in 1986.⁸ Moreover, the size of the ocean marine insurance industry, as a proportion of the overall property and casualty insurance industry, has declined from 3% of total P&C insurance premiums in 1989 to 0.7% of overall writings in 2009.⁹

An industry once dominated by individual freestanding monoline underwriters (i.e., managing agencies/pools) is now dominated by small marine underwriting units subsumed within multiline insurers, either in the commercial or speciality lines divisions. In addition, offshore energy insurers, who traditionally were defined by their willingness to assume risk without relying on technical analysis, now require professional engineers to evaluate risk and quantify exposures. Marine insurance underwriting is now guided not by experienced and knowledgeable underwriters but by computer simulation models and estimates on exposure promulgated by actuaries and quantitative approaches.¹⁰

Performance

Table 2 shows ocean marine global premiums by class for first-party physical damage coverage. Importantly, these figures do not include third-party liability coverage for bodily injury and property damages and clean up and containment of oil spills. These data are not readily available because the main market players are based principally in London and Bermuda and beyond the reach of state insurance regulators. Based on conversations with offshore energy insurance brokers, the estimated total offshore energy property insurance premiums is in the range of \$3 to \$3.5 billion annually. There is an additional \$500 million in third-party liability capacity. Most operators of offshore energy facilities (e.g., MODU) carry about \$300 to \$500 million of operator extra expense insurance.

In 2009, the offshore energy insurance market experienced surplus capacity due to two main factors. First, mobile offshore drilling units (MODU) rig utilization and, hence, demand for insurance declined sharply in all oil and gas exploration and production areas of the world, but particularly in the Gulf of Mexico because of heightened hurricane activity in 2004, 2005, 2006, and 2008. According to the International Union of Marine Insurance (IUMI), the worldwide rig capacity utilization rate stood at 75% in 2009, down from 88% in 2008.¹¹ The Gulf of Mexico rig utilization rate was 49%, off from 75% in 2008. Second, the demand for ocean marine insurance has been adversely affected by the global economic downturn and the decline in world trade and the drop in market price for oil and natural gas.

⁸ Conning Research and Consulting Strategic Study Series, "Ocean Marine Insurance: Entering New Waters: 2009", Hartford, Connecticut, p. 9.

⁹ Ibid.

¹⁰ Ibid.

¹¹ International Union of Marine Insurance, "Press Release: Sharp Drop in Offshore Rig Operation in 2009," located at: [<http://www.iumi.com/index.cfm?id=7198>].

Table 2. Ocean Marine Global Insurance Premiums by Class

(\$ in millions)

	2006	2007
Global Hull	\$5,282	\$5,919
Transport/Cargo	10,724	11,958
Marine Liability	1,381	1,420
Offshore/Energy	2,736	2,806
Total	\$20,124	\$22,103

Source: International Union of Marine Insurance

Typical Offshore Energy Insurance Coverage

The ocean marine line uses several policy forms ranging from policies for cargo, brownwater (domestic U.S.) hull and bluewater (oceangoing) hull, war, primary liability, excess liability, yacht, P&I, and offshore energy.

The main types of insurance coverage commonly used in the offshore energy insurance market that are relevant to the *Deepwater Horizon* incident include: (1) offshore physical damage coverage for physical damage or loss to offshore fixed platforms, pipelines and production and accommodation facilities;¹² (2) Operator's Extra Expense (OEE); (3) Excess Liability insurance; (4) business interruption; and (5) workers' compensation. Another type of insurance coverage that provides third-party liability protection for owners and operators of vessels is Protection and Indemnity (P&I) insurance sold by P&I clubs, which are mutual associations of vessel owners. However, P&I policies sold by conventional insurers explicitly do not offer coverage to indemnify offshore energy facilities for oil pollution damages and supplemental pollution liability insurance must be obtained under a separate marine policy.¹³

- **Offshore Physical Damage.** This coverage provides post-loss financing for any direct physical loss of or damage to fixed offshore drilling, production and accommodation facilities, including: (1) offshore energy drilling, production and accommodation facilities;¹⁴ (2) pipelines; (3) subsea equipment; and (4) offshore loading. All risks are

¹² *ISO Commercial Property Causes of Loss – Special Form 10 30 04 02*, located at: [http://www.endlar.com/Documents/Policy_Forms/Arbella%20CP1030%20Special%20Cause%20of%20Loss%20Form.pdf].

¹³ In the 19th century, shipowners banded together in mutual underwriting clubs to form shipowners' Protection and Indemnity (P&I) clubs to cover shipowners' third-party liabilities and expenses arising from the owning or operation of their ships. There are thirteen separate and independent principal Clubs that form the International Group of P&I Clubs. Some of these Clubs have affiliated and reinsured subsidiary associations. The American Steamship Owners Mutual Protection and Indemnity Association, Inc., established in New York in 1917, is the only mutual P&I Club domiciled in the United States. It is a member of the International Group of P&I clubs, a collective of thirteen mutuals which together provide P&I insurance for some 90% of all world shipping. Members of the clubs are generally levied an initial sum that is used to purchase reinsurance to cover their mutual liability risks. If a club experiences unfavorable losses, the members are assessed a supplementary premium. The club attempts to build up loss reserves.

¹⁴ It is important to distinguish between a mobile offshore drilling unit (MODU), such as the *Deepwater Horizon*, and a well drilled from a MODU. A MODU is classified as a vessel and well drilling from a MODU is classified as a covered offshore facility (COF) under the OPA. The Secretary of Transportation has authority for vessel oil pollution financial responsibility and the U.S. Coast Guard regulates the oil-spill financial responsibility program for vessels. Offshore drilling rigs are classified into two categories: mobile offshore drilling units (MODUs) and fixed unites. MODUs are classified in terms of bottom-supported (shallow water) rigs and floating (deepwater) rigs. In bottom-supported units, the rig is in contact with the seafloor during drilling, while a floating rig floats over the site while it drills, held in position by anchors or equipped with thrusters to be dynamically positioned. Both units float when

covered unless specifically excluded but such risks are covered in OEE policies. For example, oil wells and regaining control of the well after a blowout and redrilling expenses are typically excluded.

- **Operator's Extra Expense (OEE)/Energy Exploration and Development (EED) Coverage** — Covers the costs of well blowout and indemnifies the offshore facility operator for third-party bodily injury claims, damage to and loss of third party property, and the cost of clean up and legal defense expenses as a result of a blowout. OEE covers evacuation expenses, the removal of wreckage and making wells safe, and the property of others in the insured's care custody and control. Coverage may also include the redrilling of a well after a blowout to the original depth and comparable condition prior to the loss, as well as the legal expenses emanating from an incident such as the sinking of a rig, or an oil spill. The oil pollution incident must be sudden and accidental and the occurrence must have taken place during the period when insurance coverage is in force. Also, the incident must become known to the insured within 90 days and the insured must report the claim to the underwriter within 180 days. OEE is sold as a "Combined Single Limit of Liability" and covers actual costs and/or expenses incurred in regaining control of an unintended subsurface flow of oil. The operator is responsible for damage to drilling equipment as determined by the "Operating Agreement" between the operator of the rig and the drilling contractor listing the risks the operator will cover. Under these Agreements the drilling contractor is typically held harmless with respect to pollution liability for underground resources and liability for damage to operator's property or injury to operator's personnel arising out of the employee/employer relationship.
- **Excess Liability Insurance.** This coverage is purchased in layers that attach excess of a certain dollar limit. A typical operator would have many layers of excess liability that adds up to a certain aggregate level of protection. Although excess liability coverage is purchased as an additional layer of coverage in excess of the OEE policy it is subject to its own terms and conditions. Thus, whereas OEE covers pollution-related third party bodily injury and third party property loss or damage or loss of use on a strict liability basis, the excess liability insurance policy excludes pollution from wells. The policy generally has a limited "buy back," which requires the pollution event to be sudden, accidental and unintended and subject to strict discovery and reporting requirements. The offshore energy facility operator must purchase specific "pollution endorsements" that overrides the pollution exclusion provision in the excess liability policy. A point of note is that the use of pollution endorsements could have the effect of reducing overall insurance capacity for cleanup of pollution from wells because the insurer is potentially liable for higher levels of third party liability on each policy.
- **Business Interruption (BI)/Loss of Production Income (LOPI)** — This coverage indemnifies the insured for lost net income that would have been earned had the damage not occurred, as well as for refunding fixed expenses incurred during the period of indemnity. Contingent business insurance coverage provides payments for damages based upon loss income due to damage to upstream facilities such as processing plants, trunklines, and refineries owned by third parties but upon which the insured's income depended. This coverage is usually written in conjunction with offshore physical damage

moved from one site to another. Bottom-supported units include jack ups, tenders, submersibles, and barges. Floating units include semi-submersibles and drillships. Fixed units (or platform rigs) are drilling units that are placed upon a platform or other structures. Subsea floating production systems are employed in deeper water. The Deepwater Horizon was a floating production system (FPS) or vessel that was connected to a subsea pipeline, while a floating, production, storage, and offloading vessel (FPSO) processed and stored oil on board a vessel prior to being offloaded into shuttle tankers.

coverage on standardized forms published by Insurance Services Office, Inc. or those that resemble the ISO form.¹⁵ Because of the standardization in contract language there tends to be more predictability in claim payments and, therefore, reduced potential litigation over contract interpretation. Companies filing a business interruption insurance claim must show that their business operation sustained actual direct physical loss of or damage to the insured property. Without this proof the BI claim could be denied because, as many experts agree, the consequences of oil spill can be far reaching without any need for the oil itself to actually reach those affected.

- **Workers Compensation/Employers' Liability** — Provides coverage for claims arising out of employee injuries or deaths incurred while the employees are in the line of duty.

Policy Issue Considerations for Congress

In the aftermath of the *Deepwater Horizon* incident, one issue that Congress may wish to consider is the willingness of the global offshore energy insurance market to participate in the OSFR program, given the proposed increase in the limit of liability required under OPA to \$10 billion and also the proposal to increase the OSFR requirement to some higher level that is yet to be determined. If insurers were willing to continue to participate, another question might be whether the new limit of liability is supported by the availability of insurance coverage on adequate terms and conditions in the global commercial insurance market for offshore energy facilities given: (1) the insurability of future offshore oil spill hazards; and (2) the impact of the global financial market crisis on insurance market's capacity for underwriting "catastrophe" or "peak" risks, including oil spill damages.

Future Insurability of Offshore Oil Spill Perils

With respect to the insurability of oil spill risk, it is instructive to point to similarities with financing recovery of large-scale natural disasters, such as Hurricane Katrina. As a major source of post-disaster recovery financing, commercial insurance companies have been called upon to pay for catastrophe-related losses, in some cases beyond their contractual policy obligation. For example, after the September 11, 2001 terrorist attacks at the World Trade Center, insurers faced pressure to interpret policy language liberally with respect to war risk coverage and the number of occurrences. After some negotiation between private insurers and reinsurers, legislators, and other industry participants, which led to the passage of the Terrorism Risk Insurance Act (a pre-disaster risk financing scheme), insurers agreed to pay claims related to the 9/11 incident. Insurers did not charge an additional premium to cover that risk. Other notable examples include asbestos and Superfund environmental claims (continuum triggers) and Hurricane Katrina with the water exclusion provision in homeowners' insurance policies where some policies were reinterpreted by the courts to expand coverage for water damage though insurers maintained that coverage was explicitly excluded. Consideration of coverage expansion through the reinterpretation of insurance contract language by the courts could affect the availability of insurance for offshore energy facilities going forward.

Availability of Offshore Energy Insurance for Oil Spills

In the aftermath of the *Deepwater Horizon* incident, offshore energy insurance underwriters have begun to reassess their risk exposures in response to newly perceived operational risks involving blowouts, fires, explosions, lost control of well and other non-hurricane risks. Insurance experts expect offshore energy insurance rates to increase in the short term as a result of the perception of

¹⁵ ISO Form CP 0030.

greater potential risk exposure. Changes in the insurance market will likely not be driven by the windstorm component of the coverage; rather, they will be driven by reassessments of operational risks. Coverage for drilling contractors and control-of-well expenses are the areas most likely to be targeted by underwriters for rate increases.

The proposed increase in the limit of liability required under OPA to \$10 billion carries at least four consequences in the offshore energy insurance and reinsurance market. *First*, some insurance market experts have asserted that the global commercial insurance capacity for third-party liability insurance — Operators' Extra Expense (OEE) and Excess Liabilities coverage — that is currently available to meet OSFR requirements is approximately \$1.5 billion. This amount is likely to be far below the OSFR for the new \$10 billion liability limits. Depending on an operator's operating earnings, the company may consider implementing a captive insurance program (self insurer), choose to increase risk retention, or join a mutual insurance company.

Insurers have pointed out that the strict liability standard with direct access to the insurer serves to further limit overall industry capacity. The reason is that the insurer cannot control claims payment with contract terms and conditions. Moreover, the OEE coverage as currently structured provides a combined single limit for well control, well redrilling after a blowout, and sudden and accidental seepage and pollution clean-up. This means prioritizing the single limit, for example, by first using the insurance proceeds to hire a well control expert to retake control of the well and, if necessary and funds remain, drill a new well, with the balance of the OEE insurance limits used for pollution clean-up and containment of oil spills.

Second, given basic economic supply-demand principles and the fallout from what may be characterized as the largest oil spill in U.S. history, most insurance market experts expect the supply of insurance coverage for the new OSFR to only be available at a high premium, if coverage is available at all. The imposition of higher strict liability limits for large-scale oil pollution could have the effect of greatly increasing the demand for liability insurance protection. This situation could multiply the challenges insurers might have in evaluating risk exposures, defining reasonable limits for the coverage and calculating insurance prices. Operators may find themselves assuming or retaining higher levels of self-insurance, which might affect the MMS's offshore oil and gas lease bidding and ultimately the royalties earned for the U.S. Treasury.

Third, if the past is an indication of the future, private commercial insurers may be reluctant to commit financial capital in underwriting unknown new risks in the post-Deepwater Horizon environment until there is greater clarity on the legislative and legal climate. Insurers would want to collect the necessary data for evaluation of risks associated with certain severity of loss and insurability, recalculate rates, policy terms and conditions, and set limitations. Conduct of these normal activities, at least in the short term, will be affected by the uncertainty of the losses associated with the recent Gulf of Mexico oil spill.

OPA's oil spill financial responsibility rule is a pre-disaster risk financing strategy that, in the wake of the Deepwater Horizon incident, could come under intense pressure because of capital shortages in the offshore energy insurance and reinsurance market. From an insurer's perspective, one issue that may arise is the potential for future massive environmental-related (strict liability) damages which leads to the question of whether offshore oil pollution will be insurable or insurable only with government support. Given the magnitude of losses and the uncertainty about future profitability in the energy insurance business, a "hard" energy insurance market — scarcity of coverage and high prices — may emerge following the *Deepwater Horizon* incident. Prior to this event, the third party pollution liability market was thought to be in a "soft" phase where rates were low as a result of oversupply of capacity.¹⁶

¹⁶ Willis Limited, "Energy Market Review: On the Edge of an Abyss?", March 2010, located at:

Fourth, many insurance market experts would likely support a more efficient pre-disaster risk financing approach to managing and financing large-scale oil spill disasters. The availability of alternative sources of insurance capacity for spreading financial risks associated with oil spills, perhaps through reinsurance sidecars, catastrophe bonds or energy insurance financial futures and options (i.e., derivative financial instruments that securitize insurance risk, turning an insurance policy or reinsurance contract into a security), could provide the added capital needed in the insurance marketplace to cover the higher liability and associated OSFR limits. For example, a reinsurance sidecar is a limited-life reinsurance company that is established to provide property catastrophe (quota-share) reinsurance for the upper layers of an insurance contract or the highest-loss events. They are constructed as private-placements rather than tradable securities – like a catastrophe bond.

**STATEMENT OF
MR. VINCENT J. FOLEY
PARTNER, HOLLAND & KNIGHT LLP
ON
ISSUES RELATED TO THE MODIFICATION OF
CAPS ON LIABILITY IN THE OIL POLLUTION ACT OF 1990
BEFORE THE
U.S. SENATE COMMITTEE ON ENVIRONMENT & PUBLIC WORKS
JUNE 9, 2010**

Good morning, Chairwoman Boxer, Ranking Member Inhofe and distinguished members of the Committee. I am Vincent Foley, a partner in the maritime practice group of Holland & Knight LLP. My specialty within the group is environmental liability and oil spill litigation. In practice, I have represented primarily ship owners, charterers, oil companies, and insurers of maritime risks. I have been asked to prepare this statement to identify issues which relate to modification of the limits of liability in the Oil Pollution Act of 1990 ("OPA").

I describe below the compensation and liability scheme set up by the OPA. The OPA creates strict liability for designated responsible parties up to prescribed limits set forth in the statute. For vessels, the limits are calculated by multiplying a dollar figure by the gross tonnage of the vessel to arrive at the overall limit. For an offshore facility, the overall limit is set at \$75 million but there is no limit on removal costs.

In the event oil pollution claims for a particular incident exceed the OPA limits, the National Pollution Fund Center ("NPFC") pays claims from the Oil Spill Liability Trust Fund (the "Trust Fund") up to a maximum of \$1 billion per incident. The Trust Fund is sourced by an eight cents per barrel tax on petroleum produced in or imported into the United States.

The OPA also has provisions which call for unlimited liability in the event the responsible party acts with gross negligence or willful misconduct, violates an applicable federal safety, construction or operating regulation, or after an oil spill fails to report or cooperate with authorities or without sufficient cause fails to follow a governmental order. State law may also provide unlimited liability for an oil spill. The OPA expressly provides that individual states may legislate to create supplemental liability for oil pollution damages. Twenty-six states and territories have enacted legislation imposing oil spill liability in excess of the OPA limits, and in several cases unlimited strict liability.

As part of the liability scheme, participants in the industry are required to submit evidence of financial responsibility sufficient to pay claims up to the OPA limits. As a practical matter, this requirement is usually met by provision of a certificate from a qualified insurance company agreeing to act as a guarantor of the OPA liability limit for a vessel or facility. The guarantor must agree to direct action lawsuits from claimants. The financial responsibility requirement ensures that compensation funds are immediately available from the responsible party to pay claims for damages and removal costs.

A dramatic increase in the OPA limits of liability or removal of current limits of liability entirely could seriously disrupt the existing compensation and liability scheme for oil spills.

STATEMENT OF VINCENT J. FOLEY
JUNE 9, 2010

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Such an increase also may jeopardize the ability of most companies to provide evidence of financial responsibility as required by the statute. Careful consideration should be given to study the effects of modifications to the OPA limits of liability including comparison to other prominent jurisdictions worldwide, which balance the interests of industry participants with protecting the environment and providing adequate compensation for oil pollution claims.

Oil Spill Liability – Federal Law

The OPA is the primary federal statute dealing with liability and compensation for the discharge of oil in navigable waters of the United States. The statutory scheme for oil pollution also includes the Federal Water Pollution Control Act (FWPCA) which provides for both mandatory and discretionary civil and criminal penalties against the owner, operator, or person in charge of a vessel that discharges a prohibited amount of oil or hazardous substances into navigable waters. In addition to the OPA limits described below, the FWPCA provides for civil and administrative fines on a per-day per-barrel basis under with no limit of liability.

There are several other federal statutes which provide for criminal penalties arising out of an unlawful discharge of oil including, for example, the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. § 1908(a), the Refuse Act, 33 U.S.C. § 407, 411-413, and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711. Criminal prosecutions can have a decisive impact on enforceability of limitations of liability for two reasons. First, if the company is convicted, the civil standard to pierce limits of liability is often met. Second, if the company seeks to enter a guilty plea, the company will usually have to acknowledge facts which undermine what would otherwise be a right to limit liability. This statement will focus on the civil liability and compensation scheme created by the OPA.

The primary objective of the OPA is to provide compensation to claimants from oil spills in U.S. navigable waters. Under the OPA, strict, joint and several liability is imposed up to statutory limits against the Responsible Party (RP) for a vessel or facility from which oil is discharged or which poses a substantial threat of discharge into navigable waters of the United States. For a vessel, the RP means any person owning, operating or demise chartering a vessel. Basically, this "operator" liability may be imposed on any person or corporation which exercises the day-to-day management or control over the vessel. For an offshore facility, the RP means the lessee or permittee of the area in which the facility is located or the holder of a right of use or easement under applicable state law or the Outer Continental State Lands Act for the area in which the facility is located.

OPA Compensation Scheme and Claims Process

The OPA created the Oil Spill Liability Trust Fund (the Trust Fund) which provides compensation to injured parties for removal costs and damages resulting from an oil spill. The Trust Fund is managed by the National Pollution Funds Center (NPFC), an administrative agency of the United States Coast Guard. The NPFC administers the Trust Fund and acts as the implementing agency of the OPA. The Trust Fund is primarily sourced by an eight cents per barrel tax on petroleum produced in or imported to the United States. In addition, the Trust Fund

receives income from transfers from other pollution funds, fines, penalties, accrued interest and cost recovery from RPs.

Upon receiving notice of an oil spill, the NPFC designates one or more RPs for the oil spill, and provides notice to potential claimants of the RP's claims process in order to facilitate and expedite payments to injured parties. The OPA provides a two step process for claimants seeking compensation. First, a claimant may seek compensation directly from the strictly liable RP or its guarantor. Second, if the RP does not settle the claim within 90 days, the claimant can either seek compensation through litigation against liable parties (including the RP) or submit the claim to the NPFC for adjudication and payment from the Trust Fund. Upon payment, the Trust Fund will be subrogated to the rights of the claimant against the RP. The Trust Fund has a fiduciary duty to ensure that when payments are made it is done on the basis of adequate supporting documentation. Claimants requesting compensation for lost profits or earning capacity must establish that property or natural resources were injured or lost and that the claimant lost income as a result of the oil spill.

In the event a RP is not immediately identified, the NPFC itself starts the claims process for potential claimants. The NPFC is also available for RPs to submit claims under circumstances where payments have been made by the RP in excess of its statutory OPA limits. In general, the maximum payout available from the Trust Fund for any one incident is \$1 billion or the balance of the Trust Fund, whichever is less.

OPA Liability of RP for Removal Costs and Damages

Subject to certain statutory limitations addressed below, the RP is liable for all removal costs including the costs to prevent, minimize, or mitigate oil pollution, and the following categories of damages (including interest accrued on OPA claims prior to judgment):

- (i) injury to natural resources,
- (ii) injury to real or personal property (including economic losses resulting from that injury, and loss of subsistence use of natural resources);
- (iii) loss of revenues on the use of natural resources or real or personal property and
- (iv) loss of profits or impairment of earning capacity resulting from such pollution, and the costs of providing additional public services during or after removal activities. 33 U.S.C. 2702 (b).

A RP has very limited defenses to liability, which are available only if the RP can establish, by a preponderance of the evidence, that the oil spill was caused solely by (1) an act of God, (2) an act of War, or (3) an act or omission of a third party (other than an employee, agent or contracting party of the RP). The RP is not entitled to these defenses if it fails to report the incident, fails to provide all reasonable cooperation in response to the spill, or fails to follow a governmental order. Even if the RP has a defense, it still must pay the removal costs and damages to any claimant, and may only recover its expenditures through subrogation against a

third party or the Trust Fund after payment. In addition, an RP is not liable to a claimant if the injury resulted from the claimant's gross negligence or willful misconduct.

OPA Limits of Liability

OPA imposes strict liability for removal costs and damages against an RP up to the statutory limits set forth in the statute. Pursuant to the statute, OPA's liability "shall be imposed notwithstanding any other provision or rule of law." This has been interpreted to mean that the Shipowner's Limitation of Liability Act of 1851 (the "Act") (which limits liability of the owner to the post-incident value of the vessel plus pending freight and creates a separate fund for personal injury claims) does not apply to limit or circumscribe OPA removal costs and damages claims. This Act may, however, be invoked by the vessel owner to limit non-OPA claims such as property damage or personal injury caused by the incident (as opposed to resulting from the oil spill).

A Mobile Offshore Drilling Unit ("MODU") like the Deepwater Horizon may be considered a vessel or an offshore facility under the OPA. The OPA's definition for "facility" includes any structure used for the purpose of "exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil." For an offshore facility, the overall OPA limit is \$75 million for damages plus the total of all removal costs. When the MODU is operating as an offshore facility (drilling a well as opposed to underway moving between drill assignments), the OPA allocates liability between the owner of the MODU and the lessee or permittee of the offshore facility. In this case, the MODU is first treated as a tank vessel and its limit of liability is calculated by multiplying its gross tonnage by \$2,000. For excess liability over that limit, the lessee or permittee of the offshore facility is liable up to the overall limit of \$75 million plus all removal costs. Although liability for removal costs for an Offshore Facility is unlimited, the limit of liability for damages of \$75 million for an offshore facility has not been adjusted since the OPA was enacted in 1990. The current OPA limit for onshore facilities and deepwater ports is \$350 million.

In contrast, the OPA limits of liability for vessels have been the subject of two recent increases. The first was the Delaware River Protection Act of 2006 which increased existing OPA limits for vessels and increased payments to the Trust Fund by responsible parties. This Act also provided for inflation-based increases to the OPA limits to be implemented by regulation every three years and imposed additional reporting requirements to the Congress by the executive branch on the effectiveness of these increases. The second increase came into effect when the Coast Guard adopted its final rule on February 2, 2010 to increase the limits of liability for vessels that apply under the OPA to reflect significant increases in the Consumer Price Index ("CPI").

A RP may lose its OPA limits of liability under the following circumstances:

- (i) gross negligence or willful misconduct;

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- (ii) violation of applicable federal safety, construction or operating regulations by the RP, its agent or employee, or a person acting pursuant to a contractual relationship with the RP.

There are a multitude of very specific federal safety, construction and operating regulations applicable to vessels and facilities which provide a basis to deprive an RP of the OPA limits for breach of a regulation which caused the oil spill. This broadly worded exception to the OPA limits has the potential to subject an RP to unlimited liability albeit without the financial guarantee in place to pay the excess liability.

In addition, a RP may be considered to have waived its OPA limits for failure to report an oil spill, or failure to provide all reasonable cooperation requested by a responsible official, or failure without sufficient cause to comply with an order issued by a governmental authority.

Evidence of Financial Responsibility for OPA limits

The OPA requires vessels and offshore facilities to establish and maintain evidence of financial responsibility sufficient to meet the maximum amount of liability resulting from an oil discharge imposed under the statute. Financial responsibility may be established by one or any combination of the following methods: (1) evidence of insurance; (2) surety bond; (3) guarantee; (4) letter of credit; (5) qualification as a self-insurer. For guarantors, the OPA requires a statement agreeing to be subject to direct action claims from the government or injured claimants who have been denied payment by the RP. A vessel typically meets the financial responsibility requirement by carrying, and filing with the U.S. Coast Guard, a Certificate of Financial Responsibility (COFR) which identifies an approved guarantor to be liable up to the vessel's OPA limit. For an offshore facility, the Marine Mineral Service (MMS) has issued Oil Spill Financial Responsibility (OSFR) rules which extend the OPA requirements of financial responsibility to certain Covered Offshore Facilities (COFs).

Supplemental State Law Liability for Oil Spill

The OPA expressly preserved the rights of states to legislate beyond the federal limits set forth as the statute. Any state or its political subdivision may impose additional liability or requirements with respect to the discharge of oil or removal activities. As a result, there are local spill statutes which exist in twenty-six states and territories which contain liability provisions for oil spills. Several of the state oil spill laws contain provisions for unlimited strict liability for clean up and removal costs, for example Alaska, California, and Maine. Of the states potentially affected by the Gulf Coast Disaster, Texas, Louisiana, and Florida have laws imposing strict joint and several liability. Conversely, Mississippi and Alabama do not impose limitations on liability, nor do they have oil pollution laws imposing strict liability.

Adequacy of OPA Federal Liability Scheme supplemented by State Law

The industry experience with oil spill litigation under the above described federal and state law scheme has been positive. The federal OPA limits of liability in the vast majority of oil spill incidents provide adequate funds from the RP to compensate claimants injured by the oil

spill. In the exceptional cases where liability exceeds the OPA limits, the NPFC is in place to make payments from the Trust Fund (sourced primarily by a petroleum tax) which becomes subrogated to the rights of such claimants to recover from RPs or third parties who may be responsible for the damages.

A U.S. Coast Guard report on implementation of OPA 90 during the period of FY 1993-FY 2004 indicated that there were seventeen (17) incidents during this period for which the costs of the incident are known to have exceeded the OPA limits. *Report on the Implementation of OPA 90*, http://www.uscg.mil/nptc/docs/PDFs/Reports/osltf_report.pdf. All of the incidents involved vessel spills. Seven (7) of the Seventeen (17) incidents generated claims to the Trust Fund for reimbursement from the RP for payments made in excess of the OPA limits. The remaining ten (10) incidents did not result in a reimbursement request from the RP due to criminal liability, DOJ settlement, gross negligence, and/or violation of federal regulations.

Comparison of OPA Regime to International Civil Liability and Fund Conventions

The OPA limits compare favorably to similar provisions of the Civil Liability and Fund Conventions (CLC), which have been adopted by most other jurisdictions worldwide (104 as of May 4, 2010) with the U.S. being a notable exception. One reason for the U.S. not acceding to the amendments to the CLC and Fund Conventions in 1992 was the higher OPA limits already in place at the time the conventions were amended.

By way of example, the OPA limit for a 50,000 ton vessel (other than a tanker) would be \$50 million (50,000 gross tons at \$1000 per gross ton) and the CLC limit would be approximately \$42 million (Special Drawing Rights (SDR) 4.51 million plus SDR 631 per every ton over 5,000 tons). For a tank vessel, the OPA limit would be \$100 million (50,000 tons at \$2,000 per gross ton), more than double the CLC limit. In both the OPA and CLC regimes, the Emergency Funds (i.e. Trust Fund and CLC Fund) which provide compensation to injured parties over and above the limits of liability are sourced by an industry tax on petroleum products. As noted above, for the Trust Fund, the maximum payout per incident is \$1 billion while the CLC Fund has a multi-tiered compensation system providing compensation up to \$305 million with a supplementary fund available (for certain signatory states) for up to \$1.126 billion.

Consideration for Increase in OPA Limits

In considering whether to increase the OPA limits of liability, it is important to thoroughly study the implementation of OPA and the overall liability and compensation regime. Industry participants including owners and operators of vessels, agencies such as the U.S. Coast Guard, and various stakeholders in the aftermath of an oil spill could be adversely affected by a precipitous change in existing OPA limits with no corresponding benefit in terms of victim compensation or deterrence of future spills. If such changes are not carefully studied and slowly implemented, the reaction from industry participants could have unintended consequences including disrupting U.S. oil imports. An increase in the OPA limits would require vessel owners to pay additional insurance premiums in order to continue to provide and maintain evidence of financial responsibility to meet the new increased limitations. As a practical matter, small and mid-sized independent tanker owners transport a majority of all imported petroleum

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products to the United States. For these owners and operators, insurance and other evidence of financial responsibility required by the OPA are affordable only because of the relatively inexpensive and generally available mutual protection and indemnity pollution insurance of up to \$1 billion per incident. Protection and indemnity clubs are associations of vessel owners joined together to pool mutual liabilities falling on their individual members. Mutual insurance provides security and stability to maritime trade because the claims of individual owners are not secured by a single insurer, but instead are collectively insured by the owners of 92% of the world's ocean-going tonnage if a claim exceeds a certain amount.

A dramatic increase in the OPA limits and the concomitant requirement for these owners and operators to provide evidence of financial responsibility for higher limits could result in this insurance coverage not being available through protection and indemnity clubs, and therefore the necessary pollution insurance would not be available at all to small, mid-size, and even most large operators. Such excessive additional insurance costs would force many of these operators out of business leaving only major players (to the extent any are willing to engage in oil transport) who can self-insure or otherwise afford to meet the financial responsibility requirements. Ultimately, the additional premiums for increased liability limits will have to be passed on to consumers in the form of increased prices for oil products in the United States.

Careful consideration should be given prior to legislating an increase in the present OPA liability limits which, based on industry experience, are an essential part of a functioning and reliable system for compensation of injured claimants. The OPA has built-in mechanisms to supplement liability for the exceptional oil spills including broadly worded exceptions to the OPA limits for violation of federal safety, construction, and operating regulations and the potential for unlimited supplemental state law liability.

Thank you for the opportunity to provide this testimony.

Senator INHOFE. Mr. Baron, I don't think there is a Member of Congress who doesn't agree that the limits that were put in place back during the *Exxon Valdez*—I happened to be in the House at the time. I actually went up there. I am very familiar with the process that took place. But that \$75 million is too low, we all understand that, and it certainly needs to be changed. And I made that very clear on the floor when I objected to the Menendez motion on the \$10 billion. I think that is arbitrary.

But let me just ask you, this is kind of hard to answer, but kind of guess with me on this. If we were to raise that to \$10 billion or eliminate the caps altogether, about how many companies, roughly, would be left to explore and produce in the Gulf?

Mr. BARON. I am really not in a position to comment about how many companies would be left. I can say that from an insurance market standpoint, there is not sufficient capacity to provide companies insurance protection to limits which are being proposed.

Senator INHOFE. Well, the big five, I would contend, and this is an argument I made on the floor, may be the last ones, along with the national oil companies, if it were raised to \$10 billion. Do you strongly disagree with that?

Mr. BARON. No, I do not.

Senator INHOFE. And BP is one of the big five. In other words, if we raised it up, I would say this would put them in a more advantageous position than they would be in today. That is my opinion.

If that were raised up there, how many of the independents, let's take the next step down below the five majors, would be able to purchase insurance to be able to operate?

Mr. BARON. Well, again, there is not sufficient capacity from the insurance market to meet these proposed limits, and I believe that then you would have to rely on their balance sheets and their ability to demonstrate the financial responsibility test.

Senator INHOFE. Yes. My concern and the reason for mentioning this is that I am one of these few in Congress who believes in order to run this machine called America we have to have fossil fuels. And one of the great sources is offshore. I know a lot of them, in fact we are suppliers in my State of Oklahoma, as are many who are out there. And it would appear to me that if we were to take the cap altogether off it could be instituting a de facto ban on offshore drilling. Do you think I am unreasonable in coming to that conclusion?

Mr. BARON. No, Senator.

Senator INHOFE. Mr. Hartman, you used a term that I asked the staff about, and I wasn't familiar with it and they weren't either. Maybe you could help us out. You said Alternative Funds Act or Fines Act. What were you saying? Would you repeat that?

Mr. HARTMAN. The Alternative Fines Act is under title 18 of the U.S. Code, and it gives a court the discretion to fine anyone convicted of a covered crime an amount equal to twice the economic harm caused by the crime or twice the economic gain as a result of the crime. That has been on the books for a number of years. It was the statute that was used in the Exxon case that resulted in the \$1.1 billion resolution instead of \$25,000 a day.

Senator INHOFE. I see. Well, that is interesting. Our staff is going to look into that because as we progress on this thing that might be a place to be looking.

Let me ask you a question that I think is very basic, and maybe everyone knows the answer but me. Many years ago I was a claims adjuster. That is what I did for a living. Establishing losses is something that is not an easy thing to do. Under the CRS report there are six categories of economic losses and different types of economic losses and natural resource damages. I have put them in those two categories because I think that is where this comes in.

And I would like to have you tell us first of all the relationship between the way the current claims process is operating and the current liability cap. Would this bill as written or any other bill that simply raised or removed the cap altogether have any effect on the claims process?

Mr. HARTMAN. In partial response, and the Chairman made the observation about what happened in Alaska, of course, that was before OPA was passed. And one of the purposes of the Oil Pollution Act and that process is to provide a quicker and more expeditious claims process. And the incentive for people to go into that process, at least in my experience, is that it is easier to prove the loss and the damages in that process than it is in court, and you don't have to prove liability that you have to prove in court.

Senator INHOFE. I see.

Mr. HARTMAN. But of course, that process is only available for claims under OPA. If I understand your question, if you expand or make it an unlimited liability amount, I suppose more claims, if there are claims beyond \$75 million, could go to that fund. Hopefully, it would create an incentive to make more people go to the fund and they wouldn't have to wait 20 years for recovery by having to go to court.

I don't know if I have answered you.

Senator INHOFE. Yes, you have. And all the way through this thing, I have been wondering when they talk about economic damages, that sounds good. That sounds easy. And certainly you folks know what economic damages that you would feel you would be entitled for some kind of remedy or recovery, but it is not an easy thing to address. It is very complicated.

OK, for the record I would like to ask you to submit to me some of the complications in determining economic losses, as well as natural resources damages. Is that fair?

Senator LAUTENBERG. I have no objection.

Senator INHOFE. OK. Good. Thank you very much.

Senator LAUTENBERG. Thanks very much.

I am going to turn my question period over to Senator Klobuchar, and we will continue. I will pick up after that.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Senator Lautenberg.

And thank you to all the witnesses, and thank you for being patient.

I just would like to hear from some of the people who are in the Gulf area. I am particularly, Mr. Minich, sympathetic about the tourism industry. That is the Subcommittee I chair on the Commerce Committee. I know what a rough time the tourism industry

has had. People don't realize that one of eight people in this country is employed in tourism. Every percentage point we lose of tourism costs us 170,000 jobs in this country.

So one of the things I was wondering about is how people are actually sort of feeling down in the Gulf. Do they truly believe that BP is going to compensate them? And are they aware of what happened with Exxon with that continuing lawsuit and how it took 20 years for the fishermen, to our people from the fishing area, to collect their damages? And are they concerned about this?

Mr. MINICH. A lot of folks in the tourism industry are not aware of the 20-year situation. We are all extremely, extremely worried about the situation. And there is no one in the tourism industry, if they get any compensation, they are not going to be fully compensated because we are seeing anywhere from 20 percent to 30 percent reduction in reservations for the rest of the summer. Well, you can't turn in a claim for that. That is just lost business. It is gone.

In our county, we are tracking dollar amounts for cancellations. If they are canceling an entire week's stay, we have a dollar amount that we can put toward that.

But the situation, too, is that there is so much uncertainty with this particular spill and where it is going and what it is going to do and how long it is going to be around that. Twenty percent of just Pinellas County alone, 20 percent of our summer business is European. And they don't want to make that long haul flight and come over here and have something happen.

So we are very concerned. The tourism industry in Florida was just making the turn from the last 2 years of the terrible economy. We felt really good about things in April. The indicators were up. Everything was positive, and then this thing hits April 20th, and it was downhill from there.

Senator KLOBUCHAR. And the fishing perspective on this?

Mr. FRENETTE. What I certainly can say, and reiterate what he just said, but since April 20th and about 5 or 6 days after that, our area, which was immediately impacted, the estuary, was completely shut down for fishing. My business was completely shut down.

Senator KLOBUCHAR. I have no doubt about the damages. I am just wondering if people believe some extra protection would help them. Or do they think BP is just going to pay?

Mr. FRENETTE. I think everybody has a lot of doubts, a lot of questions, especially from what happened with Valdez. Pretty much everybody in our area is aware of that and how long it took. We are really concerned about comments that have been made by Mr. Hayward from the inception of this accident. And quite honestly nothing really has been done yet other than a small disbursement of checks to some people. It is hard. Do I have complete faith? Absolutely not.

Senator KLOBUCHAR. All right. My other perspective, just from being not in the Gulf region, being a land of 10,000 lakes as opposed to the Ocean State of Rhode Island, is just that the taxpayers of my State and others not have to pay for this when BP clearly made some decisions that were wrong decisions.

And I am again wondering if we don't raise the cap, who do people think is going to pay for this? Is it the taxpayers?

Mr. Baron, do you think the taxpayers should be paying for this?

Mr. BARON. No, I don't.

Senator KLOBUCHAR. All right. So you believe that BP should be paying for it?

Mr. BARON. Yes.

Senator KLOBUCHAR. All right. Then our concern here, as expressed by people in the communities, is just that we have to make sure that they pay for it.

The last series of questions I want to ask is just about this incentive going forward, which I identified in my opening statement.

If we are going to have a \$75 million cap, and BP made \$16 billion last year, how is it an incentive for them to take safety measures, we know it is now, but in other ways going forward, if we don't at least have a realistic cap for the damage that it causes?

And I wondered, Mr. Murchison, if you would comment about that incentive issue. I believe that if you bask in the rewards and make \$16 billion a year, you should also have some liability for this. As I said yesterday at our Judiciary hearing, if an ethanol or a biofuel plant blew up in the middle of a corn field in Minnesota, they would be liable. If a wind turbine or a solar panel created some damage, they would be liable. And you don't have those kinds of incentives in place when you put this cap that is so disproportionate to the damage cost.

Mr. MURCHISON. And BP is going to be making money from this field long after they have quit restoring the fisheries of south Louisiana. When we are talking about people in south Louisiana going broke, we mean really going broke.

Senator KLOBUCHAR. OK.

Mr. Hartman, do you just want to add to that?

Mr. HARTMAN. Only that under current law, first of all, that cap—to the extent it is a cap—disappears if there is a violation of any Federal safety construction or operational regulation, any one. And so to the extent you are concerned about the liability cap issue and risk taking, current law addresses that. Plus, there is also an exception if they don't follow any reasonable order of the Government.

And as I said before, regardless of the cap, under State law, it doesn't exist and under these other provisions like the Alternative Fines Act, there is no cap, not to mention the other sanctions that could be available.

So I am just simply making the observation, as you think about that, think about the other existing incentives and how changing the cap would relate to those. That is all.

Senator KLOBUCHAR. Thank you.

Senator LAUTENBERG. We will keep the record open.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Let me ask a few questions about some of those other areas.

Mr. Hartman, did you when you were at the Department of Justice ever engage in criminal prosecution of environmental cases? Or were you entirely on the civil side?

Mr. HARTMAN. Criminal as well.

Senator WHITEHOUSE. Criminal as well. In terms of restitution under a criminal judgment, would there be any restriction on a judge imposing an order of criminal restitution above and beyond a civil liability cap, indeed, taking that civil liability cap into consideration in determining a criminal restitution order to make sure people were fully compensated?

Mr. HARTMAN. I don't believe under the Alternative Fines Act, for example, plus a judge's authority as a condition of probation to deal with victim restitution, that there is any technical, legal limit on his or her ability to use those processes.

Now, there are practicality issues as to whether it is appropriate to do it in a criminal process or whether it is going to unduly complicate the process.

Senator WHITEHOUSE. Yes.

Mr. HARTMAN. But in theory, it exists.

Senator WHITEHOUSE. In theory, it is perfectly available.

And are you familiar with the Rivers and Harbors Act?

Mr. HARTMAN. I am.

Senator WHITEHOUSE. That is a criminal statute.

Mr. HARTMAN. There is a criminal provision in that.

Senator WHITEHOUSE. And it provides a very low standard. It doesn't require negligence. It is simply a discharge that is not permitted. Correct?

Mr. HARTMAN. It is strict liability, like the Migratory Bird Treaty Act and the Refuse Act. That is correct.

Senator WHITEHOUSE. So in effect, from a prosecutor's point of view, if you can prove the act, the rest of it is a lay-down hand.

Mr. HARTMAN. It certainly is an easier case than proving one when you have intent.

Senator WHITEHOUSE. Yes. Here is no mental standard required, no punitive mens rea.

Mr. HARTMAN. That is correct.

Senator WHITEHOUSE. With respect to State law, before we had the *North Cape-Scandia* in Rhode Island we had the *World Prodigy*, which went ashore at Brenton Point and also did considerable damage. I was in the Attorney General's office then, as a young lawyer. And in that case there was the application of a doctrine called the Robins dry dock rule which bars recovery for economic damages in cases of an unintentional maritime tort. There are some specific limitations for things like commercial fishermen, but shore-based industries such as fish stores, hotels, those sorts of things seem to be exempted.

These types of businesses tried to recover damages after that 1989 *World Prodigy* spill, and their claims were dismissed in Federal Court in Rhode Island on the grounds that the court could not award economic damages under State law because that part of Rhode Island's law conflicted with the Federal maritime law.

So in that context I am just a little bit skeptical or have some questions about your claim that it doesn't matter if we cap the damages because there is always the State law. At least this decision that took place in Rhode Island a Federal Court essentially barred State law actions because of that restriction under Federal maritime law.

Is there not risk that a similar decision would pertain with respect to damages above the OPA cap?

Mr. HARTMAN. I haven't studied that, frankly. I don't believe that was a factor. I may be wrong about this. I don't believe that was a factor in the claims made by fishermen in the Exxon case. I just don't remember why. I am sorry.

Senator WHITEHOUSE. Professor Murchison, can we all agree that—actually I think we had President Galligan. Does he still teach at your school, or did he use to?

Mr. MURCHISON. He is now the President of Colby-Sawyer College.

Senator WHITEHOUSE. President of Colby?

Mr. MURCHISON. But he was a colleague of mine for 12 years at LSU.

Senator WHITEHOUSE. He was before the Judiciary Committee yesterday. He was a wonderful witness, by the way, as were you. So well done, Hebert Law School.

Is there any doubt that as a matter of corporate law a corporation has a solemn obligation to its shareholders to maximize its economic return?

Mr. MURCHISON. I am not a corporate law scholar, but that is what I remember from law school, Senator. And I think so.

By the way, I did briefly ask President Galligan about the question you are asking. He wouldn't concede that there is no possibility of State law applying to that claim because there is some admiralty doctrine that might be incorporated, but he did see that as a risk of not applying State damage law, particularly to a spill that occurred as far offshore as this particular one did. It is not clear about the reservation of State law authority for an oil spill that occurs out in the exclusive economic zone.

Senator WHITEHOUSE. But lifting the damage cap would be nice and clear.

Mr. MURCHISON. That seems to be the basic idea is what everybody seems to agree ought to happen, would happen. That is, BP pays for the economic damages and for the long term. You know, long after my lifetime, they are going to be working to restore the fisheries. That is the most prolific fishery area in the world.

Senator WHITEHOUSE. Thank you very much. My time is expired.

Thank you, Chairman, for your courtesy in allowing me to go ahead of you.

Senator LAUTENBERG. Thank you.

You have heard from one of our distinguished lawyers, a former U.S. Attorney and a legal scholar. I have the good fortune of not being any of those things. I come from the business world, and I ran a fairly good sized company before I came here. I knew one thing that though we had obligations to shareholders, we also had obligations to employees. We also had obligations to clients. We also had obligations to the community in which we existed.

So there are all kinds of things, including the fact that you have a moral obligation, I think, to operate honestly to the fullest extent, period. That is where I come in.

Mr. Kopchak, it is very interesting to hear that you were also in a black cloud, first to Cordova and now to the Gulf. I was in Cordova, and I arrived at the most 3 days later after the *Exxon Valdez*

ran aground. I was Chairman of the Subcommittee on Coast Guard at the time. So they rushed me up there.

And I saw tragedy dressed in the most beautiful colors you ever saw because as the oil skimmed over the water, the color, the kaleidoscope of color was quite a thing to see. But then to see employees of the Federal Government from Fish and Wildlife, the Park Service, Interior, caressing the birds and the ducks and the seals with a cloth to try and save their lives was quite a touching experience. I didn't see any joy in Alaska at that time, I must tell you.

For general information, Exxon in 1989 made \$3.8 billion, 1989; equivalent today to about \$6 billion in earnings. And fighting all that time to me shows a general contempt for the public at large because they fought the punitive claim, the \$5 billion claim over these years; got it down to \$500 million; instead of stepping up to the good citizenship obligation they have in this monopoly virtual situation, commodity situation that they had. It shows an attitude that is distressing, and I think we see the same thing here with BP.

Mr. Baron, I think you were wonderfully candid when you said that there is a finite amount of liability that can be covered, period, which says to me—and any who disagree, I would appreciate expression—that says that maybe this is an enterprise that has never been fully paid for. If we say, if it is suggested that the taxpayers ought to be the last recipient of the bill for damages that others caused, we are not the kind of society that we think we are. And it is absolutely unjust, in my view.

Mr. Hartman, you say, well, let's not rush into this. Let's look at all of the possibilities out there. Is there enough justification to say that profits from offshore drilling ought to be able to pay for their mistakes? Or is the taxpayers' obligation to bear the risk for mismanagement?

Mr. HARTMAN. I am not sure I quite understand what you are asking.

Senator LAUTENBERG. Well, what I am asking—you are suggesting, give it time. Did I misunderstand what you said? Give it time so that we can see absolutely where the fault lies and State laws, et cetera?

Mr. HARTMAN. No, if that was what I said, then I misspoke. That wasn't certainly what I intended. I am only suggesting that in considering what to do with the liability cap, just consider how it implicates other provisions of the law because it is a complicated question. In the financial assurances, for example, you can't have unlimited financial assurances. Nobody will write that, I don't think.

So if you want to make sure there is somebody there that can pay, you have to say, well, how much do you have to pay? Well, make sure you can pay everything. Well, that is fine, but there is a provision of the law that says you have to show financial assurance up to some level. You have to change that provision if you are going to change it to unlimited liability.

Just an example of how things relate. I am simply saying look at these things carefully because they are complicated. That is all.

Senator LAUTENBERG. Here we have heard this very frankly heart wrenching testimony from people who were directly affected

and whose families' lives have changed forever. Where is that cost borne? They are innocent bystanders. When I listened to Mr. Frenette, you define over \$2 billion worth of contributions from shrimp and other parts of the industry, some of it commercial, some of it recreational. We start off with over \$2 billion, \$2.5 billion worth of contributions just from those activities. Where does this get paid for?

The notion of \$10 billion coverage by my distinguished colleague from New Jersey was almost immediately eliminated because we knew very well the common expectation that this is so far above \$10 billion that just take the cap off. You did it? Pay for it.

And so Mr. Minich, when you described the kinds of losses contemplated, how do these things get paid for?

Mr. MINICH. Senator, Senator Boxer read from the application that BP did for this rig, and it said that if there was any kind of spill, they could cap it. And they haven't been able to cap it. They have not capped it. So why would we cap the limitations on their liability? I mean, that is just the bottom line. There should be no cap on their liability. They can't cap this thing. Why would we cap their liability?

Senator LAUTENBERG. Well, what we have seen when we look back at history and the trip for me to the foundering *Exxon Valdez* is just brought home by Mr. Kopchak. The fact is that the herring species are gone. There is a depletion of it and some of the other quantities of fish available there. There has been a shift.

I saw something on television the other day that had a fellow with a shovel picking up rocks that were still covered by oil, so the damage is virtually permanent. How do these things get done, Professor? How will you get these things restored? Who pays for it? Where is the obligation to clean up after you mix things up?

It was mismanagement, obviously here, and I will draw a conclusion, that said OK, we are going to take the less protective area. It costs less, and we will be able to do what we have to.

But when I asked the three witnesses that we had there one day from BP, from Transocean, from Halliburton whether it was anybody's fault there, whether the spill was anybody's fault, everyone said, well, no.

Well, whose fault is it? Is it the fault of the American public who need the nutrition, the recreation, the livability? Whose fault is it, Professor?

Mr. MURCHISON. Well, I think that is why the oil pollution damages are a no fault liability. I think the exactly the purpose of it was so that we didn't sit around arguing about that. We defined a responsible party by certain functions they operated. And to be honest with you, Senator, long after you and I are gone, it will be working on this fishery in south Louisiana.

Senator LAUTENBERG. I don't know whether that is a prediction for me, but so far we are doing pretty good.

I guess, Mr. Hartman, you are unwilling to say that BP is responsible for the spill in any way?

Mr. HARTMAN. I am not saying that at all, Senator. Technically under the law, they are the responsible party under OPA. I was only asked to give you my views on how the cap system worked to

make sure that you have information that might be relevant to your consideration.

Senator LAUTENBERG. I just wanted to be sure of the conclusions that we draw. By the way, your testimony, all of you, was excellent, clear. And you weren't afraid, Mr. Frenette and Mr. Kopchak, to show the amount of pain and excruciating result that your families, your friends, your community is paying for this. We don't often see that. People are usually steeled before they get here not to show any emotion. They tell us not to, but I have been here long enough it doesn't matter.

What we are going to do is we are going to keep the record open. You will get questions, I believe, in writing. And we are asking so that we can move ahead with the liability question altogether that we will have questions go out by 10 o'clock this Monday. And I would ask each of you if there are written questions to respond to those questions by noon on the following Thursday.

With that, we will adjourn this Committee hearing and say thank you to each one of you for the work that you put into and for the clarity of your testimony. Thank you very much.

[Whereupon, at 1 p.m. the Committee was adjourned.]

[Additional material submitted for the record follows:]

DEC10158

S.L.C.

111TH CONGRESS
2^D SESSION**S.** _____

To create a fair and efficient system to resolve claims of victims for economic injury caused by the Deepwater Horizon incident, and to direct the Secretary of the Interior to renegotiate the terms of the lease known as “Mississippi Canyon 252” with respect to claims relating to the Deepwater Horizon explosion and oil spill that exceed existing applicable economic liability limitations.

IN THE SENATE OF THE UNITED STATES

Mr. VITTER introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To create a fair and efficient system to resolve claims of victims for economic injury caused by the Deepwater Horizon incident, and to direct the Secretary of the Interior to renegotiate the terms of the lease known as “Mississippi Canyon 252” with respect to claims relating to the Deepwater Horizon explosion and oil spill that exceed existing applicable economic liability limitations.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

2 (a) SHORT TITLE.—This Act may be cited as the
 3 “Acceptance of Offer on Liability and Expedited Claims
 4 at Mississippi Canyon 252 Act”.

5 (b) TABLE OF CONTENTS.—The table of contents of
 6 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—DEEPWATER HORIZON CLAIMS RESOLUTION

Sec. 101. Findings and purpose.

Sec. 102. Definitions.

Subtitle A—Office of Deepwater Horizon Claims Compensation

Sec. 111. Establishment of Office of Deepwater Horizon Claims Compensation.

Sec. 112. Claimant assistance.

Sec. 113. Compensation program startup.

Sec. 114. Authority of Administrator.

Sec. 115. Advisory Committee on Deepwater Horizon Compensation.

Subtitle B—Deepwater Horizon Compensation Procedures

Sec. 121. Essential elements of eligible claim.

Sec. 122. General rule concerning no-fault compensation.

Sec. 123. Filing of claims.

Sec. 124. Eligibility determinations and claim awards.

Subtitle C—Awards

Sec. 131. Amount.

Sec. 132. Payment.

Sec. 133. Setoffs for collateral source compensation and prior awards.

Sec. 134. Subrogation.

Subtitle D—Judicial Review

Sec. 141. Judicial review of rules and regulations.

Sec. 142. Judicial review of award decisions.

Sec. 143. Other judicial challenges.

Subtitle E—Effect on Other Laws

Sec. 151. Effect on other laws.

TITLE II—LIABILITY

Sec. 201. Liability for Deepwater Horizon oil spill.

1 **TITLE I—DEEPWATER HORIZON**
2 **CLAIMS RESOLUTION**

3 **SEC. 101. FINDINGS AND PURPOSE.**

4 (a) FINDINGS.—Congress finds that—

5 (1) the oil spill resulting from the Deepwater
6 Horizon incident has caused major economic damage
7 to the residents of the States bordering the Gulf of
8 Mexico;

9 (2) the limits on strict liability imposed by the
10 Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.)
11 will be exceeded by the claims resulting from the
12 Deepwater Horizon incident; and

13 (3) while the Oil Pollution Act of 1990 (33
14 U.S.C. 2701 et seq.) places no restrictions on liabil-
15 ity for damages from the accident under State law,
16 litigation of such cases may take decades, and con-
17 sume in litigation expenses funds that could other-
18 wise be used to quickly and efficiently compensate
19 the citizens of the Gulf States for damages resulting
20 from the Deepwater Horizon incident.

21 (b) PURPOSE.—The purpose of this title is to create
22 a fair and efficient system for the payment of legitimate
23 present and future claims for damages resulting from the
24 Deepwater Horizon incident.

1 **SEC. 102. DEFINITIONS.**

2 In this title:

3 (1) ADMINISTRATOR.—The term “Adminis-
4 trator” means the Administrator of the Office.

5 (2) ADVISORY COMMITTEE.—The term “Advi-
6 sory Committee” means the Advisory Committee on
7 Deepwater Horizon Compensation established under
8 section 115(a).

9 (3) CLAIM.—The term “claim” means any
10 claim, based on any theory, allegation, or cause of
11 action, for damages presented in a civil action or
12 bankruptcy proceeding, directly, indirectly, or deriva-
13 tively arising out of, based on, or related to, in whole
14 or in part, the effects of the Deepwater Horizon in-
15 cident.

16 (4) CLAIMANT.—The term “claimant” means a
17 person or State who files a claim under section 123.

18 (5) CIVIL ACTION.—

19 (A) IN GENERAL.—The term “civil action”
20 means a civil action filed in Federal or State
21 court, whether cognizable as a case at law, in
22 equity, or in admiralty.

23 (B) EXCLUSION.—The term “civil action”
24 does not include an action relating to any work-
25 ers’ compensation law.

1 (6) COLLATERAL SOURCE COMPENSATION.—

2 The term “collateral source compensation” means
3 the compensation that a claimant received, or is en-
4 titled to receive, from a responsible party as a result
5 of a final judgment, settlement, or other payment
6 for damages that are the source of a claim under
7 section 123, including payments made under the Oil
8 Pollution Act of 1990 (33 U.S.C. 2701 et seq.).

9 (7) COMPENSATION PROGRAM.—The term
10 “compensation program” means the compensation
11 program established under this title.

12 (8) DAMAGES.—The term “damages” means
13 damages specified in section 131(b), including the
14 cost of assessing those damages.

15 (9) DEEPWATER HORIZON INCIDENT.—The
16 term “Deepwater Horizon incident” means the blow-
17 out and explosion of the Deepwater Horizon oil rig
18 that occurred on April 20, 2010, and resulting hy-
19 drocarbon releases into the environment.

20 (10) DEPARTMENT.—The term “Department”
21 means the Department of the Interior.

22 (11) FUND.—The term “Fund” means the Oil
23 Spill Liability Trust Fund established by section
24 9509 of the Internal Revenue Code of 1986.

1 (12) LAW.—The term “law” includes all law,
2 judicial or administrative decisions, rules, regula-
3 tions, or any other principle or action having the ef-
4 fect of law.

5 (13) OFFICE.—The term “Office” means the
6 Office of Deepwater Horizon Claims Compensation
7 established under section 111.

8 (14) PARTIES.—The term “parties” means,
9 with respect to an individual claim, the claimant and
10 the responsible party.

11 (15) PERSON.—

12 (A) IN GENERAL.—The term “person”
13 means an individual, trust, firm, joint stock
14 company, partnership, association, insurance
15 company, reinsurance company, or corporation.

16 (B) EXCLUSIONS.—The term “person”
17 does not include—

18 (i) the United States;

19 (ii) a State; or

20 (iii) a political subdivision of a State.

21 (16) RESPONSIBLE PARTY.—The term “respon-
22 sible party” means a responsible party (as defined in
23 section 1001 of the Oil Pollution Act of 1990 (33
24 U.S.C. 2701)) for the Deepwater Horizon incident.

1 (17) SECRETARY.—The term “Secretary”
2 means the Secretary of the Interior.

3 (18) STATE.—The term “State” means

4 (A) each of the several States of the
5 United States;

6 (B) the District of Columbia;

7 (C) the Commonwealth of Puerto Rico;

8 (D) Guam;

9 (E) American Samoa;

10 (F) the Commonwealth of the Northern
11 Mariana Islands;

12 (G) the Federated States of Micronesia;

13 (H) the Republic of the Marshall Islands;

14 (I) the Republic of Palau; and

15 (J) the United States Virgin Islands..

16 (19) SUCCESSOR IN INTEREST.—The term
17 “successor in interest” means any person that ac-
18 quires assets, and substantially continues the busi-
19 ness operations, of a responsible party, considering
20 factors that include—

21 (A) retention of the same facilities or loca-
22 tion;

23 (B) retention of the same employees;

24 (C) maintaining the same job under the
25 same working conditions;

1 (D) retention of the same supervisory per-
2 sonnel;

3 (E) continuity of assets;

4 (F) production of the same product or
5 offer of the same service;

6 (G) retention of the same name;

7 (H) maintenance of the same customer
8 base;

9 (I) identity of stocks, stockholders, and di-
10 rectors between the asset seller and the pur-
11 chaser; or

12 (J) whether the successor holds itself out
13 as continuation of previous enterprise, but ex-
14 pressly does not include whether the person ac-
15 tually knew of the liability of the responsible
16 party under this title.

17 **Subtitle A—Office of Deepwater**
18 **Horizon Claims Compensation**

19 **SEC. 111. ESTABLISHMENT OF OFFICE OF DEEPWATER HO-**
20 **RIZON CLAIMS COMPENSATION.**

21 (a) IN GENERAL.—

22 (1) ESTABLISHMENT.—There is established
23 within the Department the Office of Deepwater Ho-
24 rizon Claims Compensation, which shall be headed
25 by the Administrator.

1 (2) PURPOSE.—The purpose of the Office shall
2 be to provide timely, fair compensation, under the
3 terms specified in this title, on a no-fault basis and
4 in a nonadversarial manner, to persons and State or
5 local governments that have incurred damages as a
6 result of the Deepwater Horizon incident.

7 (3) TERMINATION OF THE OFFICE.—The Office
8 shall terminate effective not later than 1 year fol-
9 lowing the date of certification by the Administrator
10 that the Fund has neither paid a claim in the pre-
11 vious 1-year period nor has debt obligations remain-
12 ing to pay.

13 (4) EXPENSES.—The Fund shall be available to
14 the Secretary for expenditure, without further ap-
15 propriation and without fiscal year limitation, as
16 necessary for any and all expenses associated with
17 the Office, including—

18 (A) personnel salaries and expenses, in-
19 cluding retirement and similar benefits; and

20 (B) all administrative and legal expenses.

21 (b) APPOINTMENT OF ADMINISTRATOR.—

22 (1) IN GENERAL.—The Administrator of the
23 Office shall be appointed by the President, by and
24 with the advice and consent of the Senate.

10

1 (2) TERM.—The term of the Administrator
2 shall be 5 years.

3 (3) REPORTING.—The Administrator shall re-
4 port directly to the Assistant Secretary for Policy,
5 Management, and Budget of the Department.

6 (c) DUTIES OF ADMINISTRATOR.—

7 (1) IN GENERAL.—The Administrator shall be
8 responsible for—

9 (A) processing claims for compensation for
10 damages to eligible claimants in accordance
11 with the criteria and procedures established
12 under subtitle B;

13 (B) appointing or contracting for the serv-
14 ices of such personnel, making such expendi-
15 tures, and taking any other actions as may be
16 necessary to carry out the responsibilities of the
17 Office, including entering into cooperative
18 agreements with other Federal or State agen-
19 cies and entering into contracts with nongovern-
20 mental entities;

21 (C) conducting such audits and additional
22 oversight as necessary to assure the integrity of
23 the compensation program;

1 (D) promulgating such rules, regulations,
2 and procedures as may be necessary to carry
3 out this title;

4 (E) making such expenditures as may be
5 necessary in carrying out this title;

6 (F) excluding evidence and disqualifying or
7 debarring any attorney or other individual or
8 entity who provide evidence in support of the
9 application of the claimant for compensation if
10 the Administrator determines that materially
11 false, fraudulent, or fictitious statements or
12 practices have been submitted or engaged in by
13 the individual or entity; and

14 (G) having all other powers incidental, nec-
15 essary, or appropriate to carrying out the func-
16 tions of the Office.

17 (2) CERTAIN ENFORCEMENT.—

18 (A) FALSE STATEMENTS.—For each in-
19 fraction described in paragraph (1)(F), the Ad-
20 ministrator may impose a civil penalty not to
21 exceed \$10,000 on any individual or entity
22 found to have submitted or engaged in a mate-
23 rially false, fraudulent, or fictitious statement
24 or practice under this title.

1 (B) OTHER POWERS.—The Administrator
2 shall issue appropriate regulations to carry out
3 paragraph (1)(G).

4 (d) AUDIT AND PERSONNEL REVIEW PROCE-
5 DURES.—The Administrator shall establish audit and per-
6 sonnel review procedures for evaluating the accuracy of
7 eligibility recommendations of agency and contract per-
8 sonnel.

9 **SEC. 112. CLAIMANT ASSISTANCE.**

10 (a) ESTABLISHMENT.—Not later than 180 days after
11 the date of enactment of this Act, the Administrator shall
12 establish a comprehensive claimant assistance program—

13 (1) to publicize and provide information to po-
14 tential claimants about—

15 (A) the availability of benefits for eligible
16 claimants under this title; and

17 (B) the procedures for filing claims and for
18 obtaining assistance in filing claims;

19 (2) to provide assistance to potential claimants
20 in preparing and submitting claims, including assist-
21 ance in obtaining the documentation necessary to
22 support a claim;

23 (3) to respond to inquiries from claimants and
24 potential claimants;

1 (4) to provide training with respect to the appli-
2 cable procedures for the preparation and filing of
3 claims to persons who provide assistance or rep-
4 resentation to claimants, including nonprofit organi-
5 zations and State and local government entities; and

6 (5) to provide for the establishment of a website
7 on which claimants may access all relevant forms
8 and information.

9 (b) RESOURCE CENTERS.—

10 (1) IN GENERAL.—The claimant assistance pro-
11 gram shall provide for the establishment of resource
12 centers in areas in which there are determined to be
13 large concentrations of potential claimants.

14 (2) LOCATION.—The centers shall be located, to
15 the maximum extent practicable, in facilities of the
16 Department or other Federal agencies.

17 (c) ATTORNEY'S FEES.—

18 (1) IN GENERAL.—Notwithstanding any other
19 provision of law, the representative of an individual
20 may not receive, for services rendered in connection
21 with the claim of an individual under this title, more
22 than 5 percent of a final award made (whether by
23 the Administrator initially or as a result of adminis-
24 trative review) on the claim.

1 (2) PENALTY.—Any representative of a claim-
2 ant who violates this subsection shall be fined not
3 more than the greater of—

4 (A) \$5,000; or

5 (B) twice the amount received by the rep-
6 resentative for services rendered in connection
7 with each violation.

8 **SEC. 113. COMPENSATION PROGRAM STARTUP.**

9 (a) INTERIM REGULATIONS.—Not later than 90 days
10 after the date of enactment of this Act, the Administrator
11 shall issue interim regulations and procedures for the
12 processing of claims under this title.

13 (b) INTERIM PERSONNEL.—

14 (1) IN GENERAL.—The Secretary and the As-
15 sistant Secretary for Policy, Management, and
16 Budget of the Department may make available to
17 the Administrator on a temporary basis such per-
18 sonnel and other resources as may be necessary to
19 facilitate the expeditious startup of the compensa-
20 tion program.

21 (2) CONTRACTS.—The Administrator may con-
22 tract with individuals or entities having relevant ex-
23 perience to assist in the expeditious startup of the
24 compensation program.

1 (c) EXTREME FINANCIAL HARDSHIP CLAIMS.—In
2 the final regulations promulgated under section 111(e),
3 the Administrator shall designate categories of claims to
4 be handled on an expedited basis as a result of extreme
5 financial hardship.

6 (d) INTERIM ADMINISTRATOR.—Until an Adminis-
7 trator is appointed and confirmed under section 111(b),
8 the responsibilities of the Administrator under this title
9 shall be performed by the Assistant Secretary for Policy,
10 Management, and Budget of the Department, who shall
11 have all the authority conferred by this title on the Admin-
12 istrator and who shall be considered to be the Adminis-
13 trator for purposes of this title.

14 (e) STAY OF CLAIMS; RETURN TO TORT SYSTEM.—

15 (1) STAY OF CLAIMS.—

16 (A) PENDING ACTIONS.—Notwithstanding
17 any other provision of this title, any claim for
18 damages pending in any Federal or State court
19 for monetary damages related to the Deepwater
20 Horizon incident as of the date of enactment of
21 this Act shall be subject to a stay.

22 (B) FUTURE ACTIONS.—Notwithstanding
23 any other provision of this title, any claim for
24 damages filed in any Federal or State court for
25 monetary damages related to the Deepwater

1 Horizon incident after the date of enactment of
2 this Act shall be subject to a stay 60 days after
3 the date of the filing of the claim, unless the
4 claimant has filed an election to pursue the
5 claim for damages in the Federal or State court
6 under paragraph (2).

7 (2) CLAIMS.—To be eligible for a claim, any
8 person or State that has filed a timely claim seeking
9 a judgment or order for monetary damages related
10 to the Deepwater Horizon incident in any Federal or
11 State court before, on, or after the date of enact-
12 ment of this Act, shall file with the Administrator
13 and serve on all defendants in the pending court ac-
14 tion an election to pursue the claim for damages
15 under this title or continue to pursue the claim in
16 the Federal or State court—

17 (A) not later than 60 days after the date
18 of enactment of this Act, if the claim was filed
19 in a Federal or State court before the date of
20 enactment of this Act; and

21 (B) not later than 60 days after the date
22 of the filing of the claim, if the claim is filed
23 in a Federal or State court on or after the date
24 of enactment of this Act.

1 (3) STAY.—Until the claimant files an election
2 under paragraph (2) to continue to pursue the claim
3 in the Federal or State court, the stay under para-
4 graph (1) shall remain in effect.

5 (4) EFFECT OF ELECTION.—

6 (A) IN GENERAL.—Any claimant that has
7 elected to pursue a claim for damages in Fed-
8 eral or State court under paragraph (2) shall
9 not be eligible for an award for those damages
10 under section 131.

11 (B) STAY OF CLAIM.—Any claim seeking a
12 judgment or order for monetary damages relat-
13 ing to the Deepwater Horizon incident in any
14 Federal or State court filed by a claimant that
15 has received a judgment for damages under this
16 title for that claim shall be permanently stayed.

17 (5) EFFECT OF OPERATIONAL OR NON-
18 OPERATIONAL FUND.—

19 (A) REINSTATEMENT OF CLAIMS.—If,
20 after 270 days after the date of enactment of
21 this Act, the Administrator cannot certify to
22 Congress that the Office is operational and pay-
23 ing claims at a reasonable rate, each person or
24 State that has filed a claim stayed under this
25 subsection may continue the claims of the per-

1 son or State in the court in which the case was
2 pending prior to the stay.

3 (B) OPERATIONAL OFFICE.—If the Admin-
4 istrator subsequently certifies to Congress that
5 the Office has become operational and paying
6 all valid claims at a reasonable rate, any claim
7 in a civil action in Federal or State court that
8 is not actually on trial before a jury that has
9 been impaneled and presentation of evidence
10 has commenced, but before deliberation, or be-
11 fore a judge and is at the presentation of evi-
12 dence, may, at the option of the claimant, be
13 considered a reinstated claim before the Admin-
14 istrator and the civil action before the Federal
15 or State court shall be null and void.

16 (C) NONOPERATIONAL OFFICE.—Notwith-
17 standing any other provision of this title, if the
18 Administrator certifies to Congress that the Of-
19 fice cannot become operational and paying all
20 valid claims at a reasonable rate, all claims that
21 have a stay may be filed or reinstated.

22 **SEC. 114. AUTHORITY OF ADMINISTRATOR.**

23 On any matter within the jurisdiction of the Adminis-
24 trator under this title, the Administrator may—

- 1 (1) issue subpoenas for and compel the attend-
- 2 ance of witnesses within a radius of 200 miles;
- 3 (2) administer oaths;
- 4 (3) examine witnesses;
- 5 (4) require the production of books, papers,
- 6 documents, and other potential evidence; and
- 7 (5) request assistance from other Federal agen-
- 8 cies with the performance of the duties of the Ad-
- 9 ministrator under this title.

10 **SEC. 115. ADVISORY COMMITTEE ON DEEPWATER HORIZON**

11 **COMPENSATION.**

12 (a) ESTABLISHMENT.—

13 (1) IN GENERAL.—Not later than 120 days
14 after the date of enactment of this Act, the Adminis-
15 trator shall establish an Advisory Committee on
16 Deepwater Horizon Compensation.

17 (2) COMPOSITION AND APPOINTMENT.—

18 (A) IN GENERAL.—The Advisory Com-
19 mittee shall be composed of 24 members, ap-
20 pointed in accordance with this paragraph.

21 (B) LEGISLATIVE APPOINTMENTS.—

22 (i) IN GENERAL.—The Majority Lead-
23 er of the Senate, the Minority Leader of
24 the Senate, the Speaker of the House of
25 Representatives, and the Minority Leader

20

1 of the House of Representatives shall each
2 appoint 4 members to the Advisory Com-
3 mittee.

4 (ii) REPRESENTATION.—Of the 4
5 members appointed by each Member under
6 clause (i)—

7 (I) 2 members shall represent the
8 interests of claimants; and

9 (II) 2 members shall represent
10 the interests of responsible parties.

11 (C) APPOINTMENTS BY ADMINISTRATOR.—

12 The Administrator shall appoint 8 members to
13 the Advisory Committee, who shall be individ-
14 uals with qualifications and expertise relevant
15 to the compensation program, including experi-
16 ence or expertise in marine or coastal ecology,
17 oil spill remediation, fisheries management, ad-
18 ministering compensation programs, or audits.

19 (b) DUTIES.—The Advisory Committee shall advise
20 the Administrator on—

21 (1) claims filing and claims processing proce-
22 dures;

23 (2) claimant assistance programs;

1 (3) audit procedures and programs to ensure
2 the quality and integrity of the compensation pro-
3 gram;

4 (4) analyses or research that should be con-
5 ducted to evaluate past claims and to project future
6 claims under the compensation program; and

7 (5) such other matters related to the implemen-
8 tation of this title as the Administrator considers ap-
9 propriate.

10 (c) OPERATION OF COMMITTEE.—

11 (1) TERM.—The term of a member of the Advi-
12 sory Committee shall be 3 years.

13 (2) CHAIRPERSON AND VICE CHAIRPERSON.—
14 The Administrator shall designate a Chairperson
15 and Vice Chairperson of the Advisory Committee
16 from among the members appointed under sub-
17 section (a)(2)(C).

18 (3) MEETINGS.—The Advisory Committee shall
19 meet—

20 (A) at the call of the Chairperson or a ma-
21 jority of the members of the Advisory Com-
22 mittee; and

23 (B) at least—

24 (i) 4 times per year during the first 3
25 years of the compensation program; and

1 (ii) 2 times per year thereafter.

2 (4) INFORMATION.—

3 (A) IN GENERAL.—The Administrator
4 shall provide to the Advisory Committee such
5 information as is necessary and appropriate for
6 the Advisory Committee to carry out this sec-
7 tion.

8 (B) OTHER AGENCIES.—

9 (i) IN GENERAL.—On request of the
10 Advisory Committee, the Administrator
11 may secure directly from any Federal,
12 State, or local department or agency such
13 information as may be necessary to enable
14 the Advisory Committee to carry out this
15 section.

16 (ii) PROVISION OF INFORMATION.—
17 On request of the Administrator, the head
18 of the department or agency described in
19 clause (i) shall furnish such information to
20 the Advisory Committee.

21 (5) ADMINISTRATIVE SUPPORT.—The Adminis-
22 trator shall provide the Advisory Committee with
23 such administrative support as is reasonably nec-
24 essary to enable the Advisory Committee to carry
25 out this section.

1 (d) EXPENSES.—A member of the Advisory Com-
2 mittee, other than a full-time Federal employee, while at-
3 tending a meeting of the Advisory Committee or while oth-
4 erwise serving at the request of the Administrator, and
5 while serving away from the home or regular place of busi-
6 ness of the member, shall be allowed travel and meal ex-
7 penses, including per diem in lieu of subsistence, as au-
8 thorized by section 5703 of title 5, United States Code,
9 for individuals in the Federal Government serving without
10 pay.

11 **Subtitle B—Deepwater Horizon**
12 **Compensation Procedures**

13 **SEC. 121. ESSENTIAL ELEMENTS OF ELIGIBLE CLAIM.**

14 To be eligible for an award under this title for dam-
15 ages, a claimant shall—

16 (1) file a claim in a timely manner in accord-
17 ance with section 123; and

18 (2) prove, by a preponderance of the evidence,
19 that the claimant has suffered damages as a result
20 of the Deepwater Horizon incident.

21 **SEC. 122. GENERAL RULE CONCERNING NO-FAULT COM-**
22 **PENSATION.**

23 To be eligible for an award under this title for dam-
24 ages, a claimant shall not be required to demonstrate that

1 the damages for which the claim is being made resulted
2 from the negligence or other fault of any other person.

3 **SEC. 123. FILING OF CLAIMS.**

4 (a) **ELIGIBLE CLAIMANTS.**—

5 (1) **IN GENERAL.**—Any person or State that
6 has suffered damage as a result of the Deepwater
7 Horizon incident may file a claim with the Office for
8 an award with respect to the damage.

9 (2) **LIMITATION.**—A claim may not be filed by
10 any person or State under this title for contribution
11 or indemnity.

12 (b) **STATUTE OF LIMITATIONS.**—Except as otherwise
13 provided in this subsection, if a person or State fails to
14 file a claim with the Office under this section during the
15 5-year period beginning on the date on which the person
16 or State first discovered facts that would have led a rea-
17 sonable person to conclude that damage had occurred, any
18 claim relating to the damage, and any other claim related
19 to that damage, shall be extinguished, and any recovery
20 on the damage shall be prohibited.

21 (c) **FUTURE CLAIMS NOT PRECLUDED.**—Filing of a
22 claim under subsection (a) shall not preclude the filing of
23 additional claims for damages arising from the Deepwater
24 Horizon incident that are manifest at a later date.

1 (d) REQUIRED INFORMATION.—A claim filed under
2 subsection (a) shall be in such form, and contain such in-
3 formation in such detail, as the Administrator shall by
4 regulation prescribe.

5 (e) DATE OF FILING.—A claim shall be considered
6 to be filed on the date that the claimant mails the claim
7 to the Office, as determined by postmark, or on the date
8 that the claim is received by the Office, whichever is the
9 earliest determinable date.

10 (f) INCOMPLETE CLAIMS.—

11 (1) IN GENERAL.—If a claim filed under sub-
12 section (a) is incomplete, the Administrator shall no-
13 tify the claimant of the information necessary to
14 complete the claim and inform the claimant of such
15 services as may be available through the claimant
16 assistance program established under section 112 to
17 assist the claimant in completing the claim.

18 (2) TIME PERIODS.—

19 (A) IN GENERAL.—Except as provided in
20 subparagraph (B), any time period for the proc-
21 essing of the claim shall be suspended until
22 such time as the claimant submits the informa-
23 tion necessary to complete the claim.

24 (B) DEADLINE.—If the information de-
25 scribed in subparagraph (A) is not received dur-

1 ing the 1-year period beginning on the date of
2 the notification, the claim shall be dismissed.

3 **SEC. 124. ELIGIBILITY DETERMINATIONS AND CLAIM**
4 **AWARDS.**

5 (a) IN GENERAL.—

6 (1) REVIEW OF CLAIMS.—The Administrator
7 shall, in accordance with this section, determine
8 whether each claim filed satisfies the requirements
9 for eligibility for an award under this title and, if so,
10 the value of the award.

11 (2) FACTORS.—In making a determination
12 under paragraph (1), the Administrator shall con-
13 sider—

14 (A) the claim presented by the claimant;

15 (B) the factual evidence submitted by the
16 claimant in support of the claim; and

17 (C) the results of such investigation as the
18 Administrator may consider necessary to deter-
19 mine whether the claim satisfies the criteria for
20 eligibility established by this title.

21 (3) ADDITIONAL EVIDENCE.—

22 (A) IN GENERAL.—The Administrator may
23 request the submission of evidence in addition
24 to the minimum requirements of section 123 if

1 necessary to make a determination of eligibility
2 for an award.

3 (B) COST.—If the Administrator requests
4 additional evidence under subparagraph (A),
5 the cost of obtaining the additional evidence
6 shall be borne by the Office.

7 (b) PROPOSED DECISIONS.—

8 (1) IN GENERAL.—Not later than 90 days after
9 the date of the filing of a claim, the Administrator
10 shall provide to the parties a proposed decision—

11 (A) accepting or rejecting the claim in
12 whole or in part; and

13 (B) specifying the amount of any proposed
14 award.

15 (2) FORM.—The proposed decision shall—

16 (A) be in writing;

17 (B) contain findings of fact and conclu-
18 sions of law; and

19 (C) contain an explanation of the proce-
20 dure for obtaining review of the proposed deci-
21 sion.

22 (c) REVIEW OF PROPOSED DECISIONS.—

23 (1) RIGHT TO HEARING.—

24 (A) IN GENERAL.—Any party not satisfied
25 with a proposed decision of the Administrator

1 under subsection (b) shall be entitled, on writ-
2 ten request made not later than 90 days after
3 the date of the issuance of the decision, to a
4 hearing on the claim of the claimant before a
5 representative of the Administrator.

6 (B) TESTIMONY.—At the hearing, the
7 party shall be entitled to present oral evidence
8 and written testimony in further support of the
9 claim.

10 (C) CONDUCT OF HEARING.—

11 (i) IN GENERAL.—The hearing shall,
12 to the maximum extent practicable, be con-
13 ducted at a time and place convenient for
14 the claimant.

15 (ii) ADMINISTRATION.—Except as
16 otherwise provided in this title, in con-
17 ducting the hearing, the representative of
18 the Administrator shall conduct the hear-
19 ing in a manner that best determines the
20 rights of the parties and shall not be
21 bound by—

22 (I) common law or statutory
23 rules of evidence;

24 (II) technical or formal rules of
25 procedure; or

1 (III) section 554 of title 5,
2 United States Code.

3 (iii) EVIDENCE.—For purposes of
4 clause (ii), the representative of the Ad-
5 ministrator shall receive such relevant evi-
6 dence as the claimant adduces and such
7 other evidence as the representative deter-
8 mines necessary or useful in evaluating the
9 claim.

10 (D) REQUEST FOR SUBPOENAS.—

11 (i) IN GENERAL.—Subject to clause
12 (iv), a party may request a representative
13 of the Administrator to issue a subpoena
14 but the decision to grant or deny the re-
15 quest is within the discretion of the rep-
16 resentative.

17 (ii) SUBPOENAS.—Subject to clause
18 (iii), the representative may issue sub-
19 poenas for—

20 (I) the attendance and testimony
21 of witnesses; and

22 (II) the production of books,
23 records, correspondence, papers, or
24 other relevant documents.

1 (iii) PREREQUISITES.—Subpoenas
2 may be issued for documents under this
3 subparagraph only if —

4 (I) in the case of documents, the
5 documents are relevant and cannot be
6 obtained by other means; and

7 (II) in the case of witnesses, oral
8 testimony is the best way to ascertain
9 the facts.

10 (iv) REQUEST.—

11 (I) HEARING PROCESS.—A party
12 may request a subpoena under this
13 subparagraph only as part of the
14 hearing process.

15 (II) FORM.—To request a sub-
16 poena, the requester shall—

17 (aa) submit the request in
18 writing and send the to the rep-
19 resentative as early as prac-
20 ticable, but not later than 30
21 days, after the date of the origi-
22 nal hearing request; and

23 (bb) explain why the testi-
24 mony or evidence is directly rel-
25 evant to the issues at hand, and

31

1 a subpoena is the best method or
2 opportunity to obtain the evi-
3 dence because there are no other
4 means by which the documents
5 or testimony could have been ob-
6 tained.

7 (v) FEES AND MILEAGE.—

8 (I) IN GENERAL.—Any person re-
9 quired by a subpoena to attend as a
10 witness shall be allowed and paid the
11 same fees and mileage as are paid
12 witnesses in the district courts of the
13 United States.

14 (II) FUND.—The fees and mile-
15 age shall be paid from the Fund.

16 (2) REVIEW OF WRITTEN RECORD.—

17 (A) IN GENERAL.—Instead of a hearing
18 under paragraph (1), any party not satisfied
19 with a proposed decision of the Administrator
20 shall have the option, on written request made
21 not later than 90 days after the date of the
22 issuance of the decision, of obtaining a review
23 of the written record by a representative of the
24 Administrator.

1 (B) OPPORTUNITY TO BE HEARD.—If a re-
2 view is requested under subparagraph (A), the
3 parties shall be afforded an opportunity to sub-
4 mit any written evidence or argument that the
5 claimant believes relevant.

6 (d) FINAL DECISIONS.—

7 (1) IN GENERAL.—If the period of time for re-
8 questing review of the proposed decision expires and
9 no request has been filed, or if the parties waive any
10 objections to the proposed decision, the Adminis-
11 trator shall issue a final decision.

12 (2) VARIANCE FROM PROPOSED DECISION.—If
13 the decision materially differs from the proposed de-
14 cision, the parties shall be entitled to review of the
15 decision under subsection (c).

16 (3) TIMING.—If the parties request review of
17 all or part of the proposed decision the Adminis-
18 trator shall issue a final decision on the claim not
19 later than—

20 (A) 180 days after the date the request for
21 review is received, if a party requests a hearing;
22 or

23 (B) 90 days after the date the request for
24 review is received, if the claimant requests re-
25 view of the written record.

1 (4) CONTENT.—The decision shall be in writing
2 and contain findings of fact and conclusions of law.

3 (e) REPRESENTATION.—A party may authorize an
4 attorney or other individual to represent the party in any
5 proceeding under this title.

6 **Subtitle C—Awards**

7 **SEC. 131. AMOUNT.**

8 (a) IN GENERAL.—A claimant that meets the re-
9 quirements of section 121 shall be entitled to an award
10 in an amount equal to the damages specified in subsection
11 (b) sustained as a result of Deepwater Horizon incident.

12 (b) COVERED DAMAGES.—For purposes of subsection
13 (a), covered damages shall be 1 or more of the following
14 types of damages (if applicable):

15 (1) REAL OR PERSONAL PROPERTY.—Damages
16 for injury to, or economic losses resulting from de-
17 struction of, real or personal property, which shall
18 be recoverable by a claimant who owns or leases that
19 property.

20 (2) SUBSISTENCE USE.—Damages for loss of
21 subsistence use of natural resources, which shall be
22 recoverable by any claimant who so uses natural re-
23 sources that have been injured, destroyed, or lost,
24 without regard to the ownership or management of
25 the resources.

1 (3) REVENUES.—Damages equal to the net loss
2 of taxes, royalties, rents, fees, or net profit shares
3 due to the injury, destruction, or loss of real prop-
4 erty, personal property, or natural resources, which
5 shall be recoverable by a State or a political subdivi-
6 sion of a State.

7 (4) PROFITS AND EARNING CAPACITY.—Dam-
8 ages equal to the loss of profits or impairment of
9 earning capacity due to the injury, destruction, or
10 loss of real property, personal property, or natural
11 resources, which shall be recoverable by any claim-
12 ant.

13 (5) PUBLIC SERVICES.—Damages for net costs
14 of providing increased or additional public services
15 during or after removal activities, including protec-
16 tion from fire, safety, or health hazards, caused by
17 a discharge of oil, which shall be recoverable by a
18 State or a political subdivision of a State.

19 **SEC. 132. PAYMENT.**

20 (a) PAYMENTS.—Not later than 30 days after a final
21 determination of an award under this title, a claimant that
22 is entitled to an award under this title shall receive the
23 amount of the award through payments from the respon-
24 sible parties.

1 (b) LIMITATION ON TRANSFERABILITY.—A claim
2 filed under this title shall not be assignable or otherwise
3 transferable under this title.

4 **SEC. 133. SETOFFS FOR COLLATERAL SOURCE COMPENSA-**
5 **TION AND PRIOR AWARDS.**

6 The amount of an award otherwise available to a
7 claimant under this title shall be reduced by the amount
8 of collateral source compensation.

9 **SEC. 134. SUBROGATION.**

10 Any person that pays compensation pursuant to this
11 title to any claimant for damages shall be subrogated to
12 all rights, claims, and causes of action the claimant has
13 under any other law.

14 **Subtitle D—Judicial Review**

15 **SEC. 141. JUDICIAL REVIEW OF RULES AND REGULATIONS.**

16 (a) EXCLUSIVE JURISDICTION.—The United States
17 Court of Appeals for the District of Columbia Circuit shall
18 have exclusive jurisdiction over any action to review rules
19 or regulations promulgated by the Administrator under
20 this title.

21 (b) PERIOD FOR FILING PETITION.—A petition for
22 review under this section shall be filed not later than 60
23 days after the date notice of the promulgation of the rules
24 or regulations appears in the Federal Register.

1 (c) EXPEDITED PROCEDURES.—The United States
2 Court of Appeals for the District of Columbia shall provide
3 for expedited procedures for reviews under this section.

4 **SEC. 142. JUDICIAL REVIEW OF AWARD DECISIONS.**

5 (a) IN GENERAL.—Any claimant or responsible party
6 adversely affected or aggrieved by a final decision of the
7 Administrator awarding or denying compensation under
8 this title may petition for judicial review of the decision.

9 (b) PERIOD FOR FILING PETITION.—Any petition for
10 review under this section shall be filed not later than 90
11 days after the date of issuance of a final decision of the
12 Administrator.

13 (c) EXCLUSIVE JURISDICTION.—A petition for review
14 may only be filed in the United States Court of Appeals
15 for the circuit in which the claimant resides at the time
16 of the issuance of the final order.

17 (d) STANDARD OF REVIEW.—The court shall uphold
18 the decision of the Administrator unless the court deter-
19 mines, on review of the record as a whole, that the decision
20 is not supported by substantial evidence, is contrary to
21 law, or is not in accordance with procedure required by
22 law.

23 (e) EXPEDITED PROCEDURES.—The United States
24 Court of Appeals shall provide for expedited procedures
25 for reviews under this section.

1 **SEC. 143. OTHER JUDICIAL CHALLENGES.**

2 (a) **EXCLUSIVE JURISDICTION.**—The United States
3 District Court for the District of Columbia shall have ex-
4 clusive jurisdiction over any action for declaratory or in-
5 junctive relief challenging any provision of this title.

6 (b) **PERIOD FOR FILING PETITIONS.**—An action
7 under this section shall be filed not later than the later
8 of—

9 (1) the date that is 60 days after the date of
10 enactment of this Act; or

11 (2) the date that is 60 days after the final ac-
12 tion by the Administrator or the Office giving rise
13 to the action.

14 (c) **DIRECT APPEAL.**—

15 (1) **IN GENERAL.**—A final decision in the action
16 shall be reviewable on appeal directly to the Su-
17 preme Court.

18 (2) **ADMINISTRATION.**—The appeal shall be
19 taken by the filing of a notice of appeal not later
20 than 30 days, and the filing of a jurisdictional state-
21 ment not later than 60 days, after the date of the
22 entry of the final decision.

23 (d) **EXPEDITED PROCEDURES.**—It is the sense of
24 Congress that the Supreme Court and the United States
25 District Court for the District of Columbia are urged to
26 advance on the docket and otherwise expedite, to the max-

1 imum extent practicable, the disposition of an action cov-
2 ered by this section.

3 **Subtitle E—Effect on Other Laws**

4 **SEC. 151. EFFECT ON OTHER LAWS.**

5 This title shall supersede any Federal or State law
6 to the extent that the law relates to any claim for damages
7 compensated under this title.

8 **TITLE II—LIABILITY**

9 **SEC. 201. LIABILITY FOR DEEPWATER HORIZON OIL SPILL.**

10 (a) IN GENERAL.—Congress finds that—

11 (1) executives of British Petroleum Exploration
12 & Production, Incorporated (referred to in this sec-
13 tion as “BP”) testified before Congress in May 2010
14 that BP would pay all legitimate claims relating to
15 the Deepwater Horizon explosion and oil spill that
16 exceed existing applicable economic liability limita-
17 tions;

18 (2) a letter from the Group Chief Executive of
19 BP to the Secretaries of Homeland Security and the
20 Interior dated May 16, 2010, evidences an offer of
21 BP to modify the oil and gas leasing contract in-
22 volved in the Deepwater Horizon incident to incor-
23 porate new terms of liability by stating that BP is
24 “prepared to pay above \$75 million” on “all legiti-
25 mate claims” relating to that explosion and oil spill;

1 (3) that offer is acceptable to Congress and to
2 the Secretary of the Interior;

3 (4) all documented legitimate claims pursuant
4 to the Oil Pollution Act of 1990 (33 U.S.C. 2701 et
5 seq.) for economic damages relating to the Deep-
6 water Horizon explosion and oil spill should be paid
7 by BP without limit on liability;

8 (5) BP should provide to the Federal Govern-
9 ment any claims relating to the Deepwater Horizon
10 explosion and oil spill that BP fails to pay; and

11 (6) if the Federal Government finds pursuant
12 to the Oil Pollution Act of 1990 (33 U.S.C. 2701 et
13 seq.) that such claims are legitimate under that Act,
14 the claims should be returned to BP for immediate
15 payment.

16 (b) DIRECTIVE TO SECRETARY OF THE INTERIOR.—

17 (1) IN GENERAL.—Notwithstanding any other
18 provision of law, the Secretary of the Interior (re-
19 ferred to in this section as the “Secretary”) shall—

20 (A) accept the new terms of liability of-
21 ferred by BP in the letter described in sub-
22 section (a)(2); and

23 (B) consider the oil and gas leasing con-
24 tract involved in the Deepwater Horizon inci-

1 dent as being amended to reflect those new
2 terms.

3 (2) PAYMENT OF CLAIMS.—

4 (A) IN GENERAL.—As an inherent condi-
5 tion of the amended lease described in para-
6 graph (1), BP shall present to the Secretary
7 each claim relating to the Deepwater Horizon
8 explosion and oil spill that BP fails to pay.

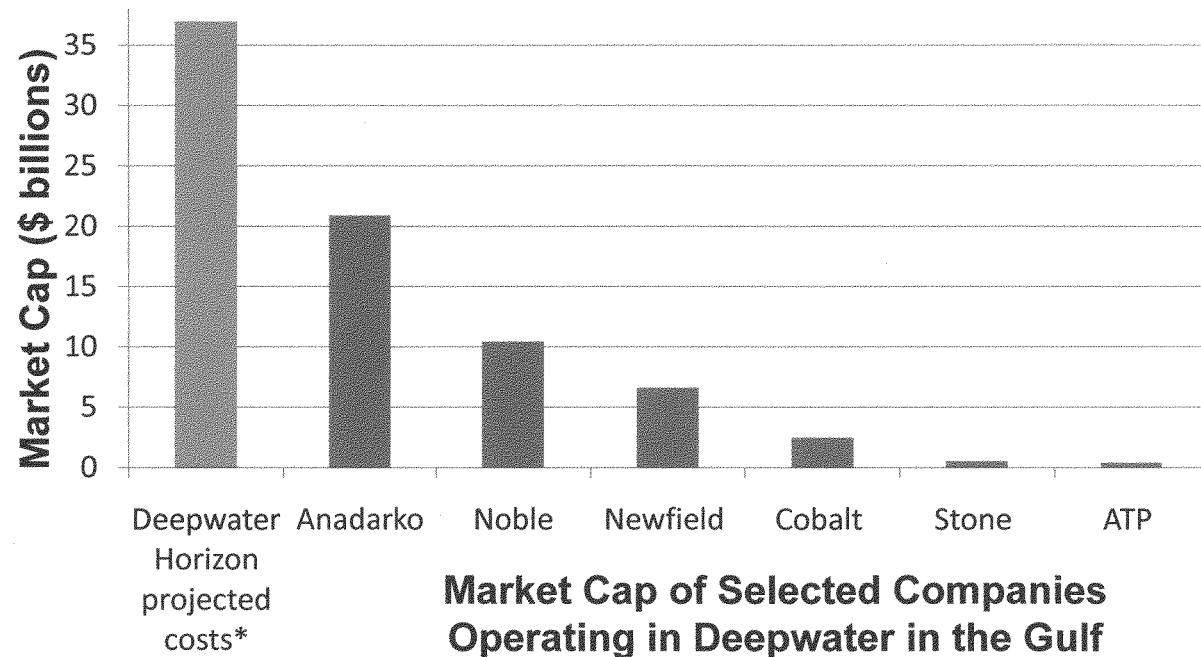
9 (B) FINDING OF LEGITIMACY.—As a fur-
10 ther inherent condition of the amended lease, if
11 the Secretary finds a claim described in sub-
12 paragraph (A) to be legitimate for payment by
13 BP, the claim shall be returned to BP for im-
14 mediate payment.

Deepwater Operations in the Gulf of Mexico by Company Size

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Data Compiled by the Office of Senator Robert Menendez

What if Another Company had Spilled?



All market cap data as reported by Yahoo Finance at 10:00 am EST on June 8, 2010 <http://finance.yahoo.com/>

* Credit Suisse Analysis that costs could be up to \$37 billion, reported in <http://www.forbes.com/2010/06/02/bp-transocean-energy-markets-equities-spill.html/>

Operator Market Caps for Deepwater Gulf of Mexico Wells					
Operator	Market Cap (\$ billions)	Water Depth (ft)	Year of First Production	Project Name	Block
ATP	0.44	1,355	2001	Ladybug	GB 409
ATP	0.44	2,975	2006	Gomez	MC 711
ATP	0.44	2,904	2007	Anduin	MC 755
ATP	0.44	4,000	2009	Mirage and Morgus	MC 941
ATP	0.44	3,452	2009	Clipper	GC 299
ATP	0.44	4,385	2010	Telemark	AT 63
W and T Offshore	0.69	1,404	2005	Baccarat	GC 178
McMoran	0.95	1,275	2004	GB 208	GB 208
Helix	1.05	2,679	2001	Typhoon	GC 237
Petrobras	1.45	2,130	2007	Cottonwood	GB 244
Petrobras	1.45	8,143	2010	Cascade	WR 206
Petrobras	1.45	8,831	2010	Chinook	WR 469
Mariner	2.21	1,120	1999	Dulcimer ¹	GB 367
Mariner	2.21	2,828	1999	Pluto	MC 674
Mariner	2.21	1,850	2000	Black Widow	EW 966
Mariner	2.21	3,980	2002	King Kong	GC 472
Mariner	2.21	4,150	2002	Yosemite	GC 516
Mariner	2.21	1,144	2004	Ochre	MC 66
Mariner	2.21	6,634	2008	Bass Lite	AT 426
Mariner	2.21	2,823	2009	Geauxpher	GB 462
Newfield	6.89	2,097	1995	Cooper ¹	GB 388
Newfield	6.89	3,911	2007	Wrigley	MC 506
El Paso	7.96	1,500	2001	Prince	EW 1003
Murphy	9.71	2,223	2003	North Medusa	MC 538
Murphy	9.71	2,223	2003	Medusa	MC 582

Operator Market Caps for Deepwater Gulf of Mexico Wells					
Operator	Market Cap (\$ billions)	Water Depth (ft)	Year of First Production	Project Name	Block
Murphy	9.71	3,330	2004	Front Runner	GC 338
Murphy	9.71	6,050	2009	Thunder Hawk	MC 734
Noble	10.63	2,960	2002	Lost Ark	EB 421
Noble	10.63	3,290	2008	Raton	MC 248
Noble	10.63	4,677	2005	Swordfish	VK 962
Noble	10.63	2,315	2006	Lorien	GC 199
Hess (Amerada Hess)	16.32	1,648	1998	Baldpate	GB 260
Hess (Amerada Hess)	16.32	1,450	1999	Penn State	GB 216
Hess (Amerada Hess)	16.32	1,736	2000	Northwestern	GB 200
Hess (Amerada Hess)	16.32	1,500	2000	Conger	GB 215
Hess (Amerada Hess)	16.32	1,054	2002	Tulane	GB 158
Hess (LLOG)	16.32	2,614	2005	Citrine	GC 157
Hess (LLOG)	16.32	1,538	2008	Valley Forge	MC 707
Hess (LLOG)	16.32	2,013	2009	MC 72	MC 72
Anadarko	21.18	1,139	2003	Pardner	MC 401
Anadarko	21.18	4,300	2004	Marco Polo	GC 608
Anadarko	21.18	4,006	2005	K2	GC 562
Anadarko	21.18	4,049	2006	K2 North	GC 518
Anadarko	21.18	8,344	2007	Vortex/Ind. Hub	AT 261
Anadarko	21.18	8,825	2007	Jubilee/Ind. Hub	AT 349
Anadarko	21.18	8,015	2007	Merganser/Ind. Hub	AT 37
Anadarko	21.18	8,087	2007	Spiderman/Ind. Hub	DC 621
Anadarko	21.18	8,340	2007	Mondo NW/Ind. Hub	LL 1
Anadarko	21.18	8,951	2007	Cheyenne/Ind. Hub	LL 399
Anadarko	21.18	8,934	2007	Atlas-Atlas NW/Ind. Hub	LL 50

Operator Market Caps for Deepwater Gulf of Mexico Wells					
Operator	Market Cap (\$ billions)	Water Depth (ft)	Year of First Production	Project Name	Block
Anadarko (Kerr McGee)	21.18	3,685	2002	Nansen	EB 602
Anadarko (Kerr McGee)	21.18	3,650	2002	North Boomvang	EB 643
Anadarko (Kerr McGee)	21.18	4,210	2002	Navajo	EB 690
Anadarko (Kerr McGee)	21.18	3,795	2002	East Boomvang	EB 688
Anadarko (Kerr McGee)	21.18	3,678	2003	West Boomvang	EB 642
Anadarko (Kerr McGee)	21.18	3,105	2003	Durango	GB 667
Anadarko (Kerr McGee)	21.18	3,100	2003	Gunnison	GB 668
Anadarko (Kerr McGee)	21.18	3,152	2003	Dawson	GB 669
Anadarko (Kerr McGee)	21.18	2,965	2006	Dawson Deep	GB 625
Anadarko (Kerr McGee)	21.18	4,970	2006	Constitution	GC 680
Anadarko (Kerr McGee)	21.18	5,272	2006	Ticonderoga	GC 768
Anadarko (Kerr McGee)	21.18	3,650	2004	Hack Wilson	EB 599
Anadarko (Kerr McGee)	21.18	5,300	2004	Red Hawk	GB 877
Marathon	22.34	1,195	1998	Oyster	EW 917
Marathon	22.34	1,800	1998	Arnold	EW 963
Marathon	22.34	7,216	2002	Camden Hills	MC 348
Marathon	22.34	2,900	2010	Droshky	GC 244
Marathon	22.34	3,000	2011	Ozona	GB 515
Devon	29.02	1,804	2003	Zia	MC 496
Eni	65.22	1,700	1998	Morpeth	EW 921
Eni	65.22	3,294	1999	Allegheny	GC 254
Eni	65.22	3,307	2000	Allegheny South	GC 298
Eni	65.22	5,610	2004	Devil's Tower	MC 773
Eni	65.22	5,610	2005	Triton/Goldfinger	MC 728
Eni	65.22	5,225	2006	Rigel	MC 252
Eni	65.22	5,881	2006	Seventeen Hands	MC299

Operator Market Caps for Deepwater Gulf of Mexico Wells					
Operator	Market Cap (\$ billions)	Water Depth (ft)	Year of First Production	Project Name	Block
Eni	65.22	7,850	2007	San Jacinto/Ind. Hub	DC 618
Eni	65.22	3,498	2009	Pegasus	GC 385
Eni	65.22	2,442	2009	Longhorn	MC 502
ConocoPhillips	75.67	4,674	2004	Magnolia	GB 783
ConocoPhillips	75.67	1,760	1989	Joliet	GC 184
BP	108.57	1,100	1991	Amberjack	MC 109
BP	108.57	1,290	1994	Pompano/ Pompano II	VK 989
BP	108.57	2,721	1997	Troika	GC 200
BP	108.57	3,236	2000	Marlin	VK 915
BP	108.57	3,535	2001	Nile	VK 914
BP	108.57	6,845	2002	King's Peak	DC 133
BP	108.57	3,065	2002	Aspen	GC 243
BP	108.57	5,400	2002	Horn Mountain	MC 127
BP	108.57	5,418	2002	King	MC 84
BP	108.57	4,340	2004	Holstein	GC 645
BP	108.57	5,759	2004	Kepler/Na Kika	MC 383
BP	108.57	6,240	2004	Ariel/Na Kika	MC 429
BP	108.57	4,420	2005	Mad Dog	GC 782
BP	108.57	7,050	2007	Atlantis	GC 787
BP	108.57	6,037	2008	Thunder Horse	MC 778
BP	108.57	3,236	2009	Dorado	VK 915
BP	108.57	6,500	2009	Isabela	MC 562
BP	108.57	5,660	2009	Thunder Horse North	MC 776
BP	108.57	4,129	2013	Puma	GC 823
ChevronTexaco	142.66	1,048	1995	Shasta ¹	GC 136

Operator Market Caps for Deepwater Gulf of Mexico Wells					
Operator	Market Cap (\$ billions)	Water Depth (ft)	Year of First Production	Project Name	Block
ChevronTexaco	142.66	2,590	1999	Genesis	GC 205
ChevronTexaco	142.66	3,393	1999	Gemini	MC 292
ChevronTexaco	142.66	1,753	2000	Petronius	VK 786
ChevronTexaco	142.66	6,989	2008	Blind Faith	MC 696
ChevronTexaco	142.66	4,000	2009	Tahiti	GC 640
BHP Billiton	144.27	2,378	2003	Boris	GC 282
BHP Billiton	144.27	4,300	2007	Shenzi	GC 652
BHP Billiton	144.27	4,232	2008	Neptune	AT 575
Shell	152.80	1,023	1979	Cognac	MC 194
Shell	152.80	1,353	1989	Bullwinkle	GC 65
Shell	152.80	2,860	1994	Auger	GB 426
Shell	152.80	1,500	1994	Tahoe/SE Tahoe	VK 783
Shell	152.80	1,785	1996	Rocky ¹	GC 110
Shell	152.80	2,000	1996	Popeye	GC 116
Shell	152.80	2,933	1996	Mars	MC 807
Shell	152.80	5,318	1997	Mensa	MC 731
Shell	152.80	3,216	1997	Ram-Powell	VK 956
Shell	152.80	3,600	1999	Macaroni	GB 602
Shell	152.80	2,045	1999	Angus	GC 113
Shell	152.80	3,800	1999	Ursa	MC 809
Shell	152.80	3,250	2000	King	MC 764
Shell	152.80	3,870	2000	Europa	MC 935
Shell	152.80	3,153	2001	Serrano	GB 516
Shell	152.80	3,400	2001	Oregano	GB 559
Shell	152.80	3,300	2001	Brutus	GC 158
Shell	152.80	4,400	2001	Crosby	MC 899

Operator Market Caps for Deepwater Gulf of Mexico Wells					
Operator	Market Cap (\$ billions)	Water Depth (ft)	Year of First Production	Project Name	Block
Shell	152.80	3,500	2001	Einset ¹	VK 872
Shell	152.80	1,939	2002	Manatee	GC 155
Shell	152.80	3,642	2002	Princess	MC 765
Shell	152.80	2,015	2003	Habanero	GB 341
Shell	152.80	6,739	2003	Herschel/ Na Kika	MC 520
Shell	152.80	6,940	2003	Fourier/ Na Kika	MC 522
Shell	152.80	6,590	2003	East Ansley/Na Kika	MC 607
Shell	152.80	2,340	2004	Llano	GB 386
Shell	152.80	3,440	2004	Glider	GC 248
Shell	152.80	7,591	2004	Coulomb/ Na Kika	MC 657
Shell	152.80	3,106	2007	Deimos	MC 806
Shell	152.80	8,000	2010	Great White	AC 857
Shell	152.80	9,226	2010	Silvertip	AC 815
Shell	152.80	9,627	2010	Tobago	AC 859
ExxonMobil	287.71	1,000	1984	Lena	MC 280
ExxonMobil	287.71	1,438	1992	Alabaster	MC 485
ExxonMobil	287.71	1,478	1993	Zinc	MC 354
ExxonMobil	287.71	4,825	2000	Hoover	AC 25
ExxonMobil	287.71	4,500	2000	Diana	EB 945
ExxonMobil	287.71	4,376	2001	Marshall	EB 949
ExxonMobil	287.71	4,580	2001	Mica	MC 211
ExxonMobil	287.71	4,856	2002	Madison	AC 24
ExxonMobil	287.71	4,852	2004	South Diana	AC 65
Deep Gulf Energy	N/A	1,900	2007	Tiger	GC 195
Hydro	N/A	7,925	2007	Q/Ind. Hub	MC 961

Operator Market Caps for Deepwater Gulf of Mexico Wells					
Operator	Market Cap (\$ billions)	Water Depth (ft)	Year of First Production	Project Name	Block
Hydro GOM	N/A	1,487	2002	Sangria ¹	GC 177
Marubeni	N/A	3,638	2003	Falcon	EB 579
Marubeni	N/A	3,412	2003	Tomahawk	EB 623
Nexen	N/A	1,168	2005	GC 137	GC 137
Pioneer	N/A	3,710	2004	Raptor	EB 668
Pioneer	N/A	4,114	2004	Harrier ¹	EB 759
Placid	N/A	1,540	1988	GC 29 ¹	GC 29
Placid	N/A	2,243	1988	GC 31 ¹	GC 31
TotalFinaElf	N/A	1,130	1999	Virgo	VK 823
TotalFinaElf	N/A	7,100	2002	Aconcagua	MC 305
TotalFinaElf	N/A	2,850	2003	Matterhorn	MC 243
Unocal	N/A	1,108	2001	Pilsner	EB 205
Walter	N/A	1,043	1995	VK 862	VK 862
Walter	N/A	1,884	1999	EW 1006	EW 1006
Walter	N/A	1,585	2001	EW 878	EW 878
Walter	N/A	1,360	2001	MC 68 ¹	MC 68
Walter	N/A	1,524	2004	MC 837	MC 837
Walter	N/A		2005	Killer Bee	MC 582
Walter	N/A	2,285	2006	SW Horseshoe	EB 430
Walter	N/A	2,924	2008	MC 161	MC 161
Walter	N/A	2,410	2009	GB 302	GB 302
Walter	N/A	2,487	2009	MC 583	MC 583
Walter	N/A	2,415	2010	MC 241	MC 241

¹ Indicates projects that are no longer in production

Data Sources:

Project data: Gulf of Mexico Oil and Gas Production Forecast 2009-2018, Minerals Management Service, 2009

Financial data: Yahoo Finance as of 5:00pm EST June 8, 2010 <http://finance.yahoo.com/>

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(Cite as: 32 F.3d 623)

H

United States Court of Appeals,
First Circuit.
In re BALLARD SHIPPING COMPANY, etc.,
Plaintiff, Appellee,
v.
BEACH SHELLFISH, et al., Claimants, Appel-
lants.
No. 94-1059.
Heard May 3, 1994.
Decided Aug. 18, 1994.

Vessel owner filed action seeking exoneration from or limitation of liability for oil spill allegedly causing economic loss to shellfish dealers. The United States District Court for the District of Rhode Island, Ronald R. Lagucux, J., 810 F.Supp. 359, dismissed dealers' claims for economic loss. Dealers appealed. The Court of Appeals, Boudin, Circuit Judge, held that Constitution's admiralty clause does not preempt Rhode Island statute permitting recovery for economic loss as result of damage to natural resources.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Fish 176 ⇨6

176 Fish
176k6 k. Injury to or Destruction of Fish. Most Cited Cases
Shellfish dealers' maritime law claims for purely economic losses from oil spill are barred under general maritime law.

[2] Admiralty 16 ⇨1.20(5)

16 Admiralty
16l Jurisdiction
16k1.10 What Law Governs
16k1.20 Effect of State Laws

16k1.20(5) k. Torts in General; Workers' Compensation. Most Cited Cases

Environmental Law 149E ⇨171

149E Environmental Law
149EV Water Pollution
149Ek169 Concurrent and Conflicting Statutes or Regulations
149Ek171 k. Federal Preemption. Most Cited Cases
(Formerly 199k25.5(2) Health and Environment)

Environmental Law 149E ⇨411

149E Environmental Law
149EIX Hazardous Waste or Materials
149Ek409 Concurrent and Conflicting Statutes or Regulations
149Ek411 k. Federal Preemption. Most Cited Cases
(Formerly 199k25.5(2) Health and Environment)

States 360 ⇨18.31

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.31 k. Environment; Nuclear Projects. Most Cited Cases
Constitution's admiralty clause does not preempt Rhode Island's Environmental Injury Compensation Act permitting recovery for economic loss as result of damage to natural resources caused by violation of Rhode Island pilotage and water pollution laws; federal Oil Pollution Act is compelling evidence that Congress does not view expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as excessive burden on maritime commerce. R.I.Gen.Laws 1956, § 46-12.3-4; U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1333; Oil Pollution Act of 1990, § 1002(b)(2)(B, E), 33 U.S.C.A. §§ 2702(b)(2)(B, E).

[3] Admiralty 16 ⇨1.20(5)

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16 Admiralty

161 Jurisdiction

16k1.10 What Law Governs

16k1.20 Effect of State Laws

16k1.20(5) k. Torts in General; Workers' Compensation. Most Cited Cases
Injured party may have claims arising from single accident both under federal maritime law and under state law, whether legislation or common law. 28 U.S.C.A. § 1333.

[4] Admiralty 16 ⇌ 2

16 Admiralty

161 Jurisdiction

16k2 k. Saving of Common-Law Remedy.

Most Cited Cases

State remedies under savings to suitors clause may be pursued in state court or, where there is basis for federal jurisdiction, in federal court. 28 U.S.C.A. § 1333.

[5] Admiralty 16 ⇌ 1.20(1)

16 Admiralty

161 Jurisdiction

16k1.10 What Law Governs

16k1.20 Effect of State Laws

16k1.20(1) k. In General. Most Cited

Cases

States 360 ⇌ 18.57

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.57 k. Maritime Matters. Most

Cited Cases

Even absent prejudice to characteristic feature of admiralty, state legislation is preempted if it interferes with proper harmony and uniformity of maritime law. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[6] Admiralty 16 ⇌ 1.20(1)

16 Admiralty

161 Jurisdiction

16k1.10 What Law Governs

16k1.20 Effect of State Laws

16k1.20(1) k. In General. Most Cited

Cases

State regulation of primary conduct-behavior of ship or sailors-in maritime realm is not automatically forbidden, but such regulation presents most direct risk of conflict between federal and state commands or of inconsistency between various state regimes to which same vessel may be subject. U.S.C.A. Const. Art. 3, § 2, cl. 1.

*624 Thomas M. Bond with whom David B. Kaplan and The Kaplan/Bond Group, Boston, MA, were on brief, for appellants.

John J. Finn with whom Thomas H. Walsh, Jr., Marianne Meacham and Bingham, Dana & Gould, Boston, MA, were on brief, for appellee.

Before SELYA, Circuit Judge, BOWNES, Senior Circuit Judge, and BOUDIN, Circuit Judge.

BOUDIN, Circuit Judge.

This appeal presents the question whether federal maritime law preempts Rhode Island legislation affording expanded state-law remedies for oil pollution damage. In an able opinion, the district court held that the remedies were preempted. Discerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence. Yet guided in part by an important Supreme Court decision rendered after the district court's decision, we are constrained to reverse in part and to remand for further proceedings.

The basic facts of the case are not in dispute. On June 23, 1989, the M/V World Prodigy, an oil tanker owned by Ballard Shipping Co., ran aground in Narragansett Bay, Rhode Island, spilling over 300,000 gallons of heating oil into the bay. The wreck occurred when the ship strayed from the designated shipping channel and collided with a rock near Brenton Reef, about a mile south of Newport at the mouth of the bay. The oil slick prompted the

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State of Rhode Island to close Narragansett Bay to all shellfishing activities for a period of two weeks during and after cleanup operations.

State authorities charged the captain of the ship with entering the bay without a local pilot on board in violation of state law. Both the captain and Ballard also pleaded guilty to criminal violations of the Federal Water Pollution Control Act, *see* 33 U.S.C. § 1319(c). The captain and owner were fined a total of \$30,500 and \$500,000, respectively. In addition, Ballard agreed to pay \$3.9 million in compensation for federal cleanup costs, \$4.7 million for state cleanup costs and damage to natural resources, \$500,000 of which was to be available to compensate individuals, and \$550,000 to settle claims for lost wages by local shellfishermen.

A number of claimants filed suit against Ballard in Rhode Island. Ballard responded on December 22, 1989, by bringing a petition in admiralty for limitation or exoneration from liability. 46 App.U.S.C. § 185. "[T]he court of admiralty in [a limitation of liability] proceeding acquires the right to marshal all claims, whether of strictly admiralty origin or not, and to give effect to them by the apportionment of the *res* and by judgment *in personam* against the owner, so far as the court may decree." *Just v. Chambers*, 312 U.S. 383, 386, 61 S.Ct. 687, 690, 85 L.Ed. 903 (1941). In the present case, several claimants reasserted their claims in the admiralty action.

The claimants in the present appeal are a group of shellfish dealers who allege severe economic losses arising from the two-week hiatus in shellfishing activities, which suspended their operations during the busiest time of the shellfishing season. They alleged negligence under the general maritime law and the common law of Rhode Island, as well as a claim for economic losses pursuant to the Rhode Island Environmental Injury Compensation Act, R.I.Gen.Laws ch. 46-12.3 *et seq.* ("the Compensation Act").

On June 17, 1992, Ballard moved to dismiss the

shellfish dealers' claims on the basis of the Supreme Court's decision in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), which held that compensation for economic losses standing alone is unavailable in admiralty *625 cases. The district court granted the motion, holding that *Robins* preempted the contrary provisions of the state's Compensation Act, which expressly provides for recovery of purely economic losses arising from an oil spill. *In re Complaint of Ballard Shipping Co.*, 810 F.Supp. 359 (D.R.I.1993). The dealers now appeal from that dismissal.

We first address the federal claims brought under the general maritime law. The Constitution grants the federal courts authority to hear "all Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2. The parties agree that the dealers' federal claims fall within this group because the spill occurred on navigable waters and arose out of traditional maritime activity. *See Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). Admiralty jurisdiction brings with it a body of federal jurisprudence, largely uncoded, known as maritime law. *See East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864, 106 S.Ct. 2295, 2298-99, 90 L.Ed.2d 865 (1986).

[1] The dealers assert that their businesses were injured when the World Prodigy spill prevented local fishermen from harvesting shellfish in Narragansett Bay and thereby precluded the dealers from purchasing the shellfish and reselling them to restaurants and other buyers. The dealers' maritime-law claims are thus purely for economic losses, unaccompanied by any physical injury to their property or person. Those federal claims, as the district court held, are squarely foreclosed by *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927).

In *Robins*, the charterer of a vessel sued a repair company that negligently damaged the vessel while it was in dry dock, alleging that the resulting delay

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caused the charterer to lose profits that it would have otherwise derived from the use of the ship. Justice Holmes wrote for the Court in holding that the suit could not be maintained:

[N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong.... The law does not spread its protection so far.

275 U.S. at 309, 48 S.Ct. at 135.

Justice Holmes's pronouncement could have been read merely as negating a claim of negligent interference with contract. See *Getty Refining and Marketing Co. v. MT FADI B*, 766 F.2d 829, 831-32 (3d Cir.1985). Instead, *Robins* has generally been taken to establish the broader rule that purely economic losses arising from a tort, but unaccompanied by physical injury to anything in which the plaintiff has a proprietary interest, are not compensable under federal maritime law. See, e.g., *State of Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022 (5th Cir.1985) (en banc), cert. denied, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986). Our circuit adopted this broader reading in *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51-52 (1st Cir.1985), and, in any event, the secondary nature of the economic injury here—which is akin to interference with contract—would likely bring this case within even a narrow reading of *Robins*.

[2] Several courts have recognized exceptions to *Robins*, but none of the familiar examples apply in this case.^{FN1} The district court so held, and the dealers do not challenge that conclusion on appeal. Accordingly, we agree that plaintiffs' federal claims for purely economic losses under the general maritime law are barred. The appeal thus turns upon the extent to which *Robins* bars the states from permitting a different result under state law pursuant to the exercise of the state's police powers.

FN1. The classic exceptions include claims brought by fishermen as "favorites of admiralty," see *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir.1974), and claims for economic losses that are intentionally caused, see *Dick Meyers Towing Service, Inc. v. United States*, 577 F.2d 1023, 1025 (5th Cir.1978), cert. denied, 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979).

[3][4] Although the Judiciary Act of 1789 vested "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" in the federal courts, the act added a *626 provision "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." 1 Stat. 76-77. The modern version of the statute saves "all other remedies to which [suitors] are otherwise entitled." 28 U.S.C. § 1333. The upshot is that an injured party may have claims arising from a single accident both under federal maritime law and under state law, whether legislation or common law. See G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 1-13, at 37 (2d ed. 1975). State remedies under the savings to suitors clause may be pursued in state court or, where there is a basis for federal jurisdiction, in federal court.

Whether a state claim is litigated in a federal court or a state forum, "the extent to which state law may be used to remedy maritime injuries is constrained by a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986) (citations omitted). How far this conformity requirement extends, and whether it preempts the dealers' state-law claims, are the central issues in this case.

On appeal, the dealers mainly stress their claims under Rhode Island's Compensation Act. The Compensation Act provides generally that owners or operators of seagoing vessels may be held liable for harms arising from negligence of the owner, operat-

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or or agents or from the violation of Rhode Island pilotage and water pollution laws. *See* R.I.Gen.Laws §§ 46-12.3-2, 46-12.3-3. The statute also contains the following specific provisions regarding economic loss:

(a) A person shall be entitled to recover for economic loss ... if the person can demonstrate the loss of income or diminution of profit to a person or business as a result of damage to the natural resources of the state of Rhode Island caused by the violation of any provision [of the piloting or water pollution laws] by the owner or operator ... of the seagoing vessel and/or caused by the negligence of the owner or operator ... of the seagoing vessel.

(b) In any suit brought to recover economic loss it shall not be necessary to prove that the loss was sustained as a result of physical injury to the person or damage to his or her property, nor shall it be a defense to any claim that the defendant owed no special duty to the plaintiff or that the loss was the result of governmental action taken in response to the violation and/or negligence of the defendant.

(c) Without limiting the generality of the foregoing, persons engaged in commercial fishing or shellfishing and/or the processors of fish or shellfish, who can demonstrate that they have sustained a loss of income or profit as a result of damage to the environment resulting from [violations of law or negligence] ... shall have a cause of action for economic loss. Persons employed by, or who operate businesses, who have sustained a loss of income or profit as a result of a decrease in the volume of business caused by the damage to the environment shall also be entitled to maintain an action for economic loss.

R.I.Gen.Laws § 46-12.3-4.

For the purposes of this appeal only, Ballard concedes that the dealers would have a valid cause of action under this statute, and that the Compensation

Act, which became effective on September 30, 1990, may be applied retroactively to cover the 1989 M/V World Prodigy spill.^{FN2} We think that the statutory claims effectively subsume state common law claims since the Compensation Act appears to go as far and further than common law in departing from *Robins*. Thus, we focus upon the statute.

FN2. *See* 1990 R.I.Pub.Laws ch. 198, § 2 (providing that the Compensation Act shall apply to all causes of action pending on or after September 30, 1990, regardless of when the violation and/or act of negligence occurred, as long as suit was commenced within the applicable statute of limitations).

The shipowner and captain insist, and the district court agreed, that the state claims are preempted under the doctrine of **627Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917). *Jensen*, in a now famous passage, held that state legislation affecting maritime commerce is invalid "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216, 37 S.Ct. at 529.

Jensen, however, was by its own terms something less than a rule of automatic and mechanical preemption. "It would be difficult, if not impossible," said the Court, "to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. *That this may be done to some extent cannot be denied.*" 244 U.S. at 216, 37 S.Ct. at 529 (emphasis added). What is even more telling is that the Supreme Court after *Jensen*, without ever repudiating its language, upheld the application of state law in a number of maritime-related cases despite the existence of a direct conflict between maritime rules and state law.

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This saga is recounted in Professor Currie's classic article, aptly titled "Federalism and the Admiralty: 'The Devil's Own Mess,'" 1960 Sup.Ct.Rev. 158. A familiar example is *Just v. Chambers*, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903 (1941), where the Court permitted a state law claim for personal injury occurring on board a ship against the estate of the vessel's owner, despite a contrary maritime rule that a shipowner's liability does not survive his death. This year, in *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994), the Court upheld a Louisiana open-forum statute, making the *forum non conveniens* doctrine unavailable in savings clause cases, even though *forum non conveniens* is a part of federal maritime law.

American Dredging assertedly reaffirms *Jensen's* three-prong test for preemption quoted above. Since no act of Congress directly governs our case, the first prong (contravention) is irrelevant to our case. The third prong ("proper harmony and uniformity") we reserve for consideration below. What is of immediate concern is the second ("material prejudice") prong; and here, *American Dredging* gave the famous language a twist that could not easily have been anticipated by the litigants in this case or by the district court.

Judged by the bare language of *Jensen*, the Compensation Act might easily seem to do "material prejudice" to a "characteristic feature" of maritime law, since *Robins* is the governing maritime rule and the Compensation Act rejects *Robins* in everything but name. But the word "characteristic" has different shadings, and *American Dredging*, in its first and most important holding, gives the "characteristic feature" language a definitive meaning: it reads the phrase to apply-and apparently only to apply-to a federal rule that either "originated in admiralty" or "has exclusive application there." 510 U.S. at ----, 114 S.Ct. at 987.

Indeed, Justice Scalia goes on to say that the doctrine at issue in *American Dredging*, the doctrine of *forum non conveniens*, "is and has been a doctrine

of general application" and that "therefore" its disregard by Louisiana does not prejudice "[a] characteristic featur[e]" of general maritime law." 510 U.S. at ----, 114 S.Ct. at 987. Further, only so narrow a reading of the characteristic feature test comports with the result in *American Dredging*. Since the *forum non conveniens* doctrine had long and widespread application in admiralty cases, *id.* at ----, 114 S.Ct. at 986, a broad reading of the characteristic feature test would have resulted in preemption.

Although it is easier to identify the origins of a doctrine recognizing liability than one denying it, we have found no evidence that *Robins'* denial of recovery for purely economic losses originated in admiralty. Justice Holmes's opinion in *Robins* presents the rule as a virtual truism for which "no authority need be cited," 275 U.S. at 309, 48 S.Ct. at 135, and refers the reader to three other opinions in which "[a] good statement [of the rule] will be found." *Id.* (citing *Elliot Steam Tug Co., Ltd. v. The Shipping Controller*, 1 K.B. 127, 139, 140 (1922); *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903); and *The Federal No. 2*, 21 F.2d 313 (2d Cir.1927)).

***628** Although *Elliot Steam Tug* and *The Federal No. 2* are both maritime cases, *Byrd* involved a suit against a defendant who had negligently damaged the lines supplying power to plaintiff's printing company. Justice Holmes also cited another case, *National Savings Bank v. Ward*, 100 U.S. 195, 25 L.Ed. 621 (1879), which involved a suit by a plaintiff who had relied upon a certificate of title prepared by the defendant attorney for a third party.

The rule applied in *Robins* is also sometimes traced to *Cattle v. Stockton Waterworks Co.*, 10 Q.B. 453 (1875), which concerned liability for delays suffered by plaintiff's construction company caused by water leaking from defendant's pipes. The admiralty cases thus reflect a traditional, if not invariable, "general principle denying liability for purely economic loss in the law of negligence." Atiyah, "Negligence and Economic Loss," 83 L.Q.Rev. 248, 248-51 (1967). In sum, "*Robins* broke no new

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ground but instead applied a principle, then settled both in the United States and England, which refused recovery for negligent interference with 'contractual rights.' " *State of Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1022 (5th Cir.1985) (en banc), cert. denied, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986).

Nor has the doctrine forbidding recovery of such losses had "exclusive" application in admiralty. See generally P. Keeton, *Prosser and Keeton on Torts* § 129, at 999-1002 (5th ed. 1984). Rather, courts have denied liability for purely economic harm in a variety of land-based contexts.^{FN3} Such cases rest on a concern about extending the scope of tort liability beyond the generally limited class of individuals who suffer physical damage to person or property. See Rabin, "Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment," 37 Stan.L.Rev. 1513, 1528 (1985). This concern stretches landward quite as much as seaward. Thus, we hold that Rhode Island's decision to depart from *Robins* does not materially prejudice a rule that originated in or is exclusive to general maritime law.

FN3. See, e.g., *Dundee Cement Co. v. Chemical Laboratories, Inc.*, 712 F.2d 1166 (7th Cir.1983) (denying recovery for lost profits from owner of tanker truck which overturned, blocking the only entrance to plaintiff's cement plant); *Nebaska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124 (Iowa 1984) (holding that businesses adversely affected by closing of bridge in which cracks developed could not recover for economic losses against the builder of the bridge); *Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200 (Ohio Ct.App.1946) (holding that plaintiff could not recover lost wages against defendant, whose negligence in storing explosives caused destruction of plaintiff's nearby place of employment); *Hart Eng'g Co. v. FMC Corp.*, 593 F.Supp. 1471, 1481-84 (D.R.I.1984)

(Selya, J.).

[5] Even absent prejudice to a characteristic feature of admiralty, state legislation is preempted if (under *Jensen's* third test) it "interferes with the proper harmony and uniformity" of maritime law. *Jensen*, 244 U.S. at 216, 37 S.Ct. at 529. As Justice Scalia observed in considering this question, "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." *American Dredging*, 510 U.S. at ----, 114 S.Ct. at 987. He did not, however, articulate a definitive test of harmony and uniformity, holding only that there is no preemption where the relevant state law is procedural rather than substantive. *Id.* at ----, 114 S.Ct. at 988. In our case, the Rhode Island statute is indisputably substantive.

Where substantive law is involved, we think that the Supreme Court's past decisions yield no single, comprehensive test as to where harmony is required and when uniformity must be maintained. Rather, the decisions however couched reflect a balancing of the state and federal interests in any given case. See, e.g., *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-42, 81 S.Ct. 886, 891-94, 6 L.Ed.2d 56 (1961); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-48, 80 S.Ct. 813, 815-18, 4 L.Ed.2d 852 (1960). Our circuit has acknowledged that "the Supreme Court ... no longer construes the Admiralty Clause as requiring 'rigid national uniformity in maritime legislation,' " *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 (1st Cir.1988), and that the preemption issue "ordinarily requires a delicate*629 accommodation of federal and state interests." *Id.* As Professor Currie summed up the matter:

The maritime nature of an occurrence does not deprive a state of its legitimate concern over matters affecting its residents or the conduct of persons within its borders; but the federal admiralty powers were granted to protect certain federal interests in maritime and commercial affairs. An is-

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sue created by such a conflict of interests can be resolved only by reference to those interests and by an attempt to maximize the effectuation of the proper concerns of both state and nation.

1960 Sup.Ct.Rev. at 169.

In balancing the state interest in regulation against a potential overriding federal need for harmony or uniformity, we start with Rhode Island's interest in implementing its Compensation Act. No one can doubt that the state's interest in avoiding pollution in its navigable waters and on its shores, and in redressing injury to its citizens from such pollution, is a weighty one. In *Huron Portland Cement*, the Supreme Court described state air pollution laws as a classic example of police power, and continued: "In the exercise of that power, the states ... may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." 362 U.S. at 442, 80 S.Ct. at 815 (emphasis added).

In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280 (1973), the Court sustained, against a maritime-law preemption challenge, a Florida statute that imposed no-fault liability on vessel owners and operators for damages to private parties caused by oil spills in territorial waters. Justice Douglas described oil spillage as "an insidious form of pollution of vast concern to every coastal city or port and to all the estuaries on which the life of the ocean and lives of the coastal people are greatly dependent." *Id.* at 328-29, 93 S.Ct. at 1594. See also *id.* at 332-43, 93 S.Ct. at 1595-1601.

Claimants in this case argue flatly that *Askew*, without more, sustains the Rhode Island statute; and perhaps it does. The difficulty is that Justice Douglas rejected the maritime law preemption claim on the ground that *Jensen* had nothing to do with "shoreside injury by ships on navigable waters." 411 U.S. at 344, 93 S.Ct. at 1601. "Historically," said Justice Douglas, "damages to the shore or to shore facilities were not cognizable

in admiralty." *Id.* at 340, 93 S.Ct. at 1599. Although Congress had by statute extended admiralty jurisdiction shoreward in 1948, the Court said that this extension did not carry *Jensen* with it. *Id.* at 341, 93 S.Ct. at 1600.

If Justice Douglas meant to avoid preemption for physical damage to the shore or shore facilities, as his words seem to suggest, this might easily not embrace damage to bay waters or the beds beneath them. If instead *Askew* meant to allow a state remedy for any intangible impact or loss ultimately felt on shore, it is hard to see what would be left of preemptive federal authority since the most traditional of admiralty events—for example, a ship collision or a seaman's death—has such intangible effects ashore. However the riddle of *Askew* is solved, we think it safest to take it here merely to show, as it assuredly does, the importance of the state's interest in providing remedies for vessel-caused oil pollution damage.

[6] The federal interest in limiting remedies is more subtle but also not without importance. The Compensation Act does not regulate the out-of-court behavior of ships or sailors—what is sometimes called "primary conduct"; rather the act is concerned with the liability imposed for conduct that is already unlawful. State regulation of primary conduct in the maritime realm is not automatically forbidden, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 179-80, 98 S.Ct. 988, 1005-06, 55 L.Ed.2d 179 (1978), but such regulation presents the most direct risk of conflict between federal and state commands, or of inconsistency between various state regimes to which the same vessel may be subject.^{FN4}

FN4. *O'Melveny & Myers v. Federal Deposit Ins. Corp.*, 512 U.S. 79, ---, 114 S.Ct. 2048, 2055, 129 L.Ed.2d 67 (1994) (suggesting that uniformity is most important where the rule at issue is one governing primary conduct); *American Dredging*, 510 U.S. at --- - ---, 114 S.Ct. at 988-89 (noting that "*forum non conveniens* does not bear upon the substantive right to re-

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cover, and is not a rule upon which maritime actors rely in making decisions about primary conduct”).

*630 Instead, the question here is the familiar one of burden. At some point, a regime of liability, or a diversity of regimes, could impose or threaten such heavy costs that maritime commerce may itself be impaired. Initially such costs are borne by shipowners but in the end they affect every business that uses ships or receives raw materials by ship and every citizen who, as a worker or consumer, depends upon such commerce. A regime may also be so difficult to administer as to prevent the efficient and predictable resolution of maritime disputes. These are not trivial or irrelevant concerns, for “the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce.”^{FN5}

FN5. *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603, 606-08, 111 S.Ct. 2071, 2074, 114 L.Ed.2d 649 (1991) (internal quotations omitted). The Supreme Court has regularly considered such burdens in admiralty preemption cases, see, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 179-80, 98 S.Ct. 988, 1005-06, 55 L.Ed.2d 179 (1978); *Huron Portland Cement*, 362 U.S. at 443-44, 80 S.Ct. at 815-16, and has drawn explicit parallels between admiralty preemption and Commerce Clause analysis. See *Davis v. Department of Labor and Industries of Washington*, 317 U.S. 249, 257, 63 S.Ct. 225, 229-30, 87 L.Ed. 246 (1942); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 323-24, 75 S.Ct. 368, 375-76, 99 L.Ed. 337 (1955) (Frankfurter, J., concurring in the result). This does not, however, mean that the admiralty clause simply duplicates a commerce clause analysis. See *American Dredging*, 510 U.S. at ---- n. 3, 114 S.Ct. at 988 n. 3.

Indeed, these very concerns-with the burden of li-

ability and of administration-underpin the *Robins* rule itself and are discussed at length in *Barber Lines*, 764 F.2d at 54-55. But it is one thing to say that a federal court, largely responsible for shaping the common law of admiralty, should follow a longstanding liability rule to govern a federal cause of action. It is quite another to say that a state remedy, presumptively preserved under the savings to suitors clause, is potentially so disruptive as to be unconstitutional. Where as here the state remedy is aimed at a matter of great and legitimate state concern, a court must act with caution.

The question, then, is whether absent the *Robins* rule there remain limitations on the scope of recovery under the Compensation Act adequate to limit the burden it imposes on maritime commerce. The Compensation Act has yet to be construed by the Rhode Island courts. We nevertheless assume that its extension of liability to cover all “loss of income or diminution of profit ... as a result of damage to the natural resources of the state of Rhode Island caused by the violation of [Rhode Island pilotage or pollution laws],” R.I.Gen.Laws § 46-12.3-4 (emphasis supplied), incorporates the familiar tort limitations of foreseeability and proximate cause. These principles do in some measure limit the burden imposed on maritime shipping.

Foreseeability may extend some distance, cf. *Barber Lines*, 764 F.2d at 52, and “remoteness” is scarcely a sharply defined concept. Compare *Petitions of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir.1968) (rejecting *Robins* but excluding economic losses suffered by the owner of a vessel prevented from unloading its cargo above a bridge that collapsed as a result of defendant's negligence as too remote to permit recovery). We cannot be sure how Rhode Island courts will develop these concepts in the context of oil pollution cases. Depending on Rhode Island's solutions, the burdens imposed by the Compensation Act, financial and administrative, may be substantial but they may also be tolerable. One might say that the case for preemption at this stage is subject to the Scotch verdict-not proven.

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Having said all this, we think one final consideration tips the scales in favor of the Compensation Act's validity. Congress has recently enacted the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*, which almost certainly provides for recovery of purely economic damages in oil spill cases.^{FN6} Section 2702(b)(2)(E) of the act provides that "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, ... shall be recoverable by any claimant." The House Conference Report makes clear that, under section 2702(b)(2)(E), "[t]he claimant need not be the owner of the damaged property or resources to recover for lost profits or income". H.R.Conf.Rep. No. 101-653, 101st Cong., 2d Sess. 103 (1990), U.S.Code Cong. & Admin.News 1990, p. 722. The act also expressly provides that it does not preempt state imposition of additional liability requirements. 33 U.S.C. § 2718(a).

FN6. We say "almost" only because one court has held to the contrary. See *In re Petition of Cleveland Tankers, Inc.*, 791 F.Supp. 669, 678-79 (E.D.Mich.1992). Most commentators, by contrast, have read the new statute-as its language and legislative history suggest-to override the *Robins Dry Dock* rule, see McCurdy, "An Overview of OPA 1990 and Its Relationship to Other Laws," 5 U.S.F.Mar.L.J. 423 (1993); Gonynor, "The *Robins Dry Dock* Rule: Is the 'Bright Line' Fading?" 4 U.S.F.Mar.L.J. 85 (1992).

The statute contains another substantial piece of evidence that Congress means to allow recovery of economic losses from injury to natural resources even though the claimant's own property was not damaged. In another subsection of the damage provision, there is an explicit provision for recovery of "economic losses resulting from destruction of real or personal property" by a claimant "who owns or leases that property." 33 U.S.C. § 2702(b)(2)(B). If

the "natural resources" injury provision in subsection (E) were limited to those owned by the claimant, the recovery thus provided would be already covered by subsection (B) and subsection (E) would be redundant. *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir.1985) (readings that create redundancies are not favored).

The new federal statute does not apply retroactively to govern the present case. See Pub.L. No. 101-380, § 1020 (providing that the statute "shall apply to an incident occurring after the date the enactment of this Act [August 18, 1990]."). But we think that the statute is compelling evidence that Congress does not view either expansion of liability to cover purely economic losses or enactment of comparable state oil pollution regimes as an excessive burden on maritime commerce. Given the Congress' superior ability to weigh the very practical considerations relating to such a judgment, we give Congress' conclusion substantial weight. For this purpose, the non-retroactivity of the statute is irrelevant.

We hold, then, that the Rhode Island's Compensation Act as reasonably construed and applied is not preempted by the admiralty clause of the Constitution. We express no judgment on whether claimants' particular injuries were reasonably foreseeable or proximately caused by the grounding of the M/V World Prodigy, or whether claimants' claims are otherwise viable under the Rhode Island statute. That determination is for the district court in the first instance or for the state courts. *Robins Dry Dock* remains the rule in this circuit for federal claims; we simply hold that Rhode Island is free to chart a different course.

Because of the Oil Pollution Act, it may well be that the immediate problem with which we have wrestled at length in this case is a transient one; the legal regime for oil pollution accidents after August 18, 1990, will largely be a creature of the new statute. But the case before us, like all cases, is important to the litigants, and the governing legal standards have application elsewhere. Applying an imprecise federal preemption standard to a little con-

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strued state statute is no easy task. For the present, assuming that the Rhode Island statute is providently construed and applied, we think that it is not unconstitutional.

The decision of the district court dismissing plaintiffs' federal claims is *affirmed*; the dismissal of plaintiffs' state claims is *reversed* and the case is *remanded* for further proceedings consistent with this opinion.

C.A.1 (R.I.),1994.
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