

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 135, 138, and 153

[Docket No. USCG–2017–0788]

RIN 1625–AC39

Financial Responsibility—Vessels; Superseded Pollution Funds

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to expand its regulations on vessel financial responsibility to apply to all tank vessels greater than 100 gross tons as required by statute, and to make other amendments that clarify and update reporting requirements, reflect current practice, and remove unnecessary regulations. This proposed rule would ensure that the Coast Guard has current information when there are significant changes in a vessel's operation, ownership, or evidence of financial responsibility, and would reflect current best practices in the Coast Guard's management of the Certificate of Financial Responsibility program.

DATES: Comments and related material must be received by the Coast Guard on or before August 11, 2020. Comments sent to the Office of Management and Budget (OMB) on collection of information must reach OMB on or before July 13, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2017–0788 using the Federal eRulemaking Portal at <https://www.regulations.gov>. See the "Public Participation and Request for Comments" portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

Collection of information. Submit comments on the collection of information discussed in section V.D of this preamble both to the Coast Guard's online docket and to the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget using one of the following two methods:

- *Email:* dhsdeskofficer@omb.eop.gov.
- *Mail:* OIRA, 725 17th Street NW, Washington, DC 20503, attention Desk Officer for the Coast Guard.

FOR FURTHER INFORMATION CONTACT: For information about this document call or email Benjamin White, National Pollution Funds Center, Coast Guard;

telephone 202–795–6066, email Benjamin.H.White@uscg.mil.

SUPPLEMENTARY INFORMATION:

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I. Public Participation and Request for Comments

The Coast Guard views public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. If you cannot submit your material by using <https://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions. Documents mentioned in this proposed rule, and all public comments, will be available in our online docket at <https://www.regulations.gov>, and can be viewed by following that website's instructions. Additionally, if you visit the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

We accept anonymous comments. All comments received will be posted

without change to <https://www.regulations.gov> and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

We do not plan to hold a public meeting but we will consider doing so if public comments indicate that a meeting would be helpful. We would issue a separate **Federal Register** notice to announce the date, time, and location of such a meeting.

II. Abbreviations

311(k) Fund The fund established by Section 311(k) of the Federal Water Pollution Control Act

CERCLA Comprehensive Environmental Response, Compensation, and Liability Act of 1980

COFR Certificate of Financial Responsibility

CFR Code of Federal Regulations

CIMS Contract Information Management System

DHS Department of Homeland Security

eCOFR Electronic Certificate of Financial Responsibility

EEZ Exclusive Economic Zone

FOSC Federal on-scene coordinator

FWPCA Federal Water Pollution Control Act

MISLE Marine Information for Safety and Law Enforcement

NAICS North American Industry Classification System

NPFC National Pollution Funds Center

NPRM Notice of proposed rulemaking

OCSLA Fund Offshore Oil Pollution Compensation Fund

OCSLAA Title III of the Outer Continental Shelf Lands Act Amendments of 1978

OMB Office of Management and Budget

OPA 90 Oil Pollution Act of 1990

OSLTF or Fund Oil Spill Liability Trust Fund

SBA Small Business Administration

U.S.C. United States Code

§ Section

III. Basis and Purpose, and Regulatory History

The Oil Pollution Act of 1990 (OPA 90) (specifically, 33 U.S.C. 2716) and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (specifically, 42 U.S.C. 9608), require responsible parties for certain vessels to establish and maintain evidence of financial responsibility. The evidence of financial responsibility must meet the maximum amount of liability under 33 U.S.C. 2704(a) or (d). Violators of those requirements are subject to various penalties under 33 U.S.C. 2716a and 42 U.S.C. 9609.

The 2010 Coast Guard Authorization Act (Pub. L. 111–281, 124 Stat. 2988

(October 15, 2010)) amended OPA 90 by expanding the population of vessels subject to the evidence of financial responsibility requirements. By statute, that population now includes any tank vessel greater than 100 gross tons but less than or equal to 300 gross tons using any place subject to the jurisdiction of the United States. The Coast Guard proposes to amend the Code of Federal Regulations (CFR) to reflect that statutory change. The Coast Guard had previously issued Certificate of Financial Responsibility (COFR) regulations at 33 CFR part 138, subpart A, which apply to vessels over 300 gross tons, as well as certain other vessels depending on how and where they are operated. In the time since the Coast Guard promulgated those regulations, the Coast Guard has modernized and simplified its COFR program. The Coast Guard has also identified certain aspects of the COFR program where it could improve compliance, particularly in the current COFR requirements for reporting changes in vessel operation, ownership, or evidence of financial responsibility that affect the basis of the Coast Guard's decision to issue a COFR. Finally, the structure of the current COFR regulations and some of their provisions, including the rules for applying vessel gross tonnage, are out of date and difficult to understand.

A. Purpose of COFR Regulations

Generally, under OPA 90, the responsible parties (owners, operators, and demise charters) for a vessel from which oil is discharged, or poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone (EEZ), are liable for the removal costs and damages specified from such an incident (33 U.S.C. 2702(a)). Embodying the "polluter pays" principle, this liability is strict, joint, and several. In addition, 42 U.S.C. 9607 also states that the responsible parties for a vessel from which a hazardous substance is released, or which poses a threat of a release of a hazardous substance, are similarly strictly liable, jointly and severally, for the resulting response costs and damages.

Under OPA 90 and CERCLA, the responsible parties for certain categories of vessels must establish and maintain evidence of financial responsibility in accordance with regulations promulgated by the Secretary. The purpose of this requirement is to ensure that, in advance of an oil pollution incident or a hazardous substance release, the responsible parties for the vessels in the specified categories have the financial ability to meet their

potential liabilities under OPA 90 and CERCLA up to the applicable limits of liability.

Under 33 U.S.C. 2716 evidence of financial responsibility is required for the following categories:

- (1) Vessels greater than 300 gross tons.
- (2) Vessels using the EEZ to transship or lighter oil destined for a place subject to the jurisdiction of the United States.
- (3) Tank vessels greater than 100 gross tons.

B. History of COFR Regulations

Initially, the Coast Guard established COFR regulations in 33 CFR part 138 with an interim rule published July 1, 1994 (59 FR 34210) followed by a final rule published March 7, 1996 (61 FR 9264). In 2008 the Coast Guard amended the COFR regulations and placed them in a newly created subpart A of part 138 (73 FR 53691, September 17, 2008).¹ In addition to making several other changes, that final rule removed a requirement that responsible parties carry an original or authorized copy of the current COFR aboard each covered vessel, because improved technology enabled the Coast Guard to view vessel COFRs electronically. This rule proposes further changes to part 138, subpart A, including changes to the management of electronic documents.

C. History of 33 CFR Part 135 and Subpart D of 33 CFR Part 153

The Coast Guard added part 135, titled "Offshore Oil Pollution Compensation Fund," to 33 CFR in 1979 (44 FR 16868, March 19, 1979) and it added subpart D, titled "Administration of the Pollution Fund," to 33 CFR part 153 in 1971 (36 FR 7010, April 13, 1971). This proposed rule would remove 33 CFR part 135 and subpart D of 33 CFR part 153, which concern management of two pollution funds for which OPA 90 repealed the authorities. The two defunct funds are the Offshore Oil Pollution Compensation Fund (OSCLA Fund) in 33 CFR part 135 and the Federal Water Pollution Control Act (FWPCA) Section 311(k) Fund (311(k) Fund) in subpart D of 33 CFR part 153.

On November 1, 2011, the Coast Guard published a notice of inquiry (76 FR 67386) soliciting public comment on whether to remove 33 CFR part 135. We received no adverse comments; there were three comments supporting the removal of part 135.

¹ That rule expanded part 138's heading to "Financial Responsibility for Water Pollution (Vessels) and OPA 90 Limits of Liability (Vessels and Deepwater Ports)" and dedicated subpart B to the last half of the revised heading—limits of liability for vessels and deepwater ports under OPA 90.

IV. Discussion of Proposed Rule

The Coast Guard proposes amending 33 CFR part 138, subpart A, and removing the superseded regulations in 33 CFR parts 135 and 153. We explain our specific proposed changes below.

A. Overview of Proposed Changes to COFR Regulations

Following is an overview of proposed revisions to 33 CFR part 138, subpart A:

(1) *Evidence of financial responsibility for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons.* As required by 33 U.S.C. 2716(a)(3), we propose extending the regulatory requirement to establish and maintain evidence of financial responsibility to any tank vessel greater than 100 gross tons but less than or equal to 300 gross tons using any place subject to the jurisdiction of the United States.

(2) *Reporting requirements.* We also propose reorganizing, clarifying, and updating the reporting requirements for submitting an Application. Examples of new requirements include documenting evidence of financial responsibility submitted in support of an Application or a request for COFR renewal, and adding into regulatory text the current practice of guarantor notification.

This set of proposed changes—including § 138.150, which is dedicated to reporting requirements and expressly links those requirements to enforcement provisions—aims to address instances in which COFR Operators fail to report changes to their status, as is currently required by 33 CFR 138.90(e). These failures include failing to report a vessel's financial changes in a timely manner, failing to report a vessel transfer to a new owner, and failing to secure a guaranty and apply for a new COFR—and have resulted in compliance gaps. These gaps compromise emergency responses where an inability to confirm financial responsibility has caused untimely responses to oil spills and undermined the COFR program.

Lastly, these proposed revisions are intended to ensure that the Director receives the most current and accurate information when issuing a COFR. These revisions would improve the Coast Guard's ability to verify vessel compliance with COFR regulations. For example, if an owner sells a vessel while it is located in a place subject to U.S. jurisdiction, the new responsible party becomes immediately subject to the COFR program. However, enforcing compliance with the COFR program's requirements depends on the Coast Guard knowing about the vessel

transfer. The proposed regulatory revisions mitigate the risk of uninsured responsible parties and derelict vessels.

(3) *Revise COFR regulations to incorporate improved management practices and technological advancements.* We also propose to amend the COFR regulations to reflect changes in the NPFC’s management of the COFR program. The proposed revisions include the following:

- New regulatory text expressly authorizing COFR Operators, guarantors, and agents for service of process to submit signed scanned documents;
- Permitting COFR Operators submitting Applications or requests for COFR renewal by email or fax to pay the COFR Application and certification fees up to 21 days after submission. This method would replace the current rule’s requirement to pay certification fees before the NPFC issues the COFR;
- Updating and simplifying the provisions that detail how to apply gross tonnage assigned under different measurement systems. This reflects

changes in the law since OPA 90’s initial legislation and conforms the regulatory text to the Coast Guard’s “Measurement of Vessels” final rule (81 FR 18701, March 31, 2016), which amended the U.S. tonnage regulations in 46 CFR part 69;

- Adding new provisions describing the COFR program’s current procedures for determining the acceptability of COFR guarantors; and
- Modifying past technical amendments to implement the Electronic COFR (eCOFR). These regulatory changes are necessary to manage the COFR program more effectively, reduce the burden to the public, and accommodate the frequent changes in vessel operation during the normal course of maritime commerce.

(4) *Clarifying terminology.* We propose clarifying and simplifying the terminology in COFR regulations for consistency with law and COFR program business practices. These changes include using terms of art consistently and simplifying terminology.

B. Discussion of Specific Proposed Changes to COFR Regulations

Table 1 provides a section-number crosswalk between the current COFR regulations and our proposed COFR regulations. The crosswalk will assist the reader in comparing the current regulations with those in this proposed rule. Following table 1 is a discussion of substantive changes, which include either new requirements or updates to the rule to match current Coast Guard practice. The narrative discussion does not address every proposed change: for example, the crosswalk shows that part of current § 138.30 is proposed to relocate to § 138.40, but we omitted narrative discussion because proposed § 138.40 contains no substantive change to requirements. When we applied plain language doctrine required by E.O. 13563 to make these regulations easier to understand but did not make substantive changes we did not discuss those changes.

TABLE 1—CROSSWALK OF CURRENT AND PROPOSED COFR REGULATIONS

| Current COFR regulations | Proposed COFR regulations |
|---|---|
| Part 138—Financial Responsibility for Water Pollution (Vessels) and OPA 90 Limits of Liability (Vessels, Deepwater Ports and Onshore Facilities). | Part 138—Evidence of Financial Responsibility for Water Pollution (Vessels) and OPA 90 Limits of Liability (Vessels, Deepwater Ports and Onshore Facilities). |
| <i>Subpart A—Financial Responsibility for Water Pollution (Vessels)</i> | <i>Subpart A—Evidence of Financial Responsibility for Water Pollution (Vessels).</i> |
| § 138.10 Scope | § 138.10 Scope and purpose. |
| § 138.15 Applicability | § 138.20 Applicability. |
| § 138.20 Definitions | § 138.30 Definitions. |
| § 138.30 General | § 138.40 General requirements. |
| § 138.30(c) through (f) | § 138.50 How to apply vessel gross tonnages. |
| § 138.40 Forms | § 138.60 Forms and submissions; ensuring submission timeliness. |
| § 138.45 Where to apply for and renew Certificates | § 138.60 Forms and submissions; ensuring submission timeliness. |
| § 138.50 Time to apply | § 138.80 Applying for COFR. |
| § 138.60 Applications, general instructions | § 138.80 Applying for COFR. |
| § 138.65 Issuance of Certificates | § 138.70 Issuance and renewal of COFR. |
| § 138.70 Renewal of Certificates | § 138.90 Renewing COFR. |
| § 138.80 Financial responsibility, how established | § 138.110 How to establish and maintain evidence of financial responsibility. |
| §§ 138.80(f) [untitled] and 138.85 Implementation schedule for amendments to applicable amounts by regulation. | § 138.100 How to calculate a total applicable amount. |
| § 138.90(a)–(c) Individual and Fleet Certificates | § 138.80 Applying for COFR. |
| § 138.90(d) and (e), untitled | § 138.150 Reporting requirements. |
| § 138.100 Non-owning operator’s responsibility for identification | § 138.160 Non-owning COFR Operator’s responsibility for identification. |
| § 138.110 Master Certificates | § 138.80 Applying for COFR. |
| § 138.120 Certificates, denial or revocation | § 138.140 Application withdrawals, COFR denials and revocations. |
| § 138.130 Fees | § 138.120 Fees. |
| § 138.140 Enforcement | § 138.170 Enforcement. |
| § 138.150 Service of process | § 138.130 Designating agents for service of process. |

Proposed § 138.10 Scope and Purpose

Proposed § 138.10(a)(2) states that the standards and procedures the Coast Guard uses to determine guarantor acceptability would be included within the scope of subpart A. In addition, we propose in § 138.10(a)(3) that the reporting requirements for guarantors

would be included within the scope of subpart A. These proposed changes for submitting evidence of financial responsibility on behalf of the COFR Operator reflects current practice.

Proposed § 138.20 Applicability

Proposed § 138.20(a)(1) would extend, as required by statute, the applicability of the rule to include tank vessels greater than 100 gross tons but less than or equal to 300 gross tons, regardless of whether it is transshipping or lightering oil. This provision expands the

population of vessels under 300 gross tons that are required to establish and maintain evidence of financial responsibility under 33 U.S.C. 2716. The current regulation includes any tank vessel using the waters of the EEZ to transship or lighter oil destined for a place subject to the jurisdiction of the United States, but if a tank vessel is not engaged in transshipping or lightering, the current regulation has an exception for those that are 300 gross tons or less.

In § 138.20(a)(2) through (a)(4), we propose extending the applicability of the rule to include guarantors, responsible parties other than the COFR Operator, and agents of process. This proposed action would be in accordance with current practice.

Proposed § 138.30 Definitions

We propose to cross-reference additional statutory and regulatory definitions, add new regulatory definitions, amend regulatory definitions in the current COFR regulations, and remove definitions that are not used.

The following definitions reflect substantive changes from the current rule:

Applicant and certificant: We propose replacing the confusing terms “applicant” and “certificant” with the term “COFR Operator” throughout the rule. This action would promote consistency with the COFR program’s business practice that authorizes the COFR Operator designated in the “Application” to represent the responsible parties for purposes of compliance with the COFR program.

COFR Operator: We propose to redefine “COFR Operator” to clarify when we are referring to the operator who is liable in the event of an incident or a release. We also propose replacing the current term “Operator” with the term “responsible party.” This rule defines the term “responsible party,” for purposes of OPA 90 and CERCLA evidence of responsibility, by cross-reference to the relevant statute, and includes all of those persons who meet the definition. This replacement of the term “operator” with the newly-defined terms “responsible party” and “COFR Operator” makes clear that the designation of a “COFR Operator” to act on behalf of the responsible parties for purposes of the COFR program does not limit or preclude other responsible parties from being operators within the meaning of OPA 90 or CERCLA. We are also expressly clarifying that, when there is more than one responsible party, the COFR Operator is the operator designated and authorized by all the vessel’s responsible parties to act on

their behalf to comply with the COFR program.

Fleet Certificate and Individual Certificate: We propose a new definition for the term “Fleet Certificate” to parallel the definition of “Master Certificate,” and a new definition for the term “Individual Certificate,” so that COFR regulations will include definitions for all three types of Certificates issued by the Director.

Financial guarantor: We propose to revise the definition to make clear that a financial guarantor cannot also be a self-insurer of a vessel, but that it is possible for the self-insurer of one vessel to be the financial guarantor for a different vessel.

Owner: We propose removing the current regulatory definition of “owner.” It does not accurately reflect current law, and it is not clear that a separate regulatory definition of “owner” is needed or helpful, as both OPA 90 and CERCLA define the term “owner” and we cross-reference those definitions.

Tank vessel: We propose removing the regulatory definition of “tank vessel,” cross-referencing the OPA 90 statutory definition in proposed § 138.30(a), and moving the exceptions to applicability that are embedded in the current regulatory definition of “tank vessel” to proposed § 138.20(d)(3).

Vessel: We propose removing the regulatory definition of “vessel” and cross-referencing in § 138.30(a) the statutory definitions that appear in OPA 90 and CERCLA. This is because there are slight differences in the OPA 90 and CERCLA definitions, specifically in the reference to public vessels in OPA 90. Therefore, although other provisions of the current COFR regulations resolve these differences, we believe the better way to resolve the wording differences is to cross-reference the statutory definitions. This approach ensures that COFR-regulation definitions will always be consistent with OPA 90 and CERCLA.

Proposed § 138.50 How To Apply Vessel Gross Tonnages

The current COFR regulations provide instructions to apply different gross tonnage measurements for three different purposes: (1) To determine whether a tonnage threshold applies; (2) to calculate a vessel’s OPA 90 and CERCLA applicable amounts of financial responsibility; and (3) to determine the vessel’s OPA 90 and COFR limits of liability. However, these provisions are complex, and have been difficult to apply, in part because they were developed and established prior to

the full coming into force of the International Convention on Tonnage Measurement of Ships (June 23, 1969) on July 18, 1994. Furthermore, the 2010 Coast Guard Authorization Act included amendments that updated, clarified, and eliminated inconsistencies in the tonnage measurement law. The Coast Guard implemented these amendments in the 2016 rule,² which also incorporated changes to help provide a suitable framework for tonnage-based regulations, allowing the Coast Guard to specify tonnage thresholds more clearly. This proposed rule maintains the purposes of applying gross tonnage measurements explained in the current COFR regulations.

This proposed rule separates provisions for applying vessel gross tonnage in proposed § 138.50, and clarifies and simplifies the current language while conforming with the 2016 amendments to the U.S. tonnage regulations. We added a table to illustrate use of gross tonnages assigned under the two overarching tonnage measurement systems provided for by U.S. law.³

As proposed in § 138.50(f), regardless of the tonnage reported on the Application, the appropriate tonnage-certifying document as provided for under the U.S. tonnage regulations, such as a tonnage certificate or completed Simplified measurement application, governs in determining the evidence of financial responsibility applicable amounts, except when the responsible parties or guarantors knew or should have known that the applicable tonnage certificate was incorrect. In the event of an oil pollution incident or hazardous substance release, the tonnage-certifying document governs the applicable limit of liability. This information is vital to the COFR program because the guaranty is to the certified tonnage at the time of the incident, and addresses what happens if a vessel undergoes a modification that affects the tonnage after a COFR Operator submits an Application. This approach also creates certainty by removing the implication that a tonnage re-measurement at the time of an incident can supersede liability and financial responsibility as reflected on the tonnage-certifying document.

The addition proposed in § 138.50(g) also requires COFR Operators to submit, upon request, the original or a copy of

² “Measurement of Vessels” final rule (81 FR 18701, March 31, 2016).

³ These systems are under the Convention Measurement System, which expresses gross tonnage as “GT ITC,” and the Regulatory Measurement System, which expresses gross tonnage as “GRT.”

the tonnage certifying document(s). The proposed rule would capture the fact that, in some circumstances, vessels may be assigned tonnage under both measurement systems.

Proposed § 138.60 Forms and Submissions; Ensuring Submission Timeliness

To remain consistent with current practice, proposed § 138.60(a) notes that forms can be completed online or downloaded. This is the Coast Guard's preference for submitting eCOFR Applications. If you submit electronic images, please note that, currently, our system only accepts the following imaging programs: PDF, JPEG, and TIFF. Because of delays associated with mail processing and security, submission of forms by mail is discouraged.

Proposed § 138.60(c)(2) also removes the option for hand-delivering submissions because of the prohibition of hand delivery under U.S. Government mail security restrictions. Also, § 138.60(e) makes clear that the timeliness of submissions is solely the responsibility of the person making the submission.

Proposed § 138.70 Issuance and Renewal of COFR

Proposed § 138.70(b) removes the express requirement to pay fees before the issuance of a COFR. This would reflect the NPFC's current business practice when the COFR Operator submits the application via fax or email.

The proposed § 138.70(e) states that certain tonnage information will be posted to the NPFC's COFR website, including the measurement system(s) used, which under proposed § 138.80(a)(1), the applicant is required to provide.

Proposed § 138.80 Applying for COFRs

Proposed § 138.80 reflects the removal of a requirement to pay fees before the issuance of a COFR when Applications are submitted by email or fax, by cross-referencing § 138.120. Section 138.120's new paragraph (a)(3)(i) allows payment to be made within 21 days of the Application. This allows flexibility for the Director to issue COFRs when the Application is complete and evidence of financial responsibility has been established, and before the NPFC receives payment. The COFR Operator must, however, ensure the fees are paid within 21 days of submission of the Application to avoid adverse consequences specified in § 138.120(a)(4).

Proposed § 138.80(a)(1)(i)(C) also clarifies that Master Certificates do not name any specific vessel, but do state

the maximum tonnages for the largest vessel for which the COFR Operator may be responsible. Without that requirement, we would not have a record of coverage if an incident occurs in the intervening period between the Application and the first periodic report of covered vessels.

Proposed § 138.80(a)(1)(iv) requires the COFR Operator to include a report with the Application providing information on the vessels covered by the Master Certificate. The proposed rule would also explain what information the COFR Operator must provide to the Director if a vessel has been assigned tonnages under both measurement systems. The inclusion of both assigned tonnages for vessels with more than one should avoid delay of the application process and the effective date of the guaranty.

Additionally, proposed § 138.80(a)(1)(iv)(B) adds a new requirement that certain Master Certificate application information be updated, including a listing of vessels that are no longer covered. This would establish the termination of the guaranty date. Finally, to assist in keeping this information up to date, if during a 6-month reporting period a vessel is transferred to another responsible party, the updated report must list the date and place of transfer and the contact information of the responsible party to whom the vessel was transferred.

Unlike the current application instruction section, § 138.60, proposed § 138.80(d) would not require an original signature page for applications submitted by email or fax. Instead, the COFR Operator may submit a legible scan of the signature page.

Proposed § 138.100 How To Calculate a Total Applicable Amount

Proposed § 138.100(c) states that when statute or regulation adjusts limits of liability, the COFR Operator must establish and maintain evidence of financial responsibility in an amount equal to or greater than the amended total applicable amount, as provided in § 138.240(a).

Proposed § 138.110 How To Establish and Maintain Evidence of Financial Responsibility

The proposed rule removes from the regulation the surety bond as a specifically mentioned method for establishing and maintaining evidence of financial responsibility. This method is still permitted as falling under the "other method" provision in paragraph (f).

Proposed § 138.110(a) explains that the guarantor continues to be liable and

must provide coverage for 30 days following NPFC receipt of a notice of cancellation and not from the date the guarantor issues the notice. The proposed rule moves this provision currently contained on the COFR guaranty forms into the regulation, and reflects a current and important NPFC business practice. The guarantor would provide the reason for termination as part of its notice of cancellation, if known. Additionally, proposed § 138.110(a) requires COFR Operators, guarantors, and self-insurers to notify the Director of any material change in submitted information, including any material change in the guarantor or self-insurer's financial position. A material change is a change that would affect the basis of the Director's approval of the guarantor or evidence of financial responsibility. This notification would be required immediately when a change occurs, rather than within 10 days of the change as specified in the current rule.

Proposed § 138.110(b) describes the current practice for establishing and maintaining the acceptability of COFR insurance guarantors. This will entail the guarantor submitting information on its structure, business practices, history, financial strength, and other information as requested by the Director. This process involves an initial determination followed by annual submission by each COFR insurance guarantor.

Proposed § 138.110(c) clarifies the net worth and working capital requirements for financial guarantors to reflect current practice. Currently, the NPFC does not add the total applicable amount of each vessel owned by one operator; rather, it bases evidence of financial responsibility on the operator's vessel with the greatest total applicable amount. This proposed rule would require net worth and working capital be based on the aggregate total applicable amounts.

Proposed § 138.110(f) changes the submission date for requesting another guaranty method for establishing evidence of financial responsibility from 45 to 90 days prior to the date the COFR is required. The NPFC needs this additional 45 days to review the financial documentation and communicate with the potential guarantor.

Proposed § 138.120 Fees

Proposed § 138.120 would eliminate an existing requirement that the application fee must be paid before the Director will issue a COFR. This would add flexibility and convenience for COFR Operators, especially if they are underway and want to enter U.S.

navigable waters or U.S. Exclusive Economic Zone. It further explains that failure to pay fees in a timely manner may result in denial or revocation of COFR, debt collection, or other enforcement. Finally, it amends the fee refund procedures in the case of overpayment. The Director would refund overpayments, because, under the proposed amendment, the NPFC will not credit overpayments for the operator's future use or for transfer to another operator anymore.

Proposed § 138.130 Designating Agents for Service of Process

Proposed § 138.130(d) shortens the notification period for a COFR Operator or Guarantor to notify the Director of a new agent for service of process from 10 days to 5 days. This shortened period reflects efficiencies relating to electronic notifications in place of mailed notifications.

Proposed § 138.140 Application Withdrawals, COFR Denials and Revocations

Proposed § 138.140 is revised to reflect current business practice. It adds a provision noting that the COFR Operator may withdraw an Application at any time before issuance of the COFR. It also includes the failure to designate and maintain a U.S. agent for service of process to the list of cases in which the Director may deny an Application or revoke a COFR. The proposed section revision also clarifies that the Director may deny an Application or revoke a COFR after obtaining additional information, such as transfer to a new operator, vessel renaming, guaranty termination or cancellation, or disapproval of the guarantor, and it adds a duty to remedy violations where a COFR for a vessel expires. Finally, it adds a provision specifying that where a COFR is revoked because 30 days have elapsed following the date the Director receives a guarantor's notice of termination, the Director may reinstate the COFR if the guarantor promptly notifies the Director that the guarantor rescinded the termination and there was no gap in coverage. This will align the regulation to the COFR guaranty forms.

Proposed § 138.150 Reporting Requirements

The proposed rule would merge reporting requirements into this one section. It would also revise the regulatory text to emphasize prior notices of changes that will require a new COFR before the change occurs. Proposed § 138.150 identifies the information that must be reported to the Director no later than 21 business days

before a new COFR is required for permanent vessel transfers and other changes requiring issuance of a new COFR, and information that need only be reported 3 business days before implementing the change for changes not requiring issuance of a new COFR. Changes that will require issuance of a new COFR include, but are not limited to: a permanent vessel transfer, change of COFR Operator, vessel name change, change in the vessel's gross tonnage, or termination of guaranty.

C. Proposed Removal of 33 CFR 138.90(f)

Current paragraph § 138.90(f) contains a non-regulatory provision dealing with the temporary transfer of custody of an unmanned barge that has a COFR issued under subpart A of part 138. The COFR Operator who transfers the barge continues to be liable under OPA 90, CERCLA, or both, and continues to maintain on file with the Director acceptable evidence of financial responsibility with respect to the barge. The provision encourages the temporary transferee to require the transferring COFR Operator to acknowledge in writing that the transferring COFR Operator agrees to remain responsible for pollution liabilities. We propose to remove § 138.90(f) because the existing COFR remains in effect in respect to that vessel, and a temporary new COFR is not required. We welcome comments on its removal, particularly from those who may employ the practice it encourages.

D. Proposed Removal of 33 CFR Part 135 and Subpart D of 33 CFR Part 153

This document also proposes to remove 33 CFR part 135 and subpart D of 33 CFR part 153 because OPA 90 repealed the legal authorities for them.

The regulations in 33 CFR part 135 apply to the management of the OCSLA Fund, under Title III of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA). Section 2004 in OPA 90 repealed the authority for this part of the CFR (see 26 U.S.C. 9509 note). Like the 311(k) Fund, the funds in the OCSLA Fund were transferred to the OSLTF. Similarly, OPA 90 superseded the financial responsibility requirements of OCSLAA. However, OPA 90 (33 U.S.C. 2751(b) and 33 U.S.C. 2716(h)) preserved the force and effect of the regulations in 33 CFR part 135 regarding OCSLAA financial responsibility implementation, until OPA 90 financial responsibility regulations superseded these provisions (see 33 U.S.C. 2716(h), 59 FR 34210, July 1, 1994 (interim rule) and 61 FR 9264, March 7, 1996 (final rule)). Since 1992, other regulations have

superseded, or appeared to overlap with, the pollution incident notification provisions of 33 CFR part 135. On November 1, 2011, the Coast Guard published a notice of inquiry (76 FR 67385) soliciting public comment on removing 33 CFR part 135. We received no comments opposed to its removal.

The regulations in subpart D of 33 CFR part 153 apply to the management of the 311(k) Fund. That section of the FWPCA was repealed by OPA 90 section 2002(b)(2) (see 33 U.S.C. 1321 note), and the funds in the 311(k) Fund were transferred to the Oil Spill Liability Trust Fund (OSLTF).

Removing part 135 and subpart D of part 153 to eliminate unauthorized regulatory requirements is necessary to eliminate potential confusion to the public.

V. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. A summary of our analyses based on these statutes or Executive orders follows.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control costs and provides that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process."

The Office of Management and Budget (OMB) has not designated this proposed rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. Because this proposed rule is not a significant regulatory action, it is exempt from the requirements of Executive Order 13771. See the OMB Memorandum titled "Guidance Implementing Executive Order 13771, titled 'Reducing Regulation and Controlling Regulatory Costs'" (April 5,

2017). A draft Regulatory Assessment is available in the docket, and a summary follows. As explained in this section, this proposed rule would impose some quantified costs, and create qualitative benefits, which the Coast Guard believes will justify the costs.

1. Analysis of Alternatives

Alternative 1: No action.

The “No Action” alternative makes no regulatory changes to the evidence of financial responsibility regulations in 33 CFR part 138, subpart A. The “No Action” alternative is not viable because the statute requires evidence of financial responsibility regulations for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons. At a minimum, a regulation implementing this requirement is required. This alternative reflects the status quo and therefore would have no regulatory cost or benefit.

Alternative 2: Promulgate evidence of financial responsibility regulations for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons (statutory requirement).

Alternative 2 reflects the absolute minimum rulemaking effort to address the statutory requirement in Section 712 of the Coast Guard Authorization Act of 2010. However, the fact that there are other aspects of the Coast Guard’s evidence of financial responsibility program that the Coast Guard would like to address, in addition to revising 33 CFR part 138, subpart A and removing regulations that are no longer authorized involving funds that were subsumed by the establishment of the OSLTF, makes this alternative unviable. This alternative would have the least net benefits of all of the proposed alternatives. This alternative reflects the most costly aspect of the rulemaking and is included in all of the proposed alternatives because it is a statutory provision.

Alternative 3: Promulgate evidence of financial responsibility regulations for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons (statutory requirement) and for deepwater ports (discretionary requirement).

Alternative 3 adds promulgating evidence of financial responsibility regulations for deepwater ports to Alternative 2. The Coast Guard considered proposing financial responsibility regulations for deepwater ports as part of this rulemaking. The deepwater port industry is experiencing increased activity in the liquefied natural gas deepwater port industry sector, raising questions about how existing laws and policies regarding

these facilities would apply. These issues do not impact vessel evidence of financial responsibility, however, and could create complexity and potentially delay the mandated regulation of tank vessels greater than 100 gross tons but less than or equal to 300 gross tons. In addition, currently only one liquefied natural gas deepwater port is in operation and it uses less than 100 gallons of oil, whereas other designs might pose a greater risk of oil spills. Additional time is necessary to analyze the effects of liquefied natural gas regulation on the economy, maritime safety, and the environment. The only other deepwater port in operation, an oil deepwater port called the Louisiana Offshore Oil Port, is self-insured, and provides evidence of financial responsibility sufficient to meet its maximum liability under OPA 90 under grandfathered requirements of the Deepwater Port Act of 1974.

After evaluating this alternative, the Coast Guard has decided not to develop deepwater port financial responsibility regulations at this time. Postponing evidence of financial responsibility regulations for deepwater ports will not impact maritime safety or the environment. Currently, there is no established market that provides and maintains evidence of financial responsibility for deepwater ports. If the market decides to pursue these ventures in the future, the costs and benefits would be analyzed accordingly as part of a future rulemaking.

Alternative 4 (Preferred alternative) Promulgate evidence of financial responsibility regulations for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons (statutory requirement); require COFR Operators and guarantors to submit additional information to the Coast Guard; make conforming amendments reflect current practices (discretionary requirement); and remove subpart D of 33 CFR part 153 D and 33 CFR part 135 from the Code of Federal Regulations (discretionary requirement).

Alternative 4 addresses the statutory requirement to require tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to establish and maintain financial responsibility. It also provides necessary updates to the current financial responsibility regulations to reflect current practices that have evolved over the past two decades, taking into account technological improvements as well as changes in policy. Lastly, this alternative removes 33 CFR part 135 and subpart D of 33 CFR part 153, both of which regulate two defunct funds, the OCSLA Fund and the 311(k) Fund.

In addition to the regulatory costs and benefits associated with Alternative 2, this alternative would add two aspects with no cost: Conforming regulations to current practice and removing two defunct portions of the CFR, which would provide intangible benefits of eliminating confusion for the public, as well as ensuring that the regulations reflect how the Coast Guard’s financial responsibility program currently operates. Additionally, a small amount of regulatory cost would be associated with the proposed requirement to require COFR Operators and guarantors to provide additional information to the Coast Guard. Although the benefits of this alternative are qualitative, the Coast Guard expects them to justify these costs.

2. Proposed Regulatory Changes

We propose amending the vessel evidence of financial responsibility regulations at 33 CFR part 138, subpart A, to:

1. Require financial responsibility to now include all tank vessels greater than 100 gross tons but less than or equal to 300 gross tons.
2. Require additional information from the COFR Operator and guarantor. The proposed revisions include:
 - Reporting of gross tonnage measurement system used and submission of a copy of the tonnage certifying document, upon request;
 - Electronic submissions;
 - Reporting of reason for termination of guaranty by a guarantor, if known; and
 - Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.
3. Conform regulations to current practice. The proposed revisions include:
 - How to apply vessel gross tonnages;
 - Removal of requirement to pay fees before issuance of a COFR;
 - Moving surety bond method to “other methods” for establishing and maintaining evidence of financial responsibility;
 - Clarification on continuation of guarantor’s liability and requirement to provide coverage for 30 days after cancellation of guaranty; and
 - Process for establishing and maintaining acceptability of COFR insurance guarantors.

In addition, for the reasons discussed above, we propose removing 33 CFR part 135 and subpart D of 33 CFR part 153 which concern management of two defunct pollution funds.

Table 2 shows whether a category of regulatory amendments have a

regulatory cost, regulatory benefit, or both. Those amendments that have a regulatory cost or benefit are discussed in detail following the table.

TABLE 2—SUMMARY OF REGULATORY AMENDMENT IMPACTS

| | Regulatory cost | Regulatory benefit |
|---|-----------------|--------------------|
| Require financial responsibility for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to establish and maintain evidence of financial responsibility (Statutory) | | |
| Application and certification costs | Yes | Yes |
| COFR premium costs | Yes | Yes |
| Require Additional Information from the COFR Operator and guarantor (Discretionary) | | |
| Reporting of gross tonnage measurement systems used and submission of a copy of the tonnage certifying document, upon request. | Yes | Yes |
| Electronic submissions | No ⁴ | Yes |
| Reporting of reason for termination of guaranty by a guarantor | Yes | Yes |
| Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change | Yes | Yes |
| Conform regulations to current Practice (Discretionary) | | |
| How to apply vessel gross tonnages | No | Yes |
| Removal of requirement to pay fees | No | Yes |
| before issuance of a COFR | No | Yes |
| Moving Surety Bond method to “other methods” for establishing and maintaining evidence of financial responsibility | No | Yes |
| Clarification on continuation of guarantor’s liability and requirement to provide coverage for 30 days after cancellation of guaranty | No | Yes |
| Process for establishing and maintaining acceptability of COFR insurance guarantors | No | Yes |
| Removal of 33 CFR part 135 and subpart D of 33 CFR part 153 (Discretionary) | | |
| Removal of 33 CFR part 135 | No ⁵ | Yes |
| Removal of subpart D of 33 CFR part 153 | No ⁶ | Yes |

3. Regulatory Costs

There are two regulatory costs identified for this proposed rule:

- Regulatory Cost 1: Require the additional tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to establish and maintain evidence of financial responsibility (statutory requirement).
- Regulatory Cost 2: Require additional information from the COFR Operator and guarantor (discretionary requirement).

Discussion of Regulatory Cost 1

The proposed rule would now require tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to establish and maintain evidence of financial responsibility.⁷ These vessels would be required to have COFRs, which would result in two types of costs:

- Application and certification costs; and
- COFR premium costs.

Application and Certification Costs: In the first year of the analysis period, the COFR Operator would be required to

pay an Application fee of \$200 and a Certification fee of \$100 for each vessel requiring a COFR. A new Certification fee would be required every 3 years to renew the COFR.

COFR Premium Costs: The additional operators of tank vessels greater than 100 gross tons but less than or equal to 300 gross tons would have to establish and maintain evidence of financial responsibility using one of these several methods: Insurance, Self-insurance, or Financial Guaranty.⁸

Affected Population: According to the Coast Guard’s Marine Information for Safety and Law Enforcement (MISLE) database, there are an average of 481 tank vessels using U.S. navigable waters or U.S. Exclusive Economic Zone from 2014–2018 that are greater than 100 gross tons but less than or equal to 300 gross tons. Table 3 shows the number of tank vessels greater than 100 gross tons but less than or equal to 300 gross tons per year (2014–2018).

TABLE 3—NUMBER OF TANK VESSELS GREATER THAN 100 GROSS TONS BUT LESS THAN OR EQUAL TO 300 GROSS TONS

| Year | Number of vessels |
|---------------------------|-------------------|
| 2014 | 488 |
| 2015 | 492 |
| 2016 | 477 |
| 2017 | 474 |
| 2018 | 474 |
| Average (2014–2018) | 481 |

Cost Summary Regulatory Cost 1

Application and Certification Costs: We assumed the number of future COFR Applications and Certifications, based on the historical average number of vessels in the population from 2014 to 2018 (481 vessels) would be constant for the 10-year analysis period.⁹ We also assumed that all vessels would renew their COFRs every 3 years through the full 10-year analysis period. In the first year of the analysis period, COFR Operators would pay an Application fee (\$200) and a Certification fee (\$100) when applying for a COFR for their vessels. Every 3 years thereafter, COFR Operators would pay a Certification fee (\$100) when renewing their COFRs. In the first year of the analysis period, the

⁴ Electronic submissions creates cost savings.

⁵ Removal of superseded regulatory requirements have no cost. The OCSLAA Fund was subsumed by the Oil Spill Liability Trust Fund.

⁶ Removal of superseded regulatory requirements have no cost. The 311(k) Fund was subsumed by the Oil Spill Liability Trust Fund.

⁷ Regulatory Cost 1 does not include vessels greater than 300 gross tons that are already required to have a COFR.

⁸ Historically, the surety bond method has been used in a very few instances. This proposed rule would move this method to the “other methods” category of financial responsibility under § 138.110(f).

⁹ This estimate, based on COFR trends for currently COFRed vessels, was validated by subject matter expert in Coast Guard’s Vessel Certification Division.

annual cost would be calculated by multiplying the number of vessels applying for COFRs (481 vessels) by the cost of the Application (\$200) and adding the number of vessels requesting certification (481) multiplied by the cost of certification (\$100) to equal \$144,300. Every third year thereafter, the cost would be calculated by multiplying the number of vessels (481) requesting certification for renewal of their COFRs by the cost of the certification (\$100) to equal \$48,100.

COFR Premium Costs: It is possible for vessel operators to choose to use the Self-insurance or Financial Guaranty methods of establishing their evidence of financial responsibility, which allows them to use their U.S. business assets. Alternatively, in the case of the Financial Guaranty method, vessels may use the U.S. business assets of a parent, affiliate, or special purpose company as evidence that they are capable of paying for removal costs and damages up to the applicable limit of liability. In those cases, they have made a business decision that the cost of the assuming liability risk under OPA 90 is less than the premium charged by commercial insurance companies. This assessment of OPA 90 risk is company-specific and not quantifiable. Therefore, for the purposes of this analysis, we have assumed that the responsible parties would use the Insurance method of establishing and maintaining their evidence of financial responsibility. We received estimates of COFR insurance premium amounts for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons from 4 COFR insurance companies representing over 90 percent of existing COFRs.¹⁰ Based on this survey of guarantors, we estimated that the premiums per vessel would range between \$300 and \$1,000 per year.

Vessel Premium Low Range Cost Estimate: The Coast Guard calculated the vessel premium low range cost estimate by using the following formula:

Number of vessels × cost of premium per vessel per year:

481 vessels × \$300 per vessel per year
= \$144,300 per year

Vessel Premium High Range Cost Estimate: The Coast Guard calculated the vessel premium high range cost estimate by using the following formula:

Number of vessels × the cost of premium per vessel per year:

481 vessels × the \$1,000 per vessel per year = \$481,000 per year

Discussion of Regulatory Cost 2

This proposed rule would require additional information from the COFR Operator and guarantor that would result in three types of costs:

- Reporting of gross tonnage measurement systems used and submission of copy of tonnage certifying document, upon request;
- Reporting of reason for termination of guaranty by a guarantor, if known; and
- Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

Reporting of Gross Tonnage Measurement Systems Used and Submission of a Copy of Tonnage Certifying Document, upon request—Affected Population: All COFR Operators, including those for the tank vessels greater than 100 gross tons but less than or equal to 300 gross tons proposed in this rule, would report the gross tonnage measurement systems used when applying for and/or renewing a COFR. The Coast Guard's COFR database indicates that there are 25,875 currently COFRed vessels. Adding the 481 COFRed tank vessels greater than 100 gross tons but less than or equal to 300 gross tons proposed in Regulation Cost 1, and assuming the number of COFRed vessels remains constant during the analysis period, the total number of COFRed vessels equals 26,356.

Master Certificate and Fleet Certificate holders would also be required to provide the gross tonnage measurement systems used for the largest vessel covered by the Application. According to the COFR database, there are currently 8 Master Certificates and 12 Fleet Certificates.

COFR Operators would also provide a copy of the tonnage certifying document, upon request. We assume that the Coast Guard would request a copy of the tonnage certifying document when there is an incident. According to incident data from the Coast Guard's CIMS database, there was an average of 12 incidents per year involving vessels with COFRs and vessels that would be required to have COFRs under this proposed rule over the five year period 2012–2017. We assume that for the analysis period, the number of incidents will remain constant with this average.

& of Reason for Termination of Guaranty by a Guarantor—Affected Population:

Based on NPFC Vessel Certification Program data on the historical number of annual notices of guaranty termination by guarantors, the Coast

Guard estimates that there will be 4,000 per year for the 10-year analysis period.

Reporting Vessel Name Change and Increased Reporting on Location of Vessel When There is a Change in Ownership on Date of Change—Affected Population: Based on NPFC Vessel Certification Program historical data, the Coast Guard estimates that there will be 1,000 submissions per year.

Cost Summary Regulatory Cost 2

Reporting of Gross Tonnage Measurement Systems Used and Submission of Copy of Tonnage Certifying Document, upon request: Reporting the gross tonnage measurement systems used with the application and/or requests for COFR renewal would result in a negligible cost impact (less than one minute of time) to the COFR Operator and would be completed with the Application for the COFR. We do not quantify this cost because it is negligible.

Based on estimates received from COFR insurance guarantors who would submit, upon request, a copy of the tonnage certifying document on behalf of the COFR Operator, COFR Operators would require 15 minutes (0.25 hours) per submission.

Number of submissions per year × number of hours × the labor cost per hour:

12 × 0.25 hours per submission = 3 hours

3 hours per year × \$35.64 per hour¹¹ = \$107 per year

Reporting of reason for termination of guaranty by a guarantor: We estimated that it would take 5 minutes (0.08 hours) for the guarantor to add the reason why the guaranty was terminated to the information they already provide to the Coast Guard when they terminate a guaranty.

Number of terminations per year × number of hours per submission × labor cost per hour:

4,000 submissions per year × 0.08 hours per submission × \$35.64 per hour = \$11,405 per year

Reporting Vessel Name Change and Increased Reporting on Location of Vessel When There is a Change in Ownership on Date of Change: We assumed that it will take an additional

¹¹ Total employer compensation costs for private industry workers averaged, \$35.64 per hour worked, found at https://www.bls.gov/news.release/archives/ecec_12152017.pdf. Bureau of Labor Statistics Economic News Release Employer Costs for Employee Compensation news release text. Friday, December 15, 2017. This wage rate was selected because it is the most general and reflects that the person submitting the information could be any worker whether an administrative assistant or a Chief Executive Officer of a company.

¹⁰ Source: NPFC's COFR database.

5 minutes (0.08 hours) per submission to provide additional information that is not already required under the current rule.

Number of submissions per year × number of hours per submission × the labor cost per hour:

1,000 submissions per year × the 0.08 hours/submission × the \$35.64 per hour¹² = \$2,851 per year

Present Value Regulatory Costs (Low Range): We estimated that the 10-year present value of the proposed rule, at a 3-percent discount rate, to be \$1.6 million. We estimated that the 10-year present value of the proposed rule, at a 7-percent discount rate, to be \$1.3 million. The estimated annualized discounted cost of the proposed rule, at a 3-percent discount rate, is \$188,877. The estimated annualized discounted cost of the proposed rule, at a 7-percent discount rate, is \$190,835.

Present Value Regulatory Costs (High Range): We estimated the 10-year present value of the proposed rule, at a 3-percent discount rate, to be \$4.4 million. We estimated the 10-year present value of the proposed rule, at a 7-percent discount rate, to be \$3.7 million. The estimated annualized discounted cost of the proposed rule, at a 3-percent discount rate, is \$525,577. The estimated annualized discounted cost of the proposed rule, at a 7-percent discount rate, is \$527,535.

4. Regulatory Benefits

There are four qualitative benefits identified for this proposed rule:

- Regulatory Benefit 1: Require Tank Vessels Greater than 100 Gross Tons to 300 Gross Tons to Establish and Maintain Evidence of Financial Responsibility (statutory requirement).
- Regulatory Benefit 2: Require additional information from the COFR Operator and guarantor (discretionary requirement).
- Regulatory Benefit 3: Conform Regulations to Current Practice (discretionary requirement).
- Regulatory Benefit 4: Removal of 33 CFR part 135 and subpart D of 33 CFR part 153 (discretionary requirement).

Discussion of Regulatory Benefit 1

Oil pollution removal costs and damages for incidents have substantially increased since 1990, even for relatively small-sized discharges. When there is no evidence of financial responsibility, it becomes more likely that the OSLTF will have to pay for at least some of the costs resulting from the incident.¹³

When vessels have COFRs, the incident cost amount paid by the responsible party is higher than for vessels that do not have COFRs. This proposed rule would add tank vessels greater than 100 gross tons but less than or equal to 300 gross tons to the vessels that are already required to establish and maintain evidence of financial responsibility.

Of the 10,000 incidents sampled from the Coast Guard's Contract Information Management System (CIMS) database during the "1990 to 2017" period, 4.91 percent were COFRed vessels and 29.15 percent were non-COFRed vessels.¹⁴ Coast Guard CIMS data show that the Coast Guard recovers 98.98 percent of costs when a vessel was COFRed, and only 27.71 percent of costs when it was not COFRed.

The proposed requirement would ensure that the costs are internalized because parties responsible for oil spills would be more fully responsible for (moving from less than 1/3 to nearly 100 percent) paying for the oil pollution removal costs and damages and help correct this market failure.¹⁵ Increased recovered cost rates shift the risk and actual costs from the OSLTF to the polluting responsible party.

Discussion of Regulatory Benefit 2

Reporting of Gross Tonnage Measurement Systems Used and Submission of copy of Tonnage Certifying Document, upon request:

COFR Operators would submit a copy of the tonnage certifying document upon request.

Providing this additional information with respect to gross tonnage will allow the Coast Guard to determine more effectively the limit of liability and applicable amounts of financial responsibility for the incident. In some cases, vessels have tonnage determined under more than one measurement system, depending on a variety of factors, including the vessel's flag, length, voyage type, keel laid, or substantial alteration date, and whether it is self-propelled. This has caused confusion with respect to which measurement system to use to determine the limit of liability and amount of financial responsibility.

Regardless of the tonnage reported on the Application, the tonnage certifying document governs the required

evidence of financial responsibility and the limit of liability at the time of the incident (except when the responsible parties or guarantors knew or should have known that the tonnage certificate information was incorrect). Using the tonnage certifying document provides the following benefits: (1) It ensures that the Coast Guard has the most accurate tonnage measurements; (2) it provides the method used to determine tonnage, as well as the tonnage amount; (3) it provides information for foreign flagged vessels that is oftentimes difficult to obtain; and (4) without the applicable tonnage certifying document, if an incident occurred, a re-measurement of tonnage could alter the already determined financial responsibility and limit of liability.

Electronic submissions: The proposed rule would allow COFR Operators, guarantors, and agents for service of process to submit signed scanned images, emails, or faxes instead of hard copy signed-in-ink originals. The Coast Guard receives approximately ten of the CG-5586 forms by mail annually. Allowing electronic submissions creates minimal cost savings; however, it allows the flexibility to COFR Operators, and enhances Coast Guard's recordkeeping goals. This would work towards the OMB's goal to maximize the use of electronic technology for collection of information from the public.

Reporting of reason for termination of guaranty by guarantor: The proposed rule would require the guarantor to include the reason for termination, if known, with the notification for termination of the guaranty. This information would provide the Coast Guard with new information about the COFR Operator in the event there is an incident.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change: The proposed rule would ensure that the Coast Guard has the most current information when initially issuing a COFR—especially concerning vessels that, over time, become derelict while in U.S. navigable waters or U.S. Exclusive Economic Zone. The proposed revisions will also improve the Coast Guard's ability to establish compliance with COFR regulations by more effectively ensuring the responsible party is able to pay its liability and mitigate risks to the OSLTF. For example, if a vessel is sold while using a place subject to U.S. jurisdiction, the new responsible parties become immediately subject to the COFR program. These proposed changes are to ensure that, while the Coast Guard still has regulatory authority over

Pollution Act of 1990: A review of the Second Decade." 36 *Tulane Maritime Law Journal*. 23–24 (2011).

¹⁴ The remaining 65.94 percent of incidents were either facility incidents or incidents where the Coast Guard could not identify the source.

¹⁵ See OMB Circular A-4, page 4 dated September 17, 2003 for a short discussion on market failures and externalities such as environmental problems.

¹² See footnote 8.

¹³ Lawrence I. Kiern, "Liability, Compensation, and Financial Responsibility Under the Oil

a responsible party and the financial assurances of the guarantor, the Coast Guard receives information relevant to continued compliance before problems arise. However, enforcing compliance with the COFR program's requirements depends on the Coast Guard knowing about the vessel transfer. The proposed regulatory revisions seek to ensure that the Coast Guard receives this information and to mitigate the risk of uninsured responsible parties and derelict vessels.

Discussion of Regulatory Benefit 3

How to apply vessel gross tonnages: This proposed rule would update and simplify the provisions respecting how to apply gross tonnage measurement methods to reflect changes in the law since OPA 90 was first enacted. This proposed rule is consistent with the Coast Guard's tonnage regulation at 46 CFR part 69 "Measurement of Vessels" (81 FR 18701, March 31, 2016).

Removal of requirement to pay fees before issuance of a COFR: The proposed rule would allow the COFR Operator to pay the COFR Application and Certification fees up to 21 days after submitting their COFR Application. This would add flexibility and convenience for COFR Operators, especially if they are underway and want to enter U.S. navigable waters or U.S. Exclusive Economic Zone.

Moving surety bond method to "other methods" for establishing and maintaining evidence of financial responsibility: The proposed rule would no longer specifically discuss the surety bond method in the regulations because it is rarely, if ever, used. However, the surety bond method would continue to be available under the "other methods" provision in the proposed rule.

Clarification on continuation of guarantor's liability and requirement to provide coverage for 30 days after cancellation of guaranty: The proposed rule would explain that the guarantor continues to be liable and must provide coverage for 30 days following NPFC receipt of a notice of cancellation. This requirement is currently contained on the COFR form and reflects a current and important NPFC business practice.

Process for establishing and maintaining acceptability of COFR insurance guarantors: The proposed rule would move the current process for establishing and maintaining acceptability of COFR insurance guarantors into the regulations to make it more transparent to the public. The Coast Guard's longstanding business practice under the current COFR regulations for determining the acceptability of guarantors is the basis of

the procedures set forth in the proposed rule. The proposed rule would also provide a process through which a COFR operator may provide new evidence of financial responsibility and obtain approval or continuation of the COFR where the Coast Guard disapproves a guarantor (for example, due to guarantor fraud or financial failure). The provision applies to pending Applications and following the issuance of a COFR.

Discussion of Regulatory Benefit 4

These regulations concern management of two pollution funds—the Offshore Oil Pollution Compensation Fund and the FWPCA Section 311(k) Fund. These provisions are no longer authorized. On November 1, 2011, the Coast Guard published a notice of inquiry (76 FR 67385) soliciting public comment on removing 33 CFR part 135 and we received no adverse comments. This aspect of the rulemaking is necessary to remove unauthorized regulatory requirements and to eliminate potential confusion to the public.

B. Small Entities

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

An Initial Regulatory Flexibility Analysis discussing the impact of this proposed rule on small entities is available in the docket, and a summary follows.

There are two potential direct costs to small entities that would result from this proposed rule:

- Regulatory Cost 1: Require Tank Vessels Greater than 100 Gross Tons to 300 Gross Tons to Establish and Maintain Evidence of Financial Responsibility (Statutory Requirement)¹⁶
- Regulatory Cost 2: Require Additional Information from COFR Operators and Guarantors (Discretionary Requirement)

Regulatory Cost 1—Require Tank Vessels Greater than 100 Gross Tons to 300 Gross Tons Establish and Maintain

¹⁶Regulatory Cost 1 does not include vessels greater than 300 gross tons that are already required to have a COFR.

Evidence of Financial Responsibility (Statutory Requirement).

Affected Population: We queried NPFC's COFR database to determine that there are 149 U.S. entities that operate tank vessels greater than 100 gross tons but less than or equal to 300 gross tons. We researched the number of employees and revenue for these entities using public and proprietary databases. We then determined which entities were small based on the Regulatory Flexibility Act's criteria for small non-profits and small governmental jurisdictions and the U.S. Small Business Administration's (SBA) "Table of Small Business Standards Matched to North American Industry Classification System (NAICS) Codes" publication for businesses.¹⁷

Of these 149 entities, we found employee and revenue data on 59 entities. Of these 59 entities, 27 were small and 32 were not small based on the Regulatory Flexibility Act and SBA's criteria. For the purposes of this analysis, we assumed that the remaining 90 entities were small entities. Adding the known small entities to the unknown entities brings the total number of entities considered to be small entities for the purpose of this analysis to be 117. Of the small entities, 115 are businesses, 2 are governmental jurisdictions, and 0 are small non-profits.

Regulatory Cost 2—Require Additional Information from COFR Operators and Guarantors (Discretionary Requirement).

Affected Population: We queried NPFC's COFR database to determine that there are 761 U.S. entities that operate vessels with COFRs, including those operating vessels proposed in Regulatory Cost 1. We researched the number of employees and revenue for these entities using public and proprietary databases. We then determined which entities were small based on the Regulatory Flexibility Act's criteria for small non-profits and small governmental jurisdictions and the U.S. Small Business Administration's (SBA) "Table of Small Business Standards Matched to North American Industry Classification System (NAICS) Codes" publication for businesses.¹⁸

Of these 761 entities, we found employee and revenue data on 354 entities. Of these 354 entities, 245 were small and 109 were not small based on the Regulatory Flexibility Act and SBA's

¹⁷The criteria for determining whether an entity is small vary by NAICS code and generally involve the number of employees or annual sales.

¹⁸The criteria for determining whether an entity is small vary by NAICS code and generally involve the number of employees or annual sales.

criteria. For the purposes of this analysis, we assumed that the remaining 407 entities were small entities. Adding the known small entities to the unknown entities brings the total number of entities considered to be small entities for the purpose of this analysis to be 652. Of the small entities, 641 are businesses, 4 are governmental jurisdictions, and 7 are small non-profits.

Regulatory Cost 1 Summary

The following calculation shows the average annual cost of establishing financial responsibility per vessel for tank vessels greater than 100 gross tons but less than or equal to 300 gross tons:

Number of Vessels × Annual Cost of Application/Certification + Number of Vessels × Annual COFR Insurance Premium

In the first year of the analysis period, COFR Operators would pay an Application fee (\$200) and a Certification fee (\$100) when applying for a COFR for their vessels. Every 3 years thereafter, COFR Operators would pay a Certification fee (\$100) when renewing their COFRs. For each tank vessel greater than 100 gross tons but less than or equal 300 gross tons, the total 10 year cost is \$600. The average annual cost for these vessels is \$60. We calculated the average premium (\$650 per year) by averaging the high-range

COFR insurance premium (\$1,000 per year) and low-range COFR insurance premium estimates (\$300 per year) provided by COFR insurance guarantors.

For example, for a small entity with three vessels, the calculation would be as follows:

Number of Vessels × Annual Cost of Application/Certification + Number of Vessels × Annual COFR Insurance Premium
 3 vessels × \$60 per year + 3 vessels × \$650 per year = \$2,130 per year

Table 4 shows the annual cost of Regulatory Cost 1 for each small entity based on the number of vessels they operate.¹⁹

TABLE 4—ANNUAL COST PER SMALL ENTITY

| Number of vessels | Number of small entities | Annual cost per small entity |
|-------------------|--------------------------|------------------------------|
| 1 | 77 | \$710 |
| 2 | 17 | 1,420 |
| 3 | 9 | 2,130 |
| 4 | 3 | 2,840 |
| 5 | 4 | 3,550 |
| 6 | 1 | 4,260 |
| 7 | 3 | 4,970 |
| 8 | 0 | 0 |
| 9 | 0 | 0 |
| 10 | 0 | 0 |
| 11 | 0 | 0 |
| 12 | 1 | 8,520 |
| 13 | 1 | 9,230 |
| 14 | 0 | 0 |
| 15 | 1 | 10,650 |
| Total | 117 | |

We then divided the annual cost per small entity by the small entity's associated annual revenue and then

multiplied by 100 to determine the percent impact of the proposed rule on the small entities' revenue. Table 5

shows the economic impact to small entities of Regulatory Cost 1.

TABLE 5—ECONOMIC IMPACT TO SMALL ENTITIES—REGULATORY COST 1

| Percent of annual revenue | Number of small entities | Percent of small entities |
|---------------------------|--------------------------|---------------------------|
| 1 to 2 | 0 | 0 |
| <1 | 117 | 100 |

Regulatory Cost 2 Summary

Reporting the gross tonnage measurement systems used with the application and/or requests for COFR renewal would result in a negligible cost impact (less than one minute of time) to the COFR Operator and would be completed with the Application for the COFR. We do not quantify this cost

because it is negligible. As shown in the Cost Benefit Analysis section of the Regulatory Analysis, the annual cost for Regulatory Cost 2 is \$14,363 per year total for all COFRed vessels, including those operating vessels proposed in Regulatory Cost 1. The per vessel cost of Regulatory Cost 2 to small entities is calculated by determining the total cost

of Regulatory Cost 2 divided by number of COFRed vessels.

\$14,363 ÷ 26,356 COFRed Vessels = \$1 per vessel²⁰

Table 6 shows the annual cost of Regulatory Cost 2 for each small entity based on the number of vessels they operate.²¹

¹⁹ Source: NPFC's COFR database.

²⁰ Rounded up to nearest dollar from \$0.55.

²¹ Source: NPFC's COFR database.

TABLE 6—ANNUAL COST PER SMALL ENTITY

| Number of vessels | Number of small entities | Annual cost per small entity |
|-------------------|--------------------------|------------------------------|
| 1 | 362 | 1 |
| 2 | 77 | 2 |
| 3 | 41 | 3 |
| 4 | 26 | 4 |
| 5 | 22 | 5 |
| 6 | 19 | 6 |
| 7 | 18 | 7 |
| 8 | 5 | 8 |
| 9 | 9 | 9 |
| 10 | 12 | 10 |
| 11 | 3 | 11 |
| 12 | 3 | 12 |
| 13 | 4 | 13 |
| 14 | 3 | 14 |
| 15 | 4 | 15 |
| 16 | 1 | 16 |
| 18 | 3 | 18 |
| 19 | 1 | 19 |
| 20 | 1 | 20 |
| 23 | 1 | 23 |
| 24 | 1 | 24 |
| 25 | 1 | 25 |
| 26 | 1 | 26 |
| 27 | 1 | 27 |
| 30 | 2 | 30 |
| 31 | 1 | 31 |
| 32 | 1 | 32 |
| 35 | 2 | 35 |
| 36 | 1 | 36 |
| 37 | 1 | 37 |
| 41 | 1 | 41 |
| 42 | 1 | 42 |
| 53 | 1 | 53 |
| 55 | 1 | 55 |
| 56 | 1 | 56 |
| 57 | 1 | 57 |
| 60 | 1 | 60 |
| 61 | 1 | 61 |
| 77 | 1 | 77 |
| 79 | 1 | 79 |
| 80 | 1 | 80 |
| 96 | 2 | 96 |
| 98 | 1 | 98 |
| 104 | 1 | 104 |
| 107 | 1 | 107 |
| 116 | 2 | 116 |
| 129 | 1 | 129 |
| 158 | 1 | 158 |
| 169 | 1 | 169 |
| 315 | 1 | 315 |
| 389 | 1 | 389 |
| 462 | 1 | 462 |
| 496 | 1 | 496 |
| Total | 652 | |

We then divided the annual cost per small entity by the small entity's associated annual revenue and then

multiplied by 100 to determine the percent impact of the proposed rule on the small entities' revenue.²² Table 7

shows the economic impact to small entities of Regulatory Cost 2.

²² Revenue information researched at <https://www.manta.com/>.

TABLE 7—ECONOMIC IMPACT TO SMALL ENTITIES—REGULATORY COST 2

| Percent of annual revenue | Number of small entities | Percent of small entities |
|---------------------------|--------------------------|---------------------------|
| 1 to 2 | 0 | 0 |
| < 1 | 652 | 100 |

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

D. Collection of Information

This proposed rule would revise a previously approved collection of information (OMB Control Number 1625–0046) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. As defined in 5 CFR 1320.3(c), “collection of information” comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the information collections, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection. We also discuss the following incremental paperwork burden associated with this proposed rule earlier in the “Cost Benefit Analysis” under “Regulatory Cost 2” and “Regulatory Benefit 2.”

Title: Financial Responsibility for Water Pollution.

OMB Control Number: 1625–0046.

Summary of the Collection of Information: This proposed rule would add additional collection of information requirements to existing OMB Control Number 1625–0046 for: COFR Operators to report gross tonnage and gross tonnage measurement systems used, and submit a copy of their tonnage certifying document, upon request; guarantors to report the reason for termination of a guaranty; and COFR Operators to report vessel name changes and increase reporting on location of vessel when there is a change in ownership on date of change.

Need for Information:

Reporting of gross tonnage measurement systems used and submission of copy of the tonnage certifying document, upon request.

Providing tonnage measurement systems used and submitting the tonnage certifying document, upon request, in the proposed rule, with respect to gross tonnage will allow the Coast Guard to determine more effectively the limit of liability and applicable amounts of financial responsibility for the incident. In some cases, the vessel may be assigned tonnage under more than one measurement system depending on a variety of factors including the vessel’s flag, length, voyage type, keel laid, or substantial alteration date, and whether it is a self-propelled vessel. This has caused confusion with respect to which method to use to determine limit of liability and amount of financial responsibility.

Regardless of the tonnage reported on the Application, the tonnage certifying document governs the required evidence of financial responsibility and the limit of liability at the time of the incident (except when the responsible parties or guarantors knew or should have known that the tonnage certifying document or certificate of registry was incorrect). Using the tonnage certifying document provides the following benefits: It ensures that the Coast Guard has the most accurate tonnage measurements; it provides the method used to determine tonnage, as well as the tonnage amount; it provides information for foreign flagged vessels

that is oftentimes difficult to obtain; and without the applicable tonnage certifying document, if an incident occurred, a re-measurement of tonnage could alter the already determined financial responsibility and limit of liability.

Reporting of reason for termination of guaranty by a guarantor.

The proposed rule would require that the guarantor include the reason for termination, if known, with the notification for termination of the guaranty. This information would provide the Coast Guard with information about the COFR Operator that otherwise would not be known in the event there is an incident.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

The additional collection of information in the proposed rule would ensure the information the Coast Guard relies on when initially issuing a COFR is up to date and remains current—especially concerning vessels that, over time, become derelict while in U.S. navigable waters or U.S. Exclusive Economic Zone. The proposed revisions would also improve the Coast Guard’s ability to establish compliance with COFR regulations by more effectively ensuring that the responsible party is able to pay its liability and mitigate risks to the OSLTF. For example, if a vessel is sold while using a place subject to U.S. jurisdiction, the new responsible parties become immediately subject to the COFR program. These proposed changes would ensure that, while the Coast Guard still has regulatory authority over a responsible party and the financial assurances of the guarantor, the Coast Guard receives information material to continued compliance before problems arise. Enforcing compliance with the COFR program’s requirements, however, depends on the Coast Guard knowing about the vessel transfer. The proposed regulatory revisions seek to ensure that the Coast Guard receives this information and to mitigate the risk of uninsured responsible parties and derelict vessels.

Proposed Use of Information:

Reporting of gross tonnage measurement systems used and

submission of copy of the tonnage certifying document, upon request.

The Coast Guard would use the additional collection of information in the proposed rule to ensure that the gross tonnage of a vessel involved in an incident is accurate to determine its limit of liability and applicable amount of financial responsibility.

Reporting of reason for termination of guaranty by a guarantor.

The Coast Guard would use the additional collection of information in the proposed rule to learn more about a vessel and its COFR Operators in the event of an incident. Adding a new requirement to provide the reason for guaranty termination will reduce the possibility that a guarantor would cancel the guaranty to simply shield themselves from potential liability in the event of an incident.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

The Coast Guard would use the additional collection of information in the proposed rule to identify a responsible party in the event there is an incident.

Description of the Respondents: The respondents are COFR Operators of vessels and OPA 90 COFR insurance guarantors.

Number of Respondents: The additional collection of information in this proposed rule would affect 761 COFR Operators and 14 OPA 90 COFR insurance guarantors.

Frequency of Response:

Reporting of gross tonnage measurement systems used and submission of copy of the tonnage certifying document.

All COFR Operators, including those for the tank vessels greater than 100 gross tons but less than or equal to 300 gross tons proposed in this rule, would report the gross tonnage measurement systems used when applying for a COFR. The Coast Guard's COFR database indicates that there are 25,875 currently COFRed vessels. Adding the 481 COFRed tank vessels greater than 100 gross tons but less than or equal to 300 gross tons proposed in Regulation Cost 1, and assuming the number of COFRed vessels remains constant during the analysis period the total number of COFRed vessels equals 26,356.

Master Certificate and Fleet Certificate holders would also be required to provide the gross tonnage measurement systems used for the largest vessel covered by the Application.

The Coast Guard estimated that COFR Operators would provide information

on $\frac{1}{3}$ of the vessels with COFRs each year due to the 3-year cycle of the Application process.

Individual Certificates—The Coast Guard's COFR database indicates that, currently, there are 25,875 COFRed vessels. Adding the 481 COFRed tank vessels greater than 100 gross tons to 300 gross tons proposed in Regulation Cost 1 equals 26,356 COFRed vessels.

$26,356 \text{ COFRed vessels} \div 3 = 8,785$ COFRed vessels per year that would require the submission of the gross tonnage measurement systems used.

Masters Certificates—According to the COFR database, there are currently 8 Master Certificates.

$8 \text{ Master Certificates} \div 3 = 3$ Master Certificates per year that would require the submission of the gross tonnage measurement systems used for the largest vessel covered by the Application.

Fleet Certificates—According to the COFR database, there are currently 12 Fleet Certificates.

$12 \text{ Fleet Certificates} \div 3 = 4$ Fleet Certificates per year that would require the submission of the gross tonnage measurement systems used for the largest vessel covered by the Application.

COFR Operators would also provide a copy of the tonnage certifying document, upon request. We assume that the Coast Guard would request a copy of the tonnage certifying document when there is an incident. According to incident data from the Coast Guard's CIMS database, there was an average of 12 incidents per year involving vessels with COFRs and vessels that would be required to have COFRs under this proposed rule over the five year period 2012–2017. We assume that for the analysis period, the number of incidents will remain constant with this average.

Reporting of reason for termination of guaranty by a guarantor.

Based on NPFC Vessel Certification Program data on the historical number of annual notices of guaranty termination by guarantors, the Coast Guard estimates that there will be 4,000 vessels per year for the 10-year analysis period.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

Based on NPFC Vessel Certification Program historical data, the Coast Guard estimates that there will be 1,000 submissions on vessel name changes and change in location when there is a change in ownership per year.

Burden of Response:

Reporting of gross tonnage measurement systems used and

submission of copy of the tonnage certifying document, upon request.

Reporting the gross tonnage measurement systems used with the application and/or requests for COFR renewal would result in a negligible burden (less than one minute of time) to the COFR Operator and would be completed with the Application for or request for renewal of the COFR.

Based on estimates received from COFR insurance guarantors who would submit, upon request, a copy of the tonnage certifying document on behalf of the COFR Operator, COFR Operators would require 15 minutes (0.25 hours) per submission.

Reporting of reason for termination of guaranty by a guarantor.

The Coast Guard estimated that it will take 5 minutes (0.08 hours) for the guarantor to add the reason why the guaranty was terminated to the information they provide to the Coast Guard already when he or she terminates a guaranty.

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

The Coast Guard assumed that it will take an additional 5 minutes (0.08 hours) per submission to provide additional information that is not already required under the current rule.

Estimate of Total Annual Burden:

Reporting of gross tonnage measurement systems used and submission of copy of the tonnage certifying document, upon request.

As stated above in the cost benefit analysis section of the preamble, we do not quantify the cost impact of reporting the gross tonnage measurement systems used because it is negligible and is provided as part of the Application and/or request for COFR renewal.

The cost burden associated with COFR Operators providing, upon request, their tonnage certifying document is calculated as follows:

Number submissions per year \times
 Number of hours \times labor cost per hour:
 $12 \times 0.25 \text{ hours per submission} = 3$
 hours
 $3 \text{ hours per year} \times \$35.64 \text{ per hour} =$
 $\$107 \text{ per year}$

Reporting of reason for termination of guaranty by a guarantor.

Number of terminations per year \times
 number of hours per submission \times labor
 cost per hour:

$4,000 \text{ submissions per year} \times 0.08 \text{ hours}$
 per submission $\times \$35.64 \text{ per hour} =$
 $\$11,405 \text{ per year}$

Reporting vessel name change and increased reporting on location of vessel when there is a change in ownership on date of change.

Number of submissions per year × number of hours per submission × labor cost per hour:

1,000 submissions per year × 0.08 hours per submission × \$35.64 per hour = \$2,851 per year

As required by 44 U.S.C. 3507(d), we will submit a copy of this proposed rule to OMB for its review of the collection of information.

We ask for public comment on the proposed collection of information to help us determine, among other things—

- How useful the information is;
- Whether the information can help us perform our functions better;
- How we can improve the quality, usefulness, and clarity of the information;
- Whether the information is readily available elsewhere;
- How accurate our estimate is of the burden of collection;
- How valid our methods are for determining the burden of collection; and
- How we can minimize the burden of collection.

If you submit comments on the collection of information, submit them by the date listed in the **DATES** section of this preamble to both the OMB and to the docket where indicated under **ADDRESSES**.

You need not respond to a collection of information unless it displays a currently valid control number from OMB. Before the Coast Guard could enforce the collection of information requirements in this proposed rule, OMB would need to approve the Coast Guard's request to collect this information.

E. Federalism

A rule has implications for federalism under Executive Order 13132 (Federalism) if it has a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under Executive Order 13132 and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132. Our analysis follows.

This rulemaking is based on provisions in OPA 90 and CERCLA; 33 U.S.C. 2716 and 42 U.S.C. 9608, respectively. This proposed rule would amend Coast Guard regulations on vessel evidence of financial responsibility and remove certain

unnecessary pollution fund regulations. The OPA 90 contains a savings clause that saves to the States the ability to regulate activities contained in Title I of OPA 90, including vessel evidence of financial responsibility requirements. See 33 U.S.C. 2718; *United States v. Locke* and *Intertanko v. Locke*, 529 U.S. 89, 105, 120 S.Ct. 1135, 1146 (2000). Thus, nothing in this proposed rule would preempt states from regulating vessel evidence of financial responsibility requirements for oil pollution. However, CERCLA contains an express preemption provision which prohibits States, except under limited circumstances, from requiring vessels to establish or maintain evidence of financial responsibility in connection with liability for the release of a hazardous substance if those vessels maintain evidence of the financial responsibility required under that subchapter (42 U.S.C. 9614(d)). Thus, except under limited circumstances, States cannot regulate requirements for vessel evidence of financial responsibility requirements for hazardous material pollution. The removal of 33 CFR part 135 and subpart D of part 153 would remove certain federal pollution fund's regulatory requirements that were superseded by OPA 90 and subsumed by the OSLTF. As the proposed rule clarifies but does not alter the existing, applicable federal law relating to pollution funds, it would not have preemptive impact. Therefore, this proposed rule is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Additionally, for rules with federalism implications and preemptive effect, Executive Order 13132 specifically directs agencies to consult with State and local governments during the rulemaking process. If you believe this rule has implications for federalism under Executive Order 13132, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100 million (adjusted for inflation) or more in any one year. Although this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This proposed rule would not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

H. Civil Justice Reform

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, (Civil Justice Reform), to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this proposed rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This proposed rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

We have analyzed this proposed rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a “significant energy action” under that order because it is not a “significant regulatory action” under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods;

sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule would be categorically excluded under paragraph L53 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. Paragraph L53 pertains to congressionally mandated regulations designed to improve or protect the environment. A preliminary Record of Environmental Consideration supporting this determination is available in the docket where indicated under the “Public Participation and Request for Comments” section of this preamble. This proposed rule involves expanding vessel financial responsibility to include tank vessels greater than 100 gross tons but less than or equal to 300 gross tons, clarifying and updating the rule’s reporting requirements, conforming the rule to current practice, and removing two superseded regulations. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects

33 CFR Part 135

Administrative practice and procedure, Continental shelf, Insurance, Oil pollution, Reporting and recordkeeping requirements.

33 CFR Part 138

Hazardous materials transportation, Insurance, Oil pollution, Reporting and recordkeeping requirements, Vessels, Water pollution control.

33 CFR Part 153

Hazardous substances, Oil pollution, Reporting and recordkeeping requirements, Water pollution control.

For the reasons discussed in the preamble, the Coast Guard proposes to

remove 33 CFR part 135, and to amend 33 CFR parts 138 and 153 as follows:

PART 135—[REMOVED]

- 1. Remove part 135.

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

- 2. The authority citation for part 138 is revised to read as follows:

Authority: 33 U.S.C. 2704, 2716, 2716a; 42 U.S.C. 9608, 9609; 6 U.S.C. 552(d); E.O. 12580, Sec. 7(b), 3 CFR, 1987 Comp., p. 193; E.O. 12777, Secs. 4 and 5, 3 CFR, 1991 Comp., p. 351, as amended by E.O. 13286, Sec. 89, 3 CFR, 2004 Comp., p. 166, and by E.O. 13638, Sec. 1, 3 CFR, 2014 Comp., p.227; Department of Homeland Security Delegation Nos. 0170.1 and 5110, Revision 01. Section 138.40 also issued under the authority of 46 U.S.C. 2103 and 14302.

- 3. In part 138, revise the part heading to read as set out above; and revise subpart A, consisting of §§ 138.10 through 138.170, to read as follows:

Subpart A — Evidence of Financial Responsibility for Water Pollution (Vessels)

Sec.

- 138.10 Scope and purpose.
- 138.20 Applicability.
- 138.30 Definitions.
- 138.40 General requirements.
- 138.50 How to apply vessel gross tonnages.
- 138.60 Forms and submissions; ensuring submission timeliness.
- 138.70 Issuance and renewal of COFRs.
- 138.80 Applying for COFRs.
- 138.90 Renewing COFRs.
- 138.100 How to calculate a total applicable amount.
- 138.110 How to establish and maintain evidence of financial responsibility.
- 138.120 Fees.
- 138.130 Agents for Service of process.
- 138.140 Application withdrawals, COFR denials and revocations.
- 138.150 Reporting requirements.
- 138.160 Non-owning COFR Operator’s responsibility for identification.
- 138.170 Enforcement.

Subpart A—Evidence of Financial Responsibility for Water Pollution (Vessels)

§ 138.10 Scope and purpose.

- (a) *Scope.* This subpart sets forth—
 - (1) The requirements and procedures each COFR Operator (as defined in § 138.30(b)) must use to establish and maintain the evidence of financial responsibility required by the OPA 90 and CERCLA (both defined in § 138.30), and to obtain Certificates of Financial Responsibility (COFR);

(2) The standards and procedures the Coast Guard uses to determine the acceptability of guarantors;

(3) The procedures guarantors must use to submit evidence of financial responsibility on behalf of the responsible parties for vessels to which this subpart applies;

(4) The requirements for designating and maintaining U.S. agents for service of process;

(5) The requirements for reporting changes affecting compliance with this subpart; and

(6) The enforcement actions that may result from non-compliance with this subpart or OPA 90, CERCLA, or both, referenced in paragraph (a)(1) of this section.

(b) *Purpose.* These requirements ensure that the responsible parties for vessels to which this subpart applies, have sufficient available financial resources to cover their potential liabilities to the United States and other claimants in the following scenarios:

(1) Under OPA 90 in the event of a discharge, or substantial threat of a discharge, of oil; and

(2) In the case of vessels greater than 300 gross tons, under CERCLA in the event of a release, or threatened release, of a hazardous substance.

§ 138.20 Applicability.

(a) *Applicability generally.* This subpart applies—

(1) To the COFR Operator of—

(i) Any vessel over 300 gross tons (except a vessel listed in paragraphs (d)(1) or (d)(2) of this section) using the navigable waters of the United States, or any port or other place subject to the jurisdiction of the United States, including any such vessel using a deepwater port or other offshore facility subject to the jurisdiction of the United States;

(ii) Any vessel of any size (except a vessel listed in paragraphs (d)(1) or (d)(3) of this section) using the waters of the Exclusive Economic Zone to transship or lighter oil (whether delivering or receiving) destined for a place subject to the jurisdiction of the United States; and

(iii) Any tank vessel over 100 gross tons (except a vessel listed in paragraphs (d)(1) or (d)(3) of this section) using the navigable waters of the United States, or any port or other place subject to the jurisdiction of the United States, including any such tank vessel using a deepwater port or other offshore facility subject to the jurisdiction of the United States;

(2) To a guarantor providing evidence of financial responsibility under this subpart on behalf of one or more of a vessel’s responsible parties;

(3) To responsible parties other than the COFR Operator designated to represent the responsible parties for purposes of this subpart; and

(4) To any person serving as a U.S. agent for service of process under this subpart.

(b) *How to apply this part to mobile offshore drilling units.* For the purposes of applying the evidence of financial responsibility required under OPA 90 and this subpart and the limits of liability set forth in subpart B of this part, and in addition to any OPA 90 offshore facility evidence of financial responsibility requirements that may apply under 30 CFR part 553, a mobile offshore drilling unit is treated as—

(1) A tank vessel when it is being used as an offshore facility; and

(2) A vessel other than a tank vessel when it is not being used as an offshore facility.

(c) *How to apply CERCLA evidence of financial responsibility to self-propelled vessels.* For the purposes of applying the evidence of financial responsibility required under CERCLA and for vessels identified in paragraph (a)(1)(i) of this section, this subpart applies to a self-propelled vessel over 300 gross tons even if it does not carry hazardous substances.

(d) *Exceptions.* (1) This subpart does not apply to public vessels.

(2) Paragraph (a)(1)(i) of this section does not apply to any non-self-propelled barge that does not carry oil as cargo or fuel and does not carry hazardous substances as cargo.

(3) Paragraphs (a)(1)(ii) and (a)(1)(iii) of this section do not apply to: any offshore supply vessel; any fishing vessel or fish tender vessel of 750 gross tons or less that transfers fuel without charge to a fishing vessel owned by the same person; any towing or pushing vessel (tug) simply because it has in its custody a tank barge; or any tank vessel that only carries, or is adapted to carry, non-liquid hazardous material in bulk as cargo or cargo residue.

§ 138.30 Definitions.

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

(1) OPA 90 (specifically in 33 U.S.C. 2701): *claim, claimant, damages, deepwater port, discharge, Exclusive Economic Zone, facility, incident, liable or liability, mobile offshore drilling unit, navigable waters, offshore facility, oil, owner or operator, person, remove, removal, removal costs, responsible party, tank vessel, United States, and vessel*; and

(2) CERCLA (42 U.S.C. 9601): *claim, claimant, damages, facility, hazardous*

substance, liable or liability, navigable waters, offshore facility, owner or operator, person, remove, removal, United States, and vessel.

(3) 46 CFR 69.9: *Convention Measurement System, foreign-flag vessel, gross tonnage ITC (GT ITC)¹ and gross register tonnage (GRT), tonnage, and U.S.-flag vessel.*

(b) As used in this subpart—
Applicable amount means an OPA 90 or CERCLA evidence of financial responsibility amount determined to apply to a vessel as provided under § 138.100.

Application means an “Application for Vessel Certificate of Financial Responsibility (Water Pollution)”, which the COFR Operator for one or more vessels has completed and verified in eCOFR, as provided in § 138.60(c)(1)(i), or signed, dated, and submitted to the NPFCA by one of the submission methods specified in § 138.60(c)(1)(ii) through (c)(1)(iv).

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

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

COFR means a current Certificate of Financial Responsibility (Water Pollution) issued by the Director, under this subpart, as provided in § 138.70, and posted on the NPFCA COFR program website <https://npfc.uscg.mil/cofr/default.aspx>.

COFR Operator means a responsible party who conducts, or has responsibility for, the operation of a vessel to which this subpart applies—that is, a person who is an operator as defined in OPA 90 and CERCLA, and, when there is more than one responsible party (including more than one operator), is the operator designated and authorized by all the vessel’s responsible parties to act on their behalf for the purpose of complying with this subpart, including submitting (or causing to be submitted) all Applications and requests for COFR renewal, evidence of financial responsibility and reports, and payment of all fees required by § 138.120.

(1) If a vessel has one owner and is operated by that owner, or the owner controls and is responsible for the

vessel’s operation, the owner is the COFR Operator. In all other cases the person who operates, or controls and is principally responsible for the operation of, the vessel (for example, the demise charterer) is the COFR Operator.

(2) A person who is responsible, or who agrees by contract to become responsible, for a vessel in the capacity of a builder, repairer, or scrapper, or for the purpose of holding the vessel out for sale or lease, is the COFR Operator. A person who takes possession of, or responsibility for, a newly built, modified, or repaired vessel from a builder or repairer, or who purchases and operates or becomes a demise charterer of a vessel held out for sale or lease, is the COFR Operator.

(3) A time or voyage charterer who does not assume responsibility for the operation of a vessel is not a COFR Operator for purposes of this subpart.

(4) The designation of an operator to act as the COFR Operator on behalf of a vessel’s responsible parties for purposes of this subpart does not limit who may be determined to be an operator under OPA 90, CERCLA, or both, in the event of an incident or a release.

Day or days means calendar days unless otherwise specified.

Director means the person in charge of the U.S. Coast Guard, National Pollution Funds Center (NPFCA), or that person’s authorized representative.

eCOFR means the electronic Certificate of Financial Responsibility web-based process located on the NPFCA COFR program website, <https://npfc.uscg.mil/cofr/default.aspx>, and is the process COFR Operators may use to apply for and renew COFRs.

Evidence of financial responsibility means the demonstration of the financial ability of the responsible parties for a vessel to which this subpart applies to meet their potential liabilities under OPA 90, CERCLA, or both, up to the total applicable amount determined as provided under § 138.100 of this subpart.

Financial guarantor is a type of guarantor and means a business entity or other person providing a financial guaranty under § 138.110(c). A financial guarantor is distinct from a COFR insurance guarantor, a self-insurer, or a surety. A self-insurer, however, may also serve as a financial guarantor for others.

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

Fleet Certificate means a COFR issued by the Director under this subpart to the COFR Operator of a fleet of 2 or more unmanned, non-self-propelled barges

¹ The acronym “ITC” refers to the International Tonnage Convention. GT ITC, as defined in 46 CFR 69.9 means the gross tonnage measurement of a vessel as applied under the Convention Measurement System.

that are not tank vessels and that, from time to time, may be subject to this subpart (for example, a hopper barge over 300 gross tons when carrying oily metal shavings or similar cargo). A Fleet Certificate covers, automatically, all unmanned, non-self-propelled, non-tank barges for which the COFR Operator may from time to time be responsible that does not exceed the maximum gross tonnage indicated on the Fleet Certificate.

Fuel means any oil or hazardous substance used, or capable of being used, to produce heat or power by burning, including power to operate equipment. A hand-carried pump with no more than 5 gallons of fuel capacity, that is neither integral to nor regularly stored aboard a non-self-propelled barge, is not equipment.

Guarantor means any person who has been determined to be acceptable by the Director, as provided in § 138.110, and who is providing evidence of financial responsibility on behalf of one or more of a vessel's responsible parties, other than as a responsible party providing self-insurance under § 138.110(d).

Hazardous material has the same meaning as set forth in 46 U.S.C. 2101.

Individual Certificate means a COFR issued by the Director under this subpart to the COFR Operator for a single vessel.

Insurance guarantor is a type of guarantor and means an insurance company, association of underwriters, ship owners' protection and indemnity association, or other person, serving as a guarantor under § 138.110(b). An *insurance guarantor* is distinct from a self-insurer, a financial guarantor, or a surety.

Master Certificate means a COFR issued by the Director under this subpart to the COFR Operator of one or more vessels that are under the custody of such person solely in the capacity of a builder, repairer, or scrapper, or for the purpose of holding vessels out for sale or lease, where such person does not physically operate the vessels. A Master Certificate covers, automatically, all of the vessels subject to this subpart held by the COFR Operator solely for purposes of construction, repair, scrapping, sale or lease. A vessel which is being operated commercially in any business venture, including the business of building, repairing, scrapping, leasing, or selling (for example, a slop barge used by a shipyard) cannot be covered by a Master Certificate and must have either a current Individual

Certificate or, if applicable, a current Fleet Certificate.

Net worth means the amount of all assets located in the United States, less all liabilities anywhere in the world.

NPFC means the U.S. Coast Guard, National Pollution Funds Center. NPFC is the U.S. Government office responsible for administering the OPA 90 and CERCLA vessel COFR program.

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

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

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

Release, for purposes of this subpart, means a release as defined in CERCLA (specifically, 42 U.S.C. 9601), or a threatened release, of a hazardous substance.

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

Self-insurer means a COFR Operator providing evidence of financial responsibility as the responsible party of the subject vessel, as provided under § 138.110(d). A self-insurer is distinct from a guarantor.

Total applicable amount means an evidence of financial responsibility amount that must be demonstrated under this subpart, determined as provided in § 138.100.

Working capital means the amount of current assets located in the United States, less all current liabilities anywhere in the world.

§ 138.40 General requirements.

(a) *Requirement to establish and maintain evidence of financial responsibility.* The COFR Operator of a vessel must establish and maintain (or cause to be established and maintained) evidence of financial responsibility acceptable to the Director using any one of the methods specified in § 138.110, in an amount equal to or greater than the total applicable amount determined under § 138.100 and, in the case of a financial guarantor, as further provided under § 138.110(c)(2) (aggregation of

total applicable amounts). The evidence of financial responsibility required by this paragraph must be—

(1) Established as of the date they become a responsible party; and
(2) Continuously maintained for so long as they remain a responsible party.

(b) *Requirement to have a COFR and report changes.* The COFR Operator must apply for and ensure the vessel is covered at all times by a current COFR, by complying with the requirements and procedures set forth in this subpart, including the reporting requirements in § 138.150.

§ 138.50 How to apply vessel gross tonnages.

(a) *Purpose.* This section sets forth the methods for applying vessel gross tonnage to—

(1) Determine whether a vessel exceeds the 100 or 300 gross ton threshold under § 138.20 and OPA 90, CERCLA, or both;

(2) Calculate the OPA 90 and CERCLA applicable amounts of financial responsibility required, as provided in § 138.100; and

(3) Determine the OPA 90 limit of liability under subpart B of this part in the event of an oil pollution incident, and the CERCLA limit of liability under 42 U.S.C. 9607 in the event of a hazardous substance release.

(b) *Both GT ITC and GRT assigned.* For a vessel assigned both gross tonnage ITC (GT ITC) and gross register tonnage (GRT) under 46 CFR part 69, apply the tonnage thresholds in § 138.20 using the assigned GRT tonnage, and determine the applicable amounts of financial responsibility and the limits of liability using the assigned GT ITC tonnage.

(c) *GT ITC or GRT assigned.* For a vessel assigned only a GT ITC or a GRT tonnage under 46 CFR part 69, apply the tonnage thresholds in § 138.20, and determine the applicable amounts of evidence of financial responsibility and the limits of liability using the assigned GT ITC or GRT tonnage.

(d) *High or low GRT assigned.* For a vessel assigned a high and low GRT tonnage under 46 CFR part 69, subpart D (Dual Regulatory Measurement System), apply the tonnage thresholds in § 138.20, and determine the applicable amounts of financial responsibility and the limits of liability, using the high GRT tonnage.

(e) *Summary.* The use of assigned gross tonnages, as required by paragraphs (b) through (d) of this section, is summarized in the following table.

TABLE 1 TO § 138.50—USE OF ASSIGNED GROSS TONNAGES

| Category | Assigned tonnage | |
|---|---|---|
| | To apply the tonnage thresholds in § 138.20 | To determine applicable amounts under § 138.100 and limits of liability |
| <i>Vessels Assigned Both GT ITC and GRT</i> | GRT | GT ITC. |
| <i>Vessels Assigned—</i> | | |
| GT ITC only | GT ITC | GT ITC. |
| GRT only | GRT | GRT. |

(f) *Certified gross tonnage governs.* In the event of an incident or release, the responsible parties and guarantors are governed by the vessel's assigned gross tonnage on the date of the incident. This is as determined under paragraphs (b) through (e) of this section and evidenced on the appropriate tonnage certifying document as provided for under the U.S. tonnage regulations or international conventions (for example, tonnage certificate or completed Simplified measurement application, International Tonnage Certificate (1969)), regardless of what gross tonnage is specified in the Application or guaranty form submitted under this subpart, except when the responsible parties or guarantors knew or should have known that the tonnage certificate information was incorrect (see also § 138.110(h)(1)(iii)).

(g) *Requirement to present tonnage certifying document(s).* Each COFR Operator must submit to the Director, or other authorized United States Government official, upon request, for examination and copying, the original or an unaltered and legible electronic copy of the vessel's applicable tonnage certifying document(s).

§ 138.60 Forms and submissions; ensuring submission timeliness.

(a) *Where to obtain forms.* All forms referred to in this subpart are available at the NPFC COFR program website, <https://npfc.uscg.mil/cofr/default.aspx>, and may be completed online or downloaded.

(b) *Where to obtain information.* Direct all questions concerning the requirements of this subpart to the NPFC at one of the addresses in paragraphs (c)(1)(ii) through (iv) of this section or by calling the NPFC at 202-795-6130.

(c) *How to present Applications and other required submissions.*

(1) Provide all submissions required by this subpart to the Director, by one of the following four methods:

(i) Electronically, using the eCOFR process (located at <https://npfc.uscg.mil/cofr/default.aspx>);

(ii) By email, sent to such email address as the Director may specify, attaching legible electronic images scanned in a format acceptable to the Director;

(iii) By fax, sent to 202-795-6123 with a cover sheet specifying the total number of pages, the sender's telephone number, and referencing NPFC telephone number 202-795-6130; or

(iv) By mail, addressed to: Director, National Pollution Funds Center; ATTN: VESSEL CERTIFICATION; U.S. Coast Guard Stop 7605; 2703 Martin Luther King Jr Ave SE; Washington, DC 20593-7605.

(2) Submissions may not be hand delivered to the NPFC.

(3) Do not present submissions by more than one method.

(d) *Required contents of submissions.* Unless otherwise instructed by the Director, all submissions required by this subpart must—

(1) Set forth, in full, the correct legal name of the COFR Operator to whom the COFR is to be, or has been, issued;

(2) Be in English, and

(3) Express all monetary terms in United States dollars.

(e) *Ensuring the timeliness of submissions; requesting deadline exceptions.*

(1) Compliance with a submission deadline will be determined based on the day the submission is received by NPFC. If a deadline specified in this subpart falls on a weekend or Federal holiday, the deadline will occur on the next business day.

(2) Ensuring the timeliness of the submissions is the sole responsibility of the person making the submission.

(3) The Director may, in the Director's sole discretion, grant an exception to a deadline specified in this subpart only upon written request, submitted as provided in paragraph (c) and (d) of this section, in advance of the deadline and for good cause shown. The Director will not grant a deadline exception request that does not set forth the reasons for the request and that does not give NPFC sufficient time to consider and act on an Application or a request for COFR renewal before the COFR is required.

(f) *Public access to information.*

Financial data and other information submitted to the Director is considered public information to the extent required by the Freedom of Information Act (5 U.S.C. 552) and permitted by the Privacy Act (5 U.S.C. 552(a)).

§ 138.70 Issuance and renewal of COFRs.

(a) *Types of COFRs.* The Director issues the following three types of COFRs as provided further in § 138.80: Individual Certificates, Fleet Certificates and Master Certificates.

(b) *Requirements before issuance and renewal of COFRs.* The Director will issue or renew a COFR only after NPFC receives a completed Application or request for COFR renewal, and satisfactory evidence of financial responsibility.

(c) *COFRs are issued only to designated COFR Operators.* Each COFR of any type is issued only in the name of the COFR Operator designated in the Application or request for COFR renewal.

(d) *Form of issuance.* All COFRs are issued by the Director in electronic form on NPFC's COFR program website (<https://npfc.uscg.mil/cofr/default.aspx>) for a term of no more than 3 years from the date of issuance.

(e) *Information included in COFRs.* The following information is available on NPFC's COFR program website for each COFR issued by the Director:

(1) The name of the COFR Operator;

(2) The date of COFR expiration;

(3) The COFR number;

(4) For an Individual Certificate, the name of the covered vessel, and the vessel's gross tonnage information, including the measurement system(s) used;

(5) For a Fleet Certificate, the gross tons of the largest unmanned, non-self-propelled, non-tank barge within the fleet, including the measurement systems(s) used; and

(6) For a Master Certificate, the gross tons of the largest tank vessel and largest vessel other than a tank vessel eligible for coverage by the Master Certificate, including the measurement systems(s) used.

§ 138.80 Applying for COFRs

(a) *How to apply for a COFR.* To apply for a COFR of any type, the COFR Operator must—

(1) Submit, or cause to be submitted, to the Director, by one of the submission methods provided in § 138.60(c):

(i) An Application;

(A) For an Individual Certificate, list the name of the covered vessel, and the vessel's gross tonnage information, including the measurement system(s) used on the application;

(B) For a Fleet Certificate, instead of listing each individual barge, mark the box with the following statement: "This is an Application for a Fleet Certificate. The largest unmanned, non-self-propelled, non-tank barge to be covered by this Application is [INSERT APPLICABLE GROSS TONS] GT ITC and [INSERT GROSS TONNAGE] GRT"; and

(C) For a Master Certificate, instead of listing each individual vessel, mark the box with the following statement: "This is an Application for a Master Certificate. The largest tank vessel to be covered by this Application is [INSERT APPLICABLE GROSS TONS] GT ITC and [INSERT APPLICABLE GROSS TONS] GRT, as applicable. The largest vessel other than a tank vessel to be covered by this Application is [INSERT APPLICABLE GROSS TONS] GT ITC and [INSERT APPLICABLE GROSS TONS] GRT, as applicable."

(ii) The evidence of financial responsibility using one of the guaranty methods provided in § 138.110;

(A) For a Fleet Certificate, the evidence of financial responsibility must be in the total applicable amount, determined as provided in § 138.100, for the largest unmanned, non-self-propelled, non-tank barge to be covered.

(B) For a Master Certificate, the evidence of financial responsibility must be in the total applicable amount determined as provided in § 138.100 for the largest tank vessel and largest non-tank vessel to be covered by the Master Certificate.

(iii) The agent for service of process designations required by § 138.130; and

(iv) All other supporting documentation required by this subpart.

(A) At the time of Application for a Master Certificate, the COFR Operator must submit a report to the Director, indicating: The name; previous name, if applicable; type; gross tonnage and measurement system(s) used, for each vessel covered by the Master Certificate, indicating which vessels, if any, are tank vessels. If a vessel has both a GT ITC and GRT tonnage, specify both gross tonnages.

(B) Six months after receiving a Master Certificate, and every 6 months thereafter, each COFR Operator must submit to the Director, an updated report, separately listing the vessels no longer covered by that Master Certificate. If a vessel has both a GT ITC and GRT, both gross tonnages must be specified. If a vessel has been transferred to another responsible party and the COFR Operator to whom the Master Certificate was issued ceases to be the vessel's operator, the COFR Operator must report the date and place of the transfer, and the name and contact information of the responsible party to whom the vessel was transferred. If the vessels covered by the Master Certificate have not changed from the previous report, the COFR Operator may submit an updated report that indicates no change from previous report.

(2) Pay, or cause to be paid, all fees required by § 138.120.

(b) *Application deadline.* The Director must receive the Application, evidence of financial responsibility, and other required supporting documentation, at least 21 days prior to the date the Certificate is required. The COFR Operator may seek an exception to the 21-day submission deadline only as provided in § 138.60(e)(3).

(c) *Where to obtain Application forms.* COFR Operators may create an Application using the online eCOFR web process (located at <https://npfc.uscg.mil/cofr/default.aspx>) or, if not using eCOFR, may obtain an "Application for Vessel Certificate of Financial Responsibility (Water Pollution)" at the same website.

(d) *Requirement to verify, or sign and date, the Application.* (1) The COFR Operator must complete and either verify the Application in eCOFR as provided in § 138.60(c)(1)(i) or, if not using eCOFR, sign and date the hard-copy signature page of the Application and submit the signed Application to the Director, by one of the methods specified in § 138.60(c)(1)(ii)-(iv).

(2) The Application must include the title of the person signing it.

(3) If the person signing the Application is acting under a Power of Attorney, they must include a copy of the Power of Attorney with the Application.

(e) *Requirement to update Applications.* The COFR Operator must report any changes to the Application to the Director in writing, no later than 5 business days after discovery of the change. The Director may require that the COFR Operator submit a revised Application and provide additional evidence of financial responsibility, and

pay any additional fees required by § 138.120.

(f) *Amending Fleet and Master Certificates.* Before operating a barge or vessel that exceeds the maximum gross tonnage indicated on the COFR, the COFR Operator must:

(1) Submit a new or amended Application, or a written request to supplement the Application, to reflect the new maximum gross tonnages on the COFR;

(2) Unless the COFR Operator qualifies as a self-insurer at the higher total applicable amount, submit, or cause to be submitted, evidence of financial responsibility using one of the guaranty methods provided in § 138.110 to the Director, demonstrating increased coverage based on the new maximum gross tonnage; and

(3) Pay a new certification fee, as required by § 138.120.

§ 138.90 Renewing COFRs.

(a) The COFR Operator must submit a request for COFR renewal to the NPFC at least 21 days, but no earlier than 90 days, before the expiration date of the current COFR.

(b) The COFR Operator may seek an exception to the 21-day request for COFR renewal submission deadline in paragraph (a) of this section only as provided in § 138.60(e)(3).

(c) The COFR Operator must identify in the request for COFR renewal all changes to the information contained in the initial Application, including the gross ton measurement system(s) used (if not previously provided), the evidence of financial responsibility, and all other supporting documentation previously submitted to the Director, as provided in § 138.150.

§ 138.100 How to calculate a total applicable amount.

The total applicable amount is the sum of the OPA 90 applicable amount determined under paragraph (a) of this section plus the CERCLA applicable amount determined under paragraph (b) of this section.

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

(b) *CERCLA applicable amount.* The applicable amount under CERCLA is determined as follows:

(1) For a vessel over 300 gross tons carrying a hazardous substance as cargo, and for any vessel covered under §§ 138.110(c)(3) or (d)(2)(ii) (calculation of CERCLA applicable amounts for financial guarantors and self-insurers), the greater of \$5,000,000 or \$300 per gross ton.

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

(c) *Amended applicable amounts.* If an applicable amount determined under paragraph (a) or (b) of this section is amended by statute or regulation, the COFR Operator must establish and maintain evidence of financial responsibility in an amount equal to or greater than the amended total applicable amount, as provided in § 138.240(a).

(d) *OPA 90 and CERCLA applicable amounts and limits of liability.*

The responsible parties are strictly, jointly and severally liable, for the costs and damages resulting from an incident or a release, but together they need only

establish and maintain an amount of financial responsibility equal to the single limit of liability per incident or release. Only that portion of the evidence of financial responsibility under this subpart with respect to—

(1) OPA 90 is required to be made available by a guarantor for the costs and damages related to an incident where there is not also a release; and

(2) CERCLA is required to be made available by a guarantor for the costs and damages related to a release where there is not also an incident. A guarantor (or a self-insurer for whom the exceptions to a limitations of liability are not applicable), therefore, is not required to apply the entire amount of financial responsibility to an incident

involving oil alone or a release involving a hazardous substance alone.

§ 138.110 How to establish and maintain evidence of financial responsibility.

(a) *General requirement; guaranty effective date and termination date.* The COFR Operator of each vessel must submit, or cause to be submitted, to the Director, the evidence of financial responsibility required by § 138.40(a) using one of the methods specified in this section.

(1) If submitted on behalf of the COFR Operator, the guarantor must provide evidence of financial responsibility to the Director.

(2) The effective and termination dates are as follows:

TABLE 2 TO § 138.110—EFFECTIVE AND TERMINATION DATES

| Type of certificate | Effective date | Termination date |
|---------------------|---|--|
| Individual | Guaranty form submission date | 30 days after the date the Director and the COFR Operator receive written notice from the guarantor that the guarantor intends to cancel the guaranty for that vessel. |
| Fleet | Guaranty form submission date or date COFR Operator becomes a Responsible Party for the vessel. | |
| Master | Guaranty form submission date or date COFR Operator becomes a Responsible Party for the vessel. | |

(3) Termination Provisions: (i) The guarantor must specify the reason for terminating the guaranty in the notice required by this paragraph, if known.

(ii) Termination of the guaranty as to any covered vessel will not affect the liability of the guarantor in connection with an incident or release commencing or occurring prior to the effective date of the guaranty termination.

(4) If, at any time, the information contained in the evidence of financial responsibility submitted under this section changes, or there is a material change in a guarantor or self-insurer's financial position, the guarantor or COFR Operator or self-insurer (as applicable), must report the change to the Director, as provided in § 138.150.

(b) *Insurance guaranty method.* The COFR Operator may establish and maintain evidence of financial responsibility using the insurance guaranty method by submitting an Insurance Guaranty Form to the Director.

(1) Each form must be executed by no more than four COFR insurance guarantors accepted by the Director. A lead underwriter is considered one of the COFR insurance guarantors.

(2) The process for establishing and maintaining the acceptability of a COFR insurance guarantor is as follows:

(i) The COFR insurance guarantor must request an initial determination by

the Director of the COFR insurance guarantor's acceptability to serve as a COFR insurance guarantor under this subpart, at least 90 days before the date a COFR is required, by submitting information describing the COFR insurance guarantor's structure, business practices, history, and financial strength, and such other information as may be requested by the Director.

(ii) The Director reviews the continued acceptability of COFR insurance guarantors annually. Each COFR insurance guarantor must submit updates to the initial request submitted under paragraph (b)(2)(i) of this section, annually, within 90 days after the close of the COFR insurance guarantor's fiscal year, describing any material changes to the COFR insurance guarantor's legal status, structure, business practices, history, and financial strength, since the previous year's submission, and providing such other information as may be requested by the Director.

(c) *Financial guaranty method.* The COFR Operator may establish and maintain evidence of financial responsibility using the financial guaranty method by submitting a Financial Guaranty Form to the Director.

(1) Each form must be executed by no more than four financial guarantors

accepted by the Director, at least one of which must be a parent or affiliate of the COFR Operator. (See paragraph (g) of this section for additional requirements if more than one financial guarantor signs the form.)

(2) The process for establishing and maintaining the acceptability of a financial guarantor is as follows:

(i) The financial guarantor must comply with the self-insurance provisions in paragraph (d) of this section, and the periodic reporting requirements in paragraph (e)(1) through (4) of this section.

(ii) The financial guarantor must also demonstrate that it maintains net worth and working capital, each in amounts equal to or greater than—

(A) The aggregate total applicable amounts, calculated for each COFR Operator vessel for which the financial guaranty is being provided, based on each such COFR Operator's vessel with the greatest total applicable amount, plus—

(B) The total applicable amount required to be demonstrated by a self-insurer under this subpart if the financial guarantor is also acting as a self-insurer.

(3) In the case of a vessel greater than 300 gross tons, calculate the CERCLA applicable amount under § 138.100(b)(1) based on a vessel carrying hazardous substances as cargo.

(d) *Self-insurance method.* The COFR Operator may establish and maintain evidence of financial responsibility using the self-insurance method as follows:

(1) Submit to the Director the financial statements specified in paragraphs (e)(1) through (4) of this section for the fiscal year preceding the date the COFR Operator signs the Application or request for COFR renewal.

(2) Demonstrate that the COFR Operator maintains, in the United States, working capital and net worth, each in amounts equal to or greater than the total applicable amount, calculated as follows:

(i) If the self-insurer has multiple vessels, calculate the total applicable amount based on the vessel with the greatest total applicable amount.

(ii) In the case of a vessel greater than 300 gross tons, calculate the CERCLA applicable amount under § 138.100(b)(1) based on a vessel carrying hazardous substances as cargo.

(e) *Reporting requirements for self-insurers and financial guarantors.* (1) Each self-insurer and financial guarantor must submit the following reports to the Director with the Application and annually thereafter, within the deadlines specified in paragraph (e)(4) of this section:

(i) Submit the self-insurer or financial guarantor's annual, current, and audited non-consolidated financial statements prepared in accordance with Generally Accepted Accounting Principles, and audited by an independent Certified Public Accountant in accordance with Generally Accepted Auditing Standards.

(ii) Accompany the financial statements with a declaration from the self-insurer or financial guarantor's chief financial officer, treasurer, or equivalent official, certifying the amount of the self-insurer or financial guarantor's current assets, and the amount of the self-insurer or financial guarantor's total assets included in the accompanying balance sheet, which are located in the United States.

(iii) If the financial statements cannot be submitted in non-consolidated form, submit a consolidated statement accompanied by an additional declaration prepared by the same Certified Public Accountant—

(A) Verifying the amount by which the total assets located in the United States exceed the self-insurer or financial guarantor's total (worldwide) liabilities, and the self-insurer or financial guarantor's current assets located in the United States exceed the self-insurer or financial guarantor's total (worldwide) current liabilities;

(B) Specifically naming the self-insurer or financial guarantor;

(C) Confirming that the amounts so verified relate only to the self-insurer or financial guarantor, apart from any parent or other affiliated entity; and

(D) Identifying the consolidated financial statement to which it applies.

(2) When the self-insurer or financial guarantor's demonstrated net worth is not at least ten times the cumulative total applicable amounts, their chief financial officer, treasurer, or equivalent official must submit to the Director with the Application and semi-annually thereafter, within the deadline specified in paragraph (e)(4) of this section, an affidavit stating that neither their working capital nor net worth fell during the first 6 months of the self-insurer or financial guarantor's current fiscal year, below the cumulative total applicable amounts.

(3) All self-insurers and financial guarantors must—

(i) Submit, upon the Director's request, additional financial information within the time specified; and

(ii) Notify the Director in writing within 5 days following the date the self-insurer or financial guarantor knows, or has reason to know, that its working capital or net worth has fallen below the total applicable amounts.

(4) All required annual financial statements and declarations must be submitted to the Director within 90 days after the close of the self-insurer or financial guarantor's fiscal year. All required semi-annual financial statements and declarations must be submitted to the Director within 30 days after the close of the applicable 6-month period. The Director will grant an extension of the time limits for submissions under this paragraph only as provided in § 138.60(e).

(5) A failure by a self-insurer or financial guarantor to timely submit to the Director any statement, data, notification, or other submission required may result in the Director denying or revoking the COFR, and may prompt enforcement action as provided under § 138.170.

(6) The Director may waive the working capital requirement for any self-insurer or financial guarantor that—

(i) Is a regulated public utility, a municipal or higher-level governmental entity, or an entity operating solely as a charitable, non-profit organization qualifying under the Internal Revenue Code (26 U.S.C. 501(c)), provided that the self-insurer or financial guarantor demonstrates in writing that the waiver would benefit a local public interest; or

(ii) Demonstrates in writing that working capital is not a significant

factor in the self-insurer or financial guarantor's financial condition, in which case the self-insurer or financial guarantor's net worth in relation to the required cumulative total applicable amounts, and a history of stable operations, are the major elements considered by the Director.

(f) *Other guaranty methods for establishing evidence of financial responsibility.* (1) The COFR Operator may request that the Director accept a guaranty method for establishing evidence of financial responsibility that is different from one of the methods described in paragraphs (b) through (e) of this section as follows:

(i) The COFR Operator must submit the request to the Director in writing, at least 90 days prior to the date the COFR is required.

(ii) The request must describe in detail: The method proposed; the reasons why the COFR Operator does not wish to (or is unable to) use one of the methods described in paragraphs (b) through (e); and how the proposed guaranty method assures that the vessel's responsible parties have the financial ability to meet their potential liabilities under OPA 90 and CERCLA in the event of an incident or a release.

(iii) Each COFR Operator making a request under this paragraph must provide the Director a proposed guaranty form that includes all the elements described in paragraphs (g) and (h) of this section.

(2) The Director will not accept a self-insurance method other than the one described in paragraph (d) of this section. The Director also will not accept a guaranty method under this paragraph that merely deletes or alters a requirement or provision of one of the guaranty methods described in paragraphs (b) through (e) of this section (for example, one that alters the termination clause of the Insurance Guaranty).

(3) A Director's decision to accept an alternative guaranty method of establishing evidence of financial responsibility under this paragraph is final agency action.

(g) *Additional rules regarding multiple guarantors.* If more than one guarantor executes the relevant guaranty form, the following rules apply:

(1) If a guarantor's percentage of vertical participation is specified on the relevant guaranty form, the guarantor is subject to direct action and is liable for the payment of costs and damages under OPA 90 or CERCLA, as applicable, only in accordance with the percentage of vertical participation so specified for that guarantor.

(2) Participation in the form of layering (tiers, one in excess of another) is not permitted. Only vertical participation on a percentage basis and participation with no specified percentage allocation is acceptable.

(3) If no percentage of vertical participation is specified for a guarantor on the relevant guaranty form, the guarantor's liability is joint and several for the total of the unspecified portion.

(4) The participating guarantors must designate a lead guarantor having authority to bind all of the participating guarantors for actions required of guarantors under OPA 90 or CERCLA and this subpart, including but not limited to reporting changes in the evidence of financial responsibility as provided in § 138.150(d), receipt of source designations, advertisement of source designations and the responsible party's claims procedures, and receipt and settlement of claims.

(h) *Direct action.* (1) Each guarantor providing evidence of financial responsibility must submit to the Director a written acknowledgment by the guarantor that a claimant (including a claimant by right of subrogation) may assert any claim for costs or damages arising under OPA 90, CERCLA, or both, directly against the guarantor, regardless of whether the claim is asserted in an action in court or other proceeding. The guarantor must also acknowledge that, in the event a claim is asserted directly against the guarantor under OPA 90, CERCLA, or both, the guarantor may invoke only the following rights and defenses—

(i) The incident, release, or both, were caused by the willful misconduct of a responsible party for whom the guaranty was provided;

(ii) All rights and defenses, which would be available to the responsible party under OPA 90, CERCLA, or both, as applicable;

(iii) A defense that the amount of the claim, or all claims asserted with respect to the same incident or release, whether asserted in court or in any other proceeding, exceeds the amount of the guaranty, except when the guaranty is based on the gross tonnage of the vessel (instead of the statutory minimums) and the guarantor knew or should have known that the applicable tonnage certificate was incorrect (see § 138.50(f)); and

(iv) The claim is not one made under OPA 90, CERCLA, or both.

(2) Except when the guaranty is based on the gross tonnage of the vessel (instead of the statutory minimums) and the guarantor knew or should have known that the evidence of financial responsibility or applicable tonnage

certificate is incorrect (see § 138.50(f)), a guarantor who provides evidence of financial responsibility under this subpart will be liable, with respect to any one incident or release, or both, as applicable, only for the amount of costs and damages specified in the evidence of financial responsibility.

(3) A guarantor will not be considered to have consented to direct action under any law other than OPA 90 or CERCLA, or to unlimited liability under any law or in any venue, solely because the guarantor has provided evidence of financial responsibility under this subpart.

(4) In the event of any finding that the liability of a guarantor under OPA 90 or CERCLA exceeds the amount of the guaranty provided under this subpart, that guaranty is considered null and void with respect to that excess.

(i) *Process upon disapproval of guarantor.* If the Director intends to disapprove or revoke the approval of a guarantor (for example, due to the guarantor's change in financial position), the Director will notify the COFR Operator of the need to establish new evidence of financial responsibility within a specified period.

(1) If the COFR Operator establishes, or causes to be established, new acceptable evidence of financial responsibility within the period specified by the Director in the notice, the Application if otherwise complete will be approved or the COFR will remain in effect, and the COFR Operator will not have to pay a new Application fee or certification fee.

(2) If the COFR Operator fails to establish, or cause to be established, new acceptable evidence of financial responsibility within the period specified by the Director in the notice, the Director may deny or revoke the COFR and, if revoked, the COFR Operator will have to apply for a new COFR and pay a new certification fee. The COFR Operator's failure to establish, or cause to be established, new acceptable evidence of financial responsibility within the period specified by the Director may also result in enforcement as provided under § 138.170.

§ 138.120 Fees.

(a) *Fee payment methods.* Each COFR Operator applying for a COFR, or requesting a COFR renewal, must pay the fees required by paragraphs (b) and (c) of this section as follows:

(1) All fees required by this section must be paid in United States dollars.

(2) For COFR Operators using eCOFR as provided under § 138.60(c)(1)(i), credit card payment is required.

(3) For COFR Operators submitting Applications and requests for COFR renewal under § 138.60(c)(1)(ii)–(iv) (email, fax, and mail submissions), the fees must be paid by a check, cashier's check, draft, or postal money order, made payable to the "U.S. Coast Guard". Cash payments will not be accepted.

(i) For Applications and requests for COFR renewal submitted under § 138.60(c)(1)(ii) and (iii) (email and fax submissions, respectively), all fee payments must be received by the Director no later than 21 days following submission of the Application or request for COFR renewal.

(ii) For Applications and requests for COFR renewal submitted under § 138.60(c)(1)(iv) (mail submissions), all fee payments must be enclosed with the Application or request for COFR renewal.

(4) Any failure to timely pay the fees required by this section may result in COFR denial or revocation, debt collection (see 6 CFR part 11, 44 CFR part 11, and 31 CFR parts 285, and 900 through 904), and such other enforcement under § 138.170 as may be appropriate.

(b) *Application fee.* (1) Except as provided in paragraph (b)(2), the COFR Operator must pay a non-refundable Application fee of \$200 for each Application submitted under this subpart (for each Application for one or more Individual Certificates, for a Fleet Certificate, or for a Master Certificate).

(2) An Application fee is not required when the COFR Operator submits—

(i) a request for an additional Individual Certificate under an existing Application;

(ii) a request to amend an Application;

(iii) a request for Certificate renewal;

or

(iv) a request to reinstate a Certificate, if submitted within 90 days following the Certificate's revocation.

(c) *Certification fees.* In addition to the Application fees required by paragraph (b) of this section, each COFR Operator who submits an Application or request for COFR renewal must pay the following certification fees:

(1) \$100 for each vessel listed in, or added to, an Application for one or more Individual Certificates;

(2) \$100 for each Application for a Fleet Certificate or Master Certificate; and

(3) \$100 for each request for renewal of an Individual Certificate, a Fleet Certificate or a Master Certificate.

(d) *Fee refunds.* (1) A certification fee will be refunded, upon receipt by the Director of a written request, if the

Application or request for COFR renewal is denied by the Director, or if the Application is withdrawn by the COFR Operator before the Director issues the COFR.

(2) Overpayments of Application and certification fees will be refunded to the COFR Operator.

§ 138.130 Agents for Service of process.

(a) *Designation of U.S. agents for service of process.* Each COFR Operator and guarantor must designate on the forms submitted a person located in the United States as its U.S. agent for service of process and (in the event of an incident, a release, or both) for receipt of notices of source designation, claims presented under OPA 90, CERCLA, or both, and lawsuits brought under OPA 90, CERCLA, or both.

(b) *U.S. agent for service of process acknowledgment.* Each U.S. agent for service of process designated under paragraph (a) must acknowledge the agency designation in writing unless the agent has already submitted a written master (that is, blanket) agency acknowledgment to the Director showing that the agent has agreed in advance to act as the U.S. agent for service of process for the COFR Operator or guarantor in question.

(c) *How to change the U.S. agent for service of process.* A COFR Operator or guarantor may change a designated U.S. agent for service of process, at any time and for any reason, by submitting a new U.S. agent for service of process designation in accordance with the procedure in paragraph (a), and by causing the new U.S. agent for service of process to submit the agency acknowledgment required by paragraph (b).

(d) *Replacement of unavailable U.S. agent for service of process.* In the event a designated U.S. agent for service of process becomes unavailable at any time, for any reason, the COFR Operator or guarantor must designate a new U.S. agent for service of process in accordance with the procedures in paragraph (a), within 5 days of the COFR Operator or guarantor becoming aware of such unavailability. In addition, the new U.S. agent for service of process must submit to the Director the agency acknowledgment required by paragraph (b).

(e) *Service on the Director.* If a designated U.S. agent for service of process cannot be served, then service of process on the Director, as provided in this paragraph, will constitute valid service of process on the COFR Operator or guarantor. Service of process on the Director will not be effective unless the server—

(1) Has sent a copy of each document served on the Director to the COFR Operator or guarantor, as applicable, by registered mail, at the COFR Operator or guarantor's last known address on file with the Director;

(2) Indicates, at the time process is served upon the Director, that the purpose of the mailing is to effect service of process on the COFR Operator or guarantor; and

(3) Provides evidence acceptable to the Director at the time process is served upon the Director, that service was attempted on the designated U.S. agent for service of process but failed, stating the reasons why service on the U.S. agent for service of process was not possible, and that the document was sent to the COFR Operator or guarantor, as required by paragraph (e)(1).

§ 138.140 Application withdrawals, COFR denials and revocations.

(a) *Application withdrawal.* A COFR Operator may withdraw an Application at any time prior to issuance of the COFR.

(b) *Application denials and COFR revocations.* The Director may deny an Application or revoke a COFR, and the United States may initiate enforcement under § 138.170, for any failure to comply with the requirements of this subpart, including—

(1) If the COFR Operator, or other person acting on the COFR Operator's behalf, makes a false statement in, or in connection with, any submission required by this subpart;

(2) If the COFR Operator, or other person acting on the COFR Operator's behalf, fails to establish or maintain acceptable evidence of financial responsibility, as required by this subpart;

(3) If the COFR Operator fails to pay the Application and certification fees required by § 138.120;

(4) If the COFR Operator or guarantor fails to designate and maintain a U.S. agent for service of process as required by § 138.130;

(5) If the COFR Operator, or other person acting on the COFR Operator's behalf, fails to comply with, or respond to, lawful inquiries, regulations, or orders of the U.S. Coast Guard pertaining to the activities subject to this subpart;

(6) If the COFR Operator, or other person acting on the COFR Operator's behalf, fails to timely report information required to be reported to the Director under this subpart, including failing to timely submit to the Director statements, data, financial information, notifications, affidavits, or other submissions required by this subpart; or

(7) If the Director obtains information indicating that the Application should be denied or that a new COFR is required (for example, a permanent vessel transfer, new COFR Operator, vessel renaming, guaranty termination, disapproval of a guarantor).

(c) *Procedure for reinstating COFRs following termination of guaranties.* If a COFR is revoked by the Director under paragraph (b)(2) of this section based on the expiration of 30 days following the date the Director receives a guarantor's notice of termination as provided under §§ 138.110(a)(3) and 138.150(d), the Director may reinstate the COFR if the guarantor promptly notifies the Director following the revocation that the guarantor rescinded the termination and that there was no gap in guarantor coverage.

(d) *Notice to COFR Operator of intent to deny an Application or revoke a COFR.* If the Director obtains information indicating that an Application should be denied or that a COFR should be revoked for reasons that the COFR Operator may not be aware of, the Director will notify the COFR Operator, in writing, stating the reason for the intended action.

(1) A notice from the Director that an Application is incomplete will be considered a denial unless the Application is completed by the COFR Operator within the period specified in the notice. A COFR subject to revocation remains valid until the COFR is revoked as provided in § 138.140(d)(2) and (3).

(2) If the Director issues a notice of intent to deny an Application or revoke a COFR due to a violation under paragraph (b) of this section, the COFR Operator may demonstrate compliance to the Director in writing by no later than the date specified by the Director in the notice. If the COFR Operator demonstrates compliance by that date, the Application will remain under consideration, and any current COFR will remain in effect, unless and until the Director issues a written decision denying the Application or revoking the COFR, as applicable. Otherwise, the Application denial or COFR revocation is effective as of the date specified by the notice.

(3) The denial of an Application or revocation of a COFR does not terminate the guaranty.

(e) *Request for reconsideration.* (1) A COFR Operator may ask the Director to reconsider a denial of the COFR Operator's Application or the revocation of a COFR as follows:

(i) The COFR Operator must submit the request for reconsideration, in writing, to the Director no later than 21

days after the date of the denial or revocation.

(ii) The submission must state the COFR Operator's reasons for requesting reconsideration and include all supporting documentation.

(2) A decision by the Director on reconsideration of an Application denial or a COFR revocation is final agency action. If the Director does not issue a written decision on the request for reconsideration within 30 days after its submission, the request for reconsideration will be deemed to have been denied, and the Application denial or COFR revocation will be deemed to have been affirmed as a matter of final agency action. Unless the Director issues a decision reversing the revocation, the COFR revocation remains in effect.

(f) *Duty to remedy violations.* If the COFR for a vessel expires or is revoked while the vessel is located in the navigable waters, at any port or other place subject to the jurisdiction of the United States, or in the Exclusive Economic Zone, the COFR Operator and the vessel's other responsible parties will be deemed in violation of this subpart. In such event, the COFR Operator or, if unavailable or no longer operating the vessel, the vessel's current responsible parties, must notify the Director within 24 hours, by email or other electronic means. The notice must include the information required by § 138.150(b) and must establish new evidence of financial responsibility, designate a new COFR Operator if applicable, and cure any other violation of this subpart.

§ 138.150 Reporting requirements.

(a) *Report Changes of submitted information.* When there is a change in any of the facts contained in an Application, a request for COFR renewal, evidence of financial responsibility, or other submission made under this subpart, the change must be reported, in writing, to the Director. The reports required by this section may be submitted with, but are in addition to, other submissions required by this subpart (for example, Applications, requests for COFR renewal, semi-annual and annual financial reports, Master Certificate reports).

(b) *A 21-day prior reporting requirement of permanent vessel transfers and other changes requiring issuance of a new COFR.* Current COFR Operators of vessels, and owners or operators of vessels not currently in U.S. navigable waters or the U.S. Exclusive Economic Zone, must report to the Director, and (if applicable) to the

guarantor, the following information, no later than 21 business days before the new COFR is required:

- (1) The number of the current COFR;
- (2) The name of the covered vessel;
- (3) The type of change planned;
- (4) The date the change will take place;
- (5) The reason for the change;
- (6) For a vessel that will be located in U.S. navigable waters or U.S. Exclusive Economic Zone on the date the change is scheduled to take place, where the vessel will be located on that date (for example, name and location of port);
- (7) For a vessel name change, the vessel's new legal name;
- (8) For the planned transfer of a vessel to a new responsible party, and even if the transferee's intent is to scrap or otherwise dispose of the vessel, the name and contact information of the responsible party to whom the vessel is being transferred;
- (9) For a change of COFR Operator, the name and contact information of the person who will replace the COFR Operator; and
- (10) Any other changes in the information previously submitted to ensure the information on record at the NPFC is current.

(c) *Three-day prior reporting of changes not requiring issuance of a new COFR.* In addition to the prior reporting required by paragraph (b) of this section, the COFR Operator must report any change to information contained in a submission to the Director that does not require issuance of a new COFR, by no later than 3 business days before implementing the change, including, but not limited to: Changes to the U.S. agent for service of process (other than termination), a change of a non-operator vessel owner, new contact information, and changes in vessel particulars (for example, flag, measurement, type, and scheduled vessel scrapping).

(d) *Reporting by guarantors.* Each guarantor (or, if there are multiple guarantors, each lead guarantor) must give the Director 30 days notice before terminating a guaranty as provided in § 138.110(a)(3), explaining the reason for the intended termination. In addition, each guarantor (or, if there are multiple guarantors, each lead guarantor) must give the Director notice by email or other electronic means as soon as possible before any other change occurs that would require new evidence of financial responsibility or issuance of a new COFR under paragraph (b) of this section.

(e) *Enforcement; deadline exceptions.* A failure to timely submit the reports required by this section may result in enforcement actions as provided in

§ 138.170. Exceptions to the reporting deadlines will only be granted as provided in § 138.60(e).

§ 138.160 Non-owning COFR Operator's responsibility for identification.

(a) Each COFR Operator of a vessel with a COFR, other than an unmanned, non-self-propelled barge, who is not also an owner of the vessel must ensure that the original or a legible copy of the vessel's demise charter-party (or other written document on the owner's letterhead, signed by the vessel owner, which specifically identifies the COFR Operator named on the COFR) is maintained on board the vessel.

(b) The demise charter-party or other document required by paragraph (a) of this section must be presented, upon request, for examination and copying, to the Director or other United States Government official.

§ 138.170 Enforcement.

(a) Any person who fails to comply with the requirements of this subpart, including the reporting requirements in § 138.150, may be subject to enforcement as provided in this section, including if—

- (1) The COFR Operator fails to maintain acceptable evidence of financial responsibility as required;
- (2) The name of a covered vessel is changed without reporting the change to the Director as required in § 138.150;
- (3) The COFR Operator ceases, for any reason, to be an operator of a covered vessel, including when a vessel is scrapped or transferred to a new owner or operator, and a new Application and report have not been submitted to the Director as required by §§ 138.80 and 138.150; or
- (4) The COFR Operator fails to maintain a U.S. agent for service of process.

(b) During a period of non-compliance with this subpart, all use by the vessel of the navigable waters of the United States, of any port or other place subject to the jurisdiction of the United States, or of the Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States, is forbidden.

(c) *Withholding and revoking vessel clearance.* The Secretary of the Department of Homeland Security will withhold or revoke the clearance required by 46 U.S.C. 60105 of any vessel subject to this subpart that does not have a COFR or for which the evidence of financial responsibility required has not been established and maintained.

(d) *Denying vessel entry, and detention.* The U.S. Coast Guard may

deny entry to any port or other place in the United States or the navigable waters, and may detain at any port or other place in the United States in which it is located, any vessel subject to this subpart, which does not have a COFR or for which the evidence of financial responsibility required by this subpart has not been established and maintained.

(e) *Seizure and forfeiture.* In accordance with OPA 90, any vessel subject to this subpart which is found in the navigable waters without a COFR, or for which the necessary evidence of financial responsibility has not been established and maintained as required, is subject to seizure by, and forfeiture to, the United States.

(f) *Administrative and judicial penalties and other relief.*

(1) Any person who fails to comply with the requirements of this subpart or the evidence of financial responsibility requirements of OPA 90, CERCLA, or

both, including a failure to comply with the reporting requirements in § 138.150, is subject to civil administrative and judicial penalties under OPA 90 and CERCLA, as applicable. In addition, under OPA 90, the Attorney General may secure such relief as may be necessary to compel compliance with OPA 90 and this subpart, including termination of operations.

(2) Under 18 U.S.C. 1001, any person making a false statement in, or in connection with, a submission under OPA 90 or CERCLA or this subpart is subject to prosecution.

(3) Any person who fails to timely pay the fees required by § 138.120 or any other amounts due under OPA 90 or CERCLA or this subpart may also be subject to Federal debt collection under 6 CFR part 11, 44 CFR part 11 and 31 CFR parts 285, and 900 through 904.

PART 153—CONTROL OF POLLUTION BY OIL AND HAZARDOUS SUBSTANCES, DISCHARGE REMOVAL

■ 4. The authority citation for part 153 continues to read as follows:

Authority: 14 U.S.C. 633; 33 U.S.C. 1321, 1903, 1908; 42 U.S.C. 9615; 46 U.S.C. 6101; E.O. 12580, 3 CFR, 1987 Comp., p. 193; E.O. 12777, 3 CFR, 1991 Comp., p. 351; Department of Homeland Security Delegation No. 0170.1.

§§ 153.401 through 153.417 (Subpart D) [Removed]

■ 5. In part 153, remove subpart D, consisting of §§ 153.401 through 153.417.

Dated: April 14, 2020.

Thomas G. Allan,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Resources.

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