



United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

November 29, 1994

M-36981

Memorandum

To: Acting Director, Minerals Management Service

Through: Assistant Secretary, Land and Minerals Management

From: Solicitor

Subject: Implementation of the Oil Pollution Act of 1990 by
the Minerals Management Service

This memorandum responds to your request of September 19, 1994, regarding implementation of the Oil Pollution Act of 1990 (33 U.S.C. 2701-2761) (OPA). Your memorandum raised the following questions:

I. Geographic Scope: How should the statutory phrase "offshore facility" be interpreted? Does it apply to facilities located anywhere other than the Outer Continental Shelf (OCS)? Does it apply to over-water facilities appurtenant to onshore facilities, e.g., a pipeline on a pier? At what geographic point does an offshore pipeline cease to be an "offshore facility" for the purposes of these requirements? ("Scope of OPA's Requirements")

II. Risk-Based Levels: What latitude does the Minerals Management Service (MMS) have to reduce the financial responsibility requirements for offshore facilities below \$150 million; e.g., to make the coverage proportional to the actual pollution risk posed by a specific offshore facility? ("Authority to Provide Risk-Based Levels of Responsibility")

III. De Minimis: May MMS create a de minimis exemption from the financial responsibility requirements of section 1016(c) for offshore facilities that pose little or no risk of a serious oil spill, similar to that previously provided under related requirements of the Outer Continental Shelf Lands Act? ("Authority to Allow De Minimis Exemption From Financial Responsibility")

SUMMARY OF RESPONSES

I. Geographic Scope

OPA's definition of "offshore facility" includes oil handling facilities in all waters, not just the waters of the OCS. The definition may be limited to those facilities not a part of an onshore facility, as explained in the legislative history and further delineated in Union Petroleum Corporation v. United States, 651 F.2d 734 (Ct. Cl. 1981).

II. Risk-Based Levels

OPA does not authorize MMS to set different responsibility levels for offshore facilities based on risk.

III. De Minimis

On its face, OPA requires universal coverage. To exempt from its reach facilities that otherwise fall within the statutory ambit, but that handle a de minimis amount of oil, MMS would have to demonstrate that the benefit of requiring evidence of financial responsibility in such instances is either nonexistent, trivial, or that the statutory design fairly implies allowing an exemption. Being designed to assure the availability of funds for spill clean-up, OPA presents a high hurdle for such a justification.

BACKGROUND

The Oil Pollution Act of 1990, 104 Stat. 484 (1990), 33 U.S.C. 2701-2761, was enacted after many years of legislative effort, and approximately a year and a half after the Exxon Valdez oil spill. It is a complex regulatory and liability regime to prevent oil spills and to pay for cleanup and damages if spills occur. Section 1016 of OPA, 33 U.S.C. 2716, requires that responsible parties demonstrate evidence of financial responsibility for offshore facilities, vessels, and deepwater ports.

Prior to OPA, section 305(b) of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1815(b), required owners of OCS facilities handling more than 1,000 barrels of oil at any one time to evidence financial responsibility of \$35 million. OCS facilities were exempt if they handled fewer than 1,000 barrels. See 43 U.S.C. 1815(b) (1978), repealed by OPA, section 2004, 104 Stat. 504 (1990). Prior to OPA, no financial responsibility requirement existed for onshore or non-OCS offshore facilities. The Clean Water Act required financial responsibility evidence only of vessel owners. 33 U.S.C. 1321(p).

OPA reaches all offshore facilities, broadly defined, not just facilities on the OCS. Under OPA, responsible parties for all offshore facilities are required to evidence \$150 million in

financial responsibility to cover the total costs of cleanup and removal plus potential liability for damages (which the statute limits to \$75 million). See section 1004(a)(3) (33 U.S.C. 2704(a)(3)) and section 1016(c) (33 U.S.C. 2716(c)). OPA continues to exempt onshore facilities from the financial responsibility requirement and limits the liability of those responsible for onshore facilities to \$350 million for removal costs and damages combined. See section 1004(a)(4) (33 U.S.C. 2704(a)(4)).

The following chart captures the essence of OPA's changes:

<u>Topic</u>	<u>Pre-OPA</u>	<u>Post-OPA</u>
Offshore Facilities		
Coverage	Financial responsibility-OCS facilities handling at least 1,000 barrels of oil (OCSLA) Liability-All facilities in, on, or under waters of the U.S., regardless of volume	Financial responsibility and liability - All facilities in, on, or under waters of the U.S., regardless of volume
Responsible Party	Owner or operator	Lessees, Permittees, Holders of Rights of Use & Easement
Financial Responsibility Evidence	\$35 million (OCS only)	\$150 million
Liability Limit	OCS-\$35 million plus all removal and cleanup costs Other offshore: Damages-governed by state law Removal-\$50 million (subject to reduction to \$8 million)	All offshore (incl. OCS): \$75 million for damages No limit for cleanup or removal

Onshore Facilities

Coverage	In, on, or under land (other than submerged land)	Same
Responsible Party	Owner or Operator	Same
Financial Responsibility Evidence	None	None
Liability Limits	Damages-governed by state law Removal-\$50 million (subject to reduction to \$8 million). Lower limits could be set for facilities handling 1,000 barrels or less that presented no substantial risk of discharge.	\$350 million (incl. cleanup, removal and damages)

I. Scope of OPA's Requirements

Section 1016(c) (1) of OPA states:

Except as provided in paragraph (2), each responsible party with respect to an offshore facility shall establish and maintain evidence of financial responsibility of \$150,000,000 to meet the amount of liability to which the responsible party could be subjected under section 2704(a) of this title in a case in which the responsible party would be entitled to limit liability under that section. In a case in which a person is the responsible party for more than one facility subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the facility having the greatest maximum liability.

33 U.S.C. 2716(c) (1).

The scope of the financial responsibility requirement in OPA depends on several definitions and how they interrelate with the statutory requirement. The questions of where, what, and who comprise the three basic areas for analysis to determine the statutorily imposed scope.

A. Where

Section 1001(22) of OPA defines "offshore facility" to mean

any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

33 U.S.C. 2701(22).¹ Section 1001(21) defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 2701(21). Combining the two means OPA defines "offshore facility" broadly to include facilities in, on, or under all "waters of the United States," and not merely the territorial sea and the waters above the OCS.

Section 1016(c) requires evidence of financial responsibility of all responsible parties for all "offshore facilities" (with different requirements for deepwater ports). OPA specifically uses the term "Outer Continental Shelf facility" in addressing the unlimited liability of owners of an "Outer Continental Shelf facility" for removal costs, even though the same is true of other offshore facilities. Compare 33 U.S.C. 2704(c)(3) with 33 U.S.C. 2704(a)(3). OPA defines "Outer Continental Shelf facility" much more narrowly than "offshore facility."² It seems plain then, that the term "offshore facility" covers more than facilities on the OCS.

The legislative history confirms this. For example, the Senate bill's definition of offshore facility was the same as finally enacted, but it applied a different financial responsibility level to an Outer Continental Shelf facility (\$100 million) from that applying to an "other offshore facility" ("sufficient to meet the

¹ "Onshore facility" means any facility (including, but not limited to, motor vehicle and rolling stock) of any kind located in, on, or under any land within the United States other than submerged land. 33 U.S.C. 2701(21).

² OPA defines "Outer Continental Shelf facility" as

an offshore facility which is located, in whole or in part, on the Outer Continental Shelf and is or was used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil produced from the Outer Continental Shelf.

33 U.S.C. 2701(25).

maximum amount of liability to which the owner or operator could be subject"). See section 104(b) of S. 686, as recited in 135 Cong. Reg. 18,738 (1989). See also section 102(c) of S. 686, as recited in 135 Cong. Rec. 18,735 (1989) which refers to an "Outer Continental Shelf facility" being subject to unlimited removal costs plus \$75 million while the liability cap for "any other onshore or offshore facility" is \$350 million. See also S. Rep. No. 94, 101st Cong., 1st Sess. 13 (1990) which separately recites liability limits of \$100 million for "any Outer Continental Shelf facility" and "any other onshore or offshore facility." These various distinctions in earlier versions indicate a congressional choice to include facilities on both the OCS and other waters within the concept of "offshore facility" in the final version.

Title I of OPA adopted the existing Federal Water Pollution Control Act (FWPCA, now the Clean Water Act) definitions of "onshore facility," "offshore facility," and "navigable waters." Thus, FWPCA's legislative and regulatory history bears directly on the scope of the term "offshore facility."³ The FWPCA, as originally enacted in 1972, defined the term "offshore facility" as "any facility . . . in, on, or under any navigable water of the United States." 33 U.S.C. 1321 (1974). It defined "navigable waters" as "the waters of the United States."⁴ The FWPCA's legislative history reflects an intent to adopt as broad an interpretation of "navigable waters" as the Commerce Clause allows: jurisdiction over all activities that could conceivably affect navigation or

³ The OPA Conference Report states:

In each case, these FWPCA definitions shall have the same meaning in this legislation as they do under the FWPCA and shall be interpreted accordingly.

H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. 102 (1990).

⁴ EPA's regulatory elaboration of the definition embraces waters used in the past, or susceptible to use as a means to transport interstate or foreign commerce, including adjacent wetlands; tributaries of navigable waters and adjacent wetlands; intrastate lakes, rivers, streams, mudflats, sandflats and wetlands, the use, degradation, or destruction of which affect interstate commerce including, but not limited to those utilized by travelers for recreational or other purposes, those from which fish or shellfish could be taken and sold in interstate commerce, and those utilized for industrial purposes by industries in interstate commerce. Wetlands are also defined quite broadly. 40 C.F.R. 116.3.

interstate commerce, including activities in wetlands.⁵ In 1977 Congress considered and rejected attempts to exclude wetlands from the scope of section 404 "because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.'" United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 137 (1985).

The 1977 amendments added to the FWPCA definition of "offshore facility" the phrase "and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters" 33 U.S.C. 1321(11) (1988) (emphasis added). The FWPCA explains that "subject to the jurisdiction of the United States" is determined "by virtue of United States citizenship, United States vessel documentation, or as provided by international agreement to which the United States is a party." 33 U.S.C. 1321(a)(17); see also 33 U.S.C. 1321(b)(1). The legislative history shows an intent to expand federal jurisdiction for the cleanup of oil spills "to the limits of the jurisdiction of the United States" to protect "resources over which the United States exercises jurisdiction. . . ." (i.e., fisheries within what has since been called the Exclusive Economic Zone). See H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 91-92 (1977), and S. Rep. No. 370, 95th Cong., 1st Sess. 64-65 (1977).

The statutory definitions unambiguously dictate an extensive geographic reach. Nothing in the statute or its legislative history provides a basis for MMS to limit facilities subject to the financial responsibility requirement to just those facilities on the OCS.

B. What

Section 1001(9) of OPA defines "facility" to mean

any structure, group of structures, equipment, or device (other than a vessel) which is used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil. This term includes any motor vehicle, rolling stock, or pipeline used for one or more of these purposes;

33 U.S.C. 2701(9).

As indicated above, OPA applies different requirements to onshore

⁵ The FWPCA conference report states: "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Rep. No. 1236, 92nd Cong., 2nd Sess. 144 (1972). See also 118 Cong. Rec. 33,756-57 (1972) (statement of Cong. Dingell).

facilities ("in, on, or under land . . . other than submerged land") and offshore facilities ("in, on, or under . . . navigable waters"). OPA does not on its face indicate which set of rules governs a facility that is both on dry land and over navigable waters. Neither does the statutory language specify whether an appurtenance to a facility should be treated as a component of the facility, or whether instead it should be classified onshore or offshore based on its own characteristics.

We look to the legislative history for guidance. The Conference Report for OPA indicates Congress' desire not to treat as "offshore facilities" over-water facilities connected to "onshore facilities" to the extent FWPCA treated them as "onshore facilities":

To the extent that docks, piping, wharves, piers and other similar appurtenances that rest on submerged land and that are directly or indirectly connected to a land-based terminal are deemed to be part of an onshore facility under the FWPCA, they are likewise deemed to be part of an onshore facility under the Conference substitute.

H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. 102 (1990)

Nine years before OPA was enacted, the Court of Claims decided that docks and other appurtenances to an onshore facility (in that case an oil terminal) were part of an onshore facility under FWPCA. Union Petroleum Corporation v. United States, 651 F.2d 734 (Ct. Cl. 1981). The terminal included loading racks for trucks and railroad tank cars, and a dock for oil tankers extending into a creek. The issue was whether the company that reported a spill into the creek from a tank car on tracks connected to its terminal could be reimbursed for its cleanup costs, despite the fact that it did not own, lease or operate the tank car. The Clean Water Act allows an owner or operator who removes spilled oil from an "onshore or offshore facility" to recover cleanup costs. 33 U.S.C. 1321(i)(1) (1986). The United States argued that "facility" in this context referred only to the tank car, and because the company did not own, lease or operate the tank car, its reporting of the spill did not allow it to recover cleanup costs. The court declined to construe the term "facility" narrowly to refer to tank cars alone. It rejected that "hypertechnical approach" and instead construed "facility" broadly so as not to discourage immediate cleanup operations, a principal thrust of this part of the FWPCA. Id. at 743-44. The court found "operational responsibility," or "possession and control" more appropriate tests for its purposes than ownership. Id. at 745.

Consistent with Union, the Coast Guard defined "facility" for FWPCA purposes prior to OPA to include "structures, equipment and appurtenances thereto." 33 C.F.R. 154.05. We are unaware of any administrative interpretations by the Environmental Protection Agency and Coast Guard, the agencies responsible for administering

FWPCA before 1990, that conflict with the judicial guidance in Union. All of the regulations implementing the FWPCA simply recite the statutory definitions of "onshore facility" and "offshore facility" without elaboration. See 33 C.F.R. 153.103(0); 40 C.F.R. 110.1; 40 C.F.R. 112.2(c) and 40 C.F.R. 116.3. Indeed, because no difference existed in requirements imposed on offshore facilities vis-a-vis onshore facilities under the FWPCA, the agencies had little reason to determine whether a facility was onshore or offshore. Furthermore, jurisdiction between EPA and the Coast Guard was not divided along onshore-offshore lines, but instead on the basis of whether the facility was or was not transportation-related.

Union Petroleum is therefore the only guidance available. It effectively holds, albeit in a considerably different context, that an appurtenance directly connected to an onshore facility is considered part of that facility under the FWPCA. The OPA Conference Report underscored that the FWPCA definition shall have "the same meaning" in OPA. Therefore, although the issue is not free from doubt given the different context and the lack of any evidence that anyone in the Congress that enacted OPA knew of the Union Petroleum decision, I believe it is reasonable to apply its approach to OPA.

Such treatment is consistent with Congress' decision in OPA not to subject onshore facilities to financial responsibility requirements. Moreover, the justification for more rigorous regulation in OPA of "offshore facilities," from unadjustable liability limits to a universal response plan requirement, 33 U.S.C. 1321(j)(5)(B)(ii), is that offshore spills, especially those on the OCS, are potentially much more serious than onshore spills.⁶

⁶ For example, the Senate decisively rejected a motion to table California Senator Wilson's amendment to remove limits on OCS facility liability for cleanup costs. Senator Wilson had argued:

When Exxon Valdez went aground and it tore a jagged hole in its hull streaming out its cargo of crude oil, what it did was to let go some 262,000 barrels. Mr. President, when Ixtop I blew in the Gulf of Mexico, it blew with 20 times that much oil, 20 times....\$100 million...would not be enough or begin even to approach what would be necessary to contain the spill of the magnitude of the Ixtop I...this is not the finite capacity of a tanker, but the vastly great amount of oil...that there is, potentially, under that rig...Unlimited liability for cleanup costs [for OCS facilities]...has been true for over 20 years.

135 Cong. Rec. 18,366 (1989). Senator Lieberman added, "unlike other facilities or vessels, OCS rigs may not be subject to these (continued...)"

MMS will need to determine, as in Union, when something is a separate facility, and when it is a component of another facility. Where a pipeline extends out on a pier, assuming far more of the pipeline rests on land than on the pier, it should not be difficult to find that the onshore portion is the facility and the pier portion a mere appurtenance. If MMS' classification of facilities and appurtenances has a rational basis, it should survive judicial scrutiny.⁷

The same approach would apply to determining when an offshore pipeline extending onshore ceases to be an offshore facility for purposes of section 1016(c). A rational basis for classification here could be whether or not the potential for a spill from a given portion of a pipeline arises from offshore activities (such as production) or onshore activities (such as distribution). The Memorandum of Understanding (MOU) between the Environmental Protection Agency (EPA) and the Coast Guard dividing Clean Water Act responsibilities on the basis of whether a facility is transportation-related may suggest suitable points, such as valve junctions, at which to change the classification of a pipeline from offshore to onshore. See 40 C.F.R. Part 112, Appendix A.

In making its classifications, however, MMS should be aware of all the potential consequences. Specifically, while MMS' classification would be for the purpose of enforcing the evidence of financial responsibility requirements, the courts could apply the MMS treatment of "appurtenances" in determining who is liable

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tough State laws because they are outside a State's jurisdiction." 135 Cong. Rec. 18,371 (1989). See also Additional Views at S. Rep. No. 94, 101st Cong., 1st Sess. 26-27 ("There are several good reasons for maintaining one policy with respect to oil tankers and other facilities handling oil, but a different one with respect to OCS facilities"). See also S. Rep. No. 94, 101st Cong., 1st Sess. 16 and H.R. Rep. No. 242, 101st Cong., 1st Sess., pt. 2 at 53.

⁷ The legislative history does not reflect any conscious attempt to limit the Secretary's discretion to define how much of a facility must be on land to constitute an onshore facility. Like the Conference Report, the House bill used such broad, overlapping definitions as to make it necessary for the Secretary to exercise judgment as to whether a facility on or over both water and land would be an offshore facility or an onshore facility. That is, the House bill defined "offshore facility" as a facility "located, in whole or in part, on lands beneath navigable waters . . . or on the Outer Continental Shelf. . . ." It defined "onshore facility" to include a facility "any portion of which is located in, on, or under" nonsubmerged land. See 135 Cong. Rec. 27,942 (1989) (emphasis added).

and for how much in cleanup costs and damages. This is because OPA itself draws distinctions on these issues, depending upon whether the facility is onshore or offshore. That is, the "responsible party" for appurtenances of "onshore facilities" is the owner or operator of the facility, not the lessee, permittee, or holder of a right of use or easement of the underlying land. See the discussion in the next section. Also, liability for cleanup costs is limited (to \$350 million) only for "onshore facilities." See pp. 3-4, supra.

C. Who

OPA defines the party responsible for evidencing the financial responsibility for offshore facilities (except for those licensed under the Deepwater Port Act) in terms of interest in the underlying land or its use.⁸ This contrasts with its definition of "responsible party" for onshore facility, which relies on a property interest in, or operational responsibility for, the facility itself. Apparently this difference stems from Congress' desire not to burden offshore drilling contractors, who own facilities such as drilling rigs, but who have less of a stake in the income from the property than the lessee or permittee.⁹

⁸ Specifically, OPA defines "responsible party" for offshore facility as:

the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit.

Section 1001(32)(C), 33 U.S.C. 2701(32)(C).

⁹ The 1989 Senate Environment and Public Works Committee report explained its definition of "owner or operator" as follows:

A major deficiency of title III of the Outer Continental Shelf Lands Act is corrected by the reported bill. Under that title, the owner or operator of an OCS facility is held liable. Often, that owner or operator is an independent drilling contractor and not the actual holder of the rights to produce the oil....The reported bill restores the balance among leaseholders and drilling contractors on the OCS....The
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33 U.S.C. 2701(32)(B). "Lessee" is defined as someone holding a leasehold interest in an oil or gas lease on lands beneath navigable waters or on submerged lands of the Outer Continental Shelf. 33 U.S.C. 2701(16). "Permittee" is defined as a person holding authorizations, licenses, or permits for geological exploration under OCSLA section 11 or applicable state law. 33 U.S.C. 2701(28). OPA does not further define "holder of a right of use and easement. . . ."

Although the use of drilling contractors on the OCS may have given rise to the distinction OPA draws between "responsible parties" offshore and onshore, it would torture the plain language of the Act to read this as limiting the definition of "offshore facility" to the OCS. See the discussion on pages 4-7, supra. The legislative history is bereft of any such suggestions; e.g., the conferees stated: "[a]ll offshore facilities, except deepwater ports, must establish necessary evidence of financial responsibility for offshore facilities." H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. 119 (1990) (emphasis added).

Nor is there any reason to believe Congress intended for the term "responsible party" for an offshore facility to apply to a narrower range of facilities than the term "offshore facility." To the contrary, the Act contemplates that there be a responsible party for every "offshore facility," not just for those on tracts leased for mineral development, permitted for geological exploration, or the subject of an easement or use permit associated with oil and gas.

The term "holder of a right of use and easement" used in the definition of "responsible party" is broad enough to include landowners. Landowners generally have a "right of use and easement" on their land. If the definition were construed not to embrace landowners, Congress would not have needed to exempt governmental landowners/lessors from the definition, as it did. See note 8, supra.

Given the expansive definition of "offshore facility," a narrow reading of "responsible party" that excludes landowners could leave some offshore facilities--such as those inland of the coast which are not on leased water bottoms--without any responsible party answerable for damages and cleanup. For example, an owner of a drilling platform on an inland lake who also owns the bed of the

⁹(...continued)

bill accomplishes this by defining "owner or operator" for OCS facilities to mean the lessee or permittee of the area in which the facility is located (or the holder of the OCS rights).

S. Rep. No. 94, 101st Cong., 1st Sess. 12.

lake would not be a permittee, lessee, nor a holder of a right of use under this narrow view, and thus would not come under the definition of "responsible party." I can find no support for such a result in OPA or its history. The better reading is that landowners are included in the definition of "responsible party" for "offshore facility."

II. Authority to Provide Risk-Based Levels of Responsibility

Section 1016(c)(1) requires responsible parties for offshore facilities (other than deepwater ports) to

establish and maintain evidence of financial responsibility of \$150,000,000 to meet the amount of liability to which the responsible party could be subjected under section 2704(a) of this title in a case in which the responsible party would be entitled to limit liability under that section. In a case in which a person is the responsible party for more than one facility subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the facility having the greatest maximum liability.

33 U.S.C. 2716(c)(1).¹⁰ The Act unambiguously requires evidence of \$150 million in financial responsibility. Given the clarity of that minimum, the phrase "to meet the amount of liability to which the responsible party could be subjected" does not authorize MMS to increase or reduce that level. It merely refers to the purpose of the requirement.¹¹ Construing this sentence to allow the

¹⁰ OPA's language is taken verbatim from the House bill. In contrast the Senate bill set a flat \$100 million evidence requirement for OCS facilities and a requirement for all other offshore facilities tied to the \$350 million cap on liability. Compare section 1016(d)(1) of H.R. 1465, 135 Cong. Rec. 27,946 (1989) with section 104(b) of S. 686, 135 Cong. Rec. 18,738 (1989). See note 11, *infra*.

¹¹ *Id.* Even standing alone, this phrase would not authorize a reduction in the level of evidence required below the cap on liability. "[T]he amount. . .to which the responsible party could be subjected in a case in which the responsible party would be entitled to limit liability under section 2704(a)" is the liability cap. *Id.* The House Merchant Marine and Fisheries Committee bill was very clear on this point, reciting no precise dollar figure but setting the level of evidence required at "the maximum liability to which the responsible party could be subjected. . . ." Section 107(b) of H.R. 1465, printed in H.R. Rep. No. 242, 101 Cong., 1st Sess., pt. 2, at 12 (1989). The phrase appears three times in 33
(continued...)

flexibility of risked-based amounts would simply read the specification of \$150 million out of the statute.¹²

The second sentence states that the owner of multiple facilities need not maintain more evidence than the greatest maximum liability for a single facility. The term "maximum" in the second sentence cannot fairly be read as providing authority to reduce the amount required for a single facility. To do so would rob the flat \$150 million requirement in the first sentence of its straightforward meaning. The second sentence is, instead, a rather inartful way of saying that a responsible party will never have to furnish evidence of more than \$150 million, no matter how many facilities exist for which it is responsible.¹³

Perhaps the clearest indication that Congress did not intend to authorize establishment of a risk-based financial responsibility requirement for offshore facilities is the fact that in the same statute Congress did use a risk-based approach for both deepwater ports and vessels. On the former, OPA expressly authorizes the Secretary of Transportation to conduct rulemaking to reduce the

¹¹(...continued)

U.S.C. 2716, 2716(c)(1) (offshore facilities), 2716(a) (vessels) and 2716(c)(2) (deepwater ports). The amount to which it refers in the case of vessels and deepwater ports can be readily determined by formula, since liability is capped. In the case of offshore facilities, however, the maximum liability is not so readily determinable inasmuch as liability for cleanup and removal costs is unlimited, above and beyond the \$75 million ceiling on damages. This probably explains the specification of a definite figure, \$150 million, in the case of offshore facilities. In the Senate version the financial responsibility level had been fixed at \$100 million for OCS facilities, which was the only type of facility in that bill for which liability for removal costs was unlimited. See section 104(b) of S. 686, 135 Cong. Rec. 18,738 (1989) ("Each owner or operator of an outer continental shelf facility, deepwater port facility or other offshore facility shall establish and maintain evidence . . . sufficient to meet the maximum amount of liability to which the owner or operator could be subjected . . . or, in the case of an Outer Continental Shelf facility, in the amount of \$100,000,000.")

¹² "Mere words and ingenuity * * * cannot by description make permissible a course of conduct forbidden by law." United States v. City and County of San Francisco, 310 U.S. 16, 28 (1940).

¹³ The Conference Report explains the matter succinctly: "[I]n practice, this means that if a person is the responsible party for more than one offshore facility, that person must provide evidence of \$150 million in financial responsibility." H.R. Conf. Rep. No. 653, 101st Cong., 2nd Sess. 119.

level of financial responsibility and liability from \$350 million to as little as \$50 million upon a determination that the use of deepwater ports "results in a lower operational or environmental risk." Such rulemaking is to follow a study of "the relative operational and environmental risks posed by the transportation of oil by vessel to deepwater ports versus the transportation of oil by vessel to other ports." See 33 U.S.C. 2716(c)(2) and 33 U.S.C. 2704(d)(2). With regard to vessels, OPA ties financial responsibility to the level of potential liability, which is expressly based on the volume of oil handled, 33 U.S.C. 2716(a) and 33 U.S.C. 2704(a)(1) and (2). These provisions show that when Congress wanted to authorize risk-based or varying levels of financial responsibility, it knew how. There is no indication in OPA that Congress intended similar risk-based levels of financial responsibility for offshore facilities.

III. Authority to Allow De Minimis Exemption From Financial Responsibility

The courts have occasionally recognized an implied power to exempt a de minimis class from regulation if the regulation produces only a trivial gain, in order to avoid absurd or futile results. Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1978); Washington Red Raspberry Commission v. United States, 859 F.2d 898 (Fed. Cir. 1988). "Unless Congress has been extraordinarily rigid, there is likely a basis for implication of de minimis authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." Alabama Power at 360.

But the courts have also made clear that even where a power to make a de minimis exception may be implied, it does not extend to making cost-benefit calculations in the conventional sense:

That implied authority is not available for a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs. For such a situation any implied authority to make cost-benefit decisions must be based not on a general doctrine but on a fair reading of the specific statute, its aims and legislative history.

Id. at 361.

In a broad sense the difference between determining when a regulatory application is truly de minimis, and when it is simply not cost-effective by conventional cost-benefit analysis, is one of degree. But as the Alabama Power court took pains to underscore, this "difference of degree is an important one." The de minimis exemption authority is "narrow in reach and tightly bounded by the need to show that the situation is genuinely de minimis. . . ." Id.

Even if the authority to make de minimis exceptions may be implied, the courts are clear that it can be exercised only to implement the legislative design, not to thwart a statutory command. Id. Indeed, courts often find no authority for a de minimis exemption once they examine the statute. In NRDC v. Costle, 568 F.2d 1369 (D.C. Cir. 1977), the court held that EPA lacked authority to exempt categories of point sources from the permit requirements established in section 402 of FWPCA. The court stated that "courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute." See also Public Citizen v. Young, 831 F.2d 1108, 1113 (D.C. Cir. 1987); FPC v. Texaco, Inc., 417 U.S. 380 (1973); NRDC v. EPA, 966 F.2d 1292, 1305 (9th Cir. 1991).

To survive judicial scrutiny the agency must design the de minimis exemption with specific administrative burdens and a specific regulatory context in mind. Moreover, the burden of proof that the de minimis level selected fulfills the statutory purpose and has a rational basis is on the agency. Id. at 360. See also NRDC v. EPA, 966 F.2d 1292, 1305 (9th Cir. 1991) ("Without data supporting the expanded exemption, we owe no deference to EPA's line-drawing.")¹⁴

The strength and breadth of OPA's financial responsibility command, i.e., to assure that the offshore facility's responsible party has the financial resources needed to cover any claim filed under OPA, suggests that MMS has a rather heavy burden to justify a de minimis exception.¹⁵

The terms of section 1016(c) express a congressional intent to achieve universal coverage. The financial responsibility

¹⁴ The Alabama Power court found EPA had not established a rational basis for its decision to exempt facilities emitting less than 100-250 tons of certain air pollutants from the Prevention of Significant Deterioration and Best Available Control Technology requirements of the Clean Air Act, even though the levels selected coincided with levels the Act itself set for other purposes. It remanded the matter to the agency. Id. at 405.

¹⁵ EPA was unable to convince the courts that exempting small construction sites from Clean Water Act requirements faithfully implemented that Act, because EPA had to admit that the cumulative effect of runoff from small sites could have a significant effect on local water quality. NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1991). Nor could FDA satisfy the courts that exempting color additives which posed exceedingly small (but measurable) carcinogenic risks was consistent with the objectives of the Delaney Clause of the Food and Drug Act, Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987).

requirement applies to "each responsible party with respect to an offshore facility." 33 U.S.C. 2716(c) (emphasis added). "Facility" is defined to mean "any structure, group of structures, equipment or device used for one or more of the following purposes: exploring for, drilling for, producing, storing, handling, transferring, processing or transporting oil." 33 U.S.C. 2701(9) (emphasis added).¹⁶

A final indication of how narrow MMS' authority to create de minimis exemptions might be is the fact that OPA replaced Title III of the Outer Continental Shelf Lands Act. That Act contained an express exemption for facilities handling less than 1,000 barrels of oil at any one time. See 43 U.S.C. 1815(b) (1986), repealed by OPA, section 2004, 104 Stat. 504 (1990). Congress chose not to carry that exemption forward in OPA.

CONCLUSION

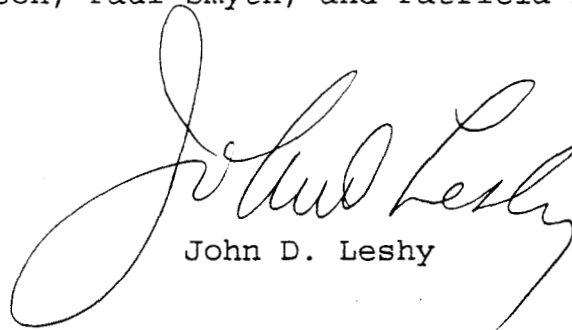
I have not focused upon practical considerations in resolving these interpretive questions because the statutory commands are clear, and the legislative history bears out the plain meaning. Whether Congress was wise or foolish in crafting and enacting these provisions of the Oil Pollution Act in this manner is not for me to say, in the context of answering the interpretive questions you have put to me. As a great jurist once wrote, in a not dissimilar context:

In the last analysis, . . . the Executive [must] abide by the limitations prescribed by the Legislature. The scrupulous vindication of that basic principle of law . . . looms more important in the abiding public interest than the embarkation on any immediate or specific project, however desirable in and of itself, in contravention of that principle.

Wilderness Society v. Morton, 479 F.2d 842, 892-93 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973). If it makes sense for facilities over inland or near-shore waters to be treated differently from OCS facilities, or for financial responsibility requirements to be risk-based, or for MMS to have general authority to create a de minimis exemption, Congress will have to say so.

¹⁶ I believe, however, that MMS may use a reasonable functionality test in defining "facility." OPA specifies facilities "used for . . . storing, handling, transferring, processing or transporting oil." Crankcase oil in an engine on an offshore platform producing only natural gas would not render the platform a "facility," even though the engine "stores" oil, because the presence of the oil is only incidental to the purpose of the facility itself, which is not to store, handle, transfer, process, or transport oil.

The following attorneys of the Division of Energy and Resources contributed substantially to the preparation of this Opinion: Dennis Daugherty, Milo Mason, Paul Smyth, and Patricia Beneke.



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