



Liability and Compensation Issues Raised by the 2010 Gulf Oil Spill

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Summary

The 2010 *Deepwater Horizon* incident produced the largest oil spill that has occurred in U.S. waters, releasing more than 200 million gallons into the Gulf of Mexico. BP has estimated the combined oil spill costs—cleanup activities, natural resource and economic damages, potential Clean Water Act (CWA) penalties, and other obligations—will be approximately \$41 billion.

The *Deepwater Horizon* oil spill raised many issues for policymakers, including the ability of the existing oil spill liability and compensation framework to respond to a catastrophic spill. This framework determines (1) who is responsible for paying for oil spill cleanup costs and the economic and natural resource damages from an oil spill; (2) how these costs and damages are defined (i.e., what is covered?); and (3) the degree to which, and conditions in which, the costs and damages are limited and/or shared by other parties, including general taxpayers.

The existing framework includes a combination of elements that distribute the costs of an oil spill between the responsible party (or parties) and the Oil Spill Liability Trust Fund (OSLTF), which is largely financed through a per-barrel tax on domestic and imported oil. Responsible parties are liable up to their liability caps (if applicable); the trust fund covers costs above liability limits up to a per-incident cap of \$1 billion.

Policymakers may want to consider the magnitude of the *Deepwater Horizon* incident and the liability and compensation issues raised under a scenario in which BP had refused to finance response activities or establish a claims process to comply with the relevant OPA provisions. BP has either directly funded oil spill response operations or reimbursed the federal government for actions taken by various agencies. BP has paid damage claims well above its liability limit and outside the scope of its liable damages.

Although evidence indicates that the levels of current framework (liability limits and OSLTF) may be sufficient to address the more common mix of spills that have historically occurred, the current combination of liability limits and \$1 billion per-incident OSLTF cap is not sufficient to withstand a spill with damages/costs that exceed a responsible party's liability limit by \$1 billion. Even if the per-incident cap were increased, the current (and projected) level of funds in the OSLTF may not be sufficient to address costs from a catastrophic spill.

The options available to address these issues depend upon the overall objective of Congress. One objective—which has been expressed by many in and outside Congress—is to provide full restoration and timely compensation (i.e., through channels other than litigation) for the impacts from the spill, without directly burdening the general taxpayers. If this is the objective, Congress may consider some combination of (1) increasing the offshore facility liability limit and corresponding financial responsibility demonstration; (2) increasing the OSLTF per-incident cap; or (3) increasing the level of funds available in the OSLTF. In addition, policymakers may want to consider an industry-financed fund, akin to the nuclear power industry's fund, that could supplement or potentially replace the current system.

Another objective might be to maintain the existing system, which may be sufficient to address all but the most extreme scenarios. Catastrophic spills in U.S. waters have historically been rare. Some may argue that establishing a system that can withstand a catastrophic event would impose costs and yield consequences that would not justify the (expected) ability to address a catastrophic event.

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Introduction

On April 20, 2010, the *Deepwater Horizon* oil drilling rig was nearing completion of BP's deepwater oil well when an uncontained release of hydrocarbons (oil and natural gas) caused explosions and fire, resulting in 11 crew member fatalities. The incident produced the largest oil spill that has occurred in U.S. waters, releasing more than 200 million gallons over approximately 84 days.¹ Although several companies were and are involved (to varying degrees) with the *Deepwater Horizon* incident, BP was (and continues to be) the most prominent private party in oil spill response and compensation activities. Thus, for the purpose of this report, BP is discussed as if it is the sole responsible party—a key term in the existing liability and compensation framework.²

The United States has not encountered a spill comparable to the 2010 Gulf spill since the 1989 *Exxon Valdez* in Prince William Sound, Alaska. The *Exxon Valdez* spill tallied approximately \$2 billion in cleanup costs and \$1 billion in natural resource damages in 1990 dollars. These combined figures equate to approximately \$5 billion in today's dollars and do not include the wider array of claims for which responsible parties are now liable.³

The total costs of the 2010 Gulf spill are projected to dwarf those of the *Exxon Valdez*. In its 2010 financial statement, BP estimated the combined oil spill costs—cleanup, natural resource and economic damages, potential Clean Water Act (CWA) penalties, and other obligations—will be approximately \$41 billion. This estimate includes payments made to date as well as projected future payments, such as claims. However, BP acknowledges the difficulty in estimating some costs and does not include these costs in its projection.⁴ Therefore, this estimate is subject to considerable uncertainty.

The incident received considerable attention in 2010,⁵ highlighting multiple policy matters regarding oil spills and their aftermath. An issue that has generated (and to some degree continues

¹ A portion (17%) of this oil did not enter the Gulf environment, but was directly recovered by BP. See, Federal Interagency Solutions Group, Oil Budget Calculator Science and Engineering Team, *Oil Budget Calculator: Deepwater Horizon-Technical Documentation*, November 2010.

² Transocean owned the *Deepwater Horizon* drilling rig. Three companies own the Macondo well: BP has a 65% share, Anadarko Petroleum Corporation has a 25% share, and MOEX Offshore has a 10% share (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, Report to the President (hereinafter "Commission Report") January 2011).

³ In addition, this figure does not include punitive damages. Punitive damage claims were litigated for more than 12 years, eventually reaching the U.S. Supreme Court in 2008 (*Exxon Shipping v. Baker*, 554 U.S. 471 (2008)). Plaintiffs were awarded approximately \$500 million in punitive damages—substantially less than was originally awarded (\$5 billion) by a U.S. district court in 1994. An additional \$500 million in post-judgment interest on those damages was subsequently awarded.

⁴ As stated by BP: "The total amounts that will ultimately be paid by BP in relation to all obligations relating to the incident are subject to significant uncertainty and the ultimate exposure and cost to BP will be dependent on many factors. Furthermore, the amount of claims that become payable by BP, the amount of fines ultimately levied on BP (including any determination of BP's negligence), the outcome of litigation, and any costs arising from any longer-term environmental consequences of the oil spill, will also impact upon the ultimate cost for BP." BP, Fourth quarter and full year 2010 financial statement, February 1, 2011, at <http://www.bp.com/>.

⁵ In the 111th Congress, the House of Representatives conducted at least 33 hearings in 10 committees; the Senate conducted at least 30 hearings in 8 committees. Members introduced more than 150 legislative proposals that would address various topics related to the oil spill.

to generate) particular interest is the oil spill liability and compensation framework.⁶ This framework, which is grounded in federal statute and regulations, determines the following:

1. who is responsible for paying for oil spill cleanup costs;
2. who is responsible for paying for economic and natural resource damages associated with an oil spill;
3. how these costs and damages are defined (i.e., what is covered); and
4. the degree to which (or conditions in which) the costs and damages are limited and/or shared by other parties, including general taxpayers.

The first section of this report provides an overview of the existing liability and compensation framework. The second section highlights many of the liability and compensation issues raised by the *Deepwater Horizon* event. The third section discusses options for policymakers to adjust, amend, or supplement the current framework.

Existing Liability and Compensation Framework

President George H. W. Bush signed into law the Oil Pollution Act of 1990 (OPA)⁷ on August 18, 1990, consolidating existing federal oil spill laws, expanding authorities within the CWA, and creating new provisions regarding oil spill liability and compensation.⁸

The OPA liability and compensation framework includes a combination of elements that distribute the costs of an oil spill between the responsible party (or parties) and a trust fund, which is largely financed through a per-barrel tax on domestic and imported oil. Responsible parties are liable up to their liability caps (if applicable); the Oil Spill Liability Trust Fund covers costs above liability limits up to a per-incident cap of \$1 billion. These elements are discussed in some detail below.

Responsible Party

A critical term and concept in the OPA liability and compensation framework is the responsible party. The liability provisions of OPA apply to “each responsible party for a vessel or a facility from which oil is discharged” (33 U.S.C. § 2702). The responsible party is specifically tasked with further OPA obligations, including claim duties. Some have identified OPA’s specific assignment of liability (often referred to as “channeling”)⁹ and other duties as a key component of the framework. The channeling mechanism may simplify the compensation process, because the

⁶ See CRS Report R41684, *Oil Spill Legislation in the 112th Congress*, by Jonathan L. Ramseur.

⁷ P.L. 101-380, primarily codified at 33 U.S.C. § 2701 *et seq.* OPA amended other sections of the U.S. Code, including the Clean Water Act (e.g., 33 U.S.C. § 1321) and portions of the tax code (26 U.S.C. § 4611 and § 9509).

⁸ See also CRS Report R41266, *Oil Pollution Act of 1990 (OPA): Liability of Responsible Parties*, by Robert Meltz; and CRS Report RL33705, *Oil Spills in U.S. Coastal Waters: Background and Governance*, by Jonathan L. Ramseur.

⁹ See e.g., Nathan Richardson, *Deepwater Horizon and the Patchwork of Oil Spill Liability Law*, Resources for the Future discussion paper, June 2010.

responsible party assignment makes it unnecessary for agencies and courts to determine which party caused the spill.¹⁰

The term “responsible party” has a specific meaning for different sources of oil spills.¹¹ As defined by OPA (Section 1001), “responsible party” means the following:

(A) Vessels. - In the case of a vessel, any person owning, operating, or demise chartering the vessel.

(B) Onshore facilities. - In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit.

(C) Offshore facilities. - In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. § 1501 et seq.)), 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.

(D) Deepwater ports. - In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. § 1501- 1524), the licensee.

(E) Pipelines. - In the case of a pipeline, any person owning or operating the pipeline.

(F) Abandonment. - In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.

Liability

OPA unified the liability provisions of existing oil spill statutes,¹² creating a freestanding liability regime. Section 1002 states that responsible parties are liable for any discharge of oil (or threat of discharge) from a vessel or facility¹³ to navigable waters, adjoining shorelines, or the exclusive economic zone of the United States (i.e., 200 nautical miles beyond the shore). Liability under OPA is strict,¹⁴ meaning that impacted parties need not show or prove that the spiller acted negligently for liability to attach.¹⁵

¹⁰ See e.g., Mark A. Cohen *et al.*, *Deepwater Drilling: Law, Policy, and Economics of Firm Organization and Safety*, Resources for the Future discussion paper, January 2011.

¹¹ See 33 U.S.C. § 2701(32).

¹² The Federal Water Pollution Control Act of 1972, as amended, generally referred to as the Clean Water Act (CWA, 33 U.S.C. § 1251 et seq); the Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA, 43 U.S.C. § 1651), the Deepwater Port Act of 1974 (DPA, 33 U.S.C. § 1501 et seq), and the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA, 43 U.S.C. § 1801 et seq).

¹³ The definition of “facility” is broadly worded and includes pipelines and motor vehicles. OPA § 1001(9).

¹⁴ Under OPA, the terms “liable” and “liability” are “construed to be the standard of liability which obtains under section 311 of the [Clean Water Act].” Courts have interpreted section 311 of the Clean Water Act as imposing strict (continued...)

Under OPA, a responsible party is liable for cleanup costs incurred, not only by a government entity, but also by a private party. But the cleanup activities must be consistent with the National Oil and Hazardous Substances Pollution Contingency Plan, generally referred to as the National Contingency Plan (NCP), the regulations governing oil and hazardous substance response operations.¹⁶

In addition, OPA broadened the scope of damages (i.e., costs) for which an oil spiller would be liable. (For a historical comparison of oil spill liability provisions, see **Table A-1** in the **Appendix** to this report.) Damages include the following:

- **Natural resources:** “damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.”¹⁷
- **Real or personal property:** “damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property.”¹⁸
- **Subsistence use:** “damages for loss of subsistence use of natural resources, which shall be recoverable by any claimant who so uses natural resources which have been injured, destroyed, or lost, without regard to the ownership or management of the resources.”¹⁹
- **Revenues:** “damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by the Government of the United States, a State, or a political subdivision thereof.”²⁰
- **Profits and earning capacity:** “damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources, which shall be recoverable by any claimant.”²¹
- **Public services:** “damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire,

(...continued)

liability on parties responsible for the discharge of oil or hazardous substances into the waters of the United States. See *United States v. New York*, 481 F. Supp. 4 (S. D.N.Y. 1979). See CRS Report R41266, *Oil Pollution Act of 1990 (OPA): Liability of Responsible Parties*, by Robert Meltz.

¹⁵ See, e.g., Nathan Richardson, *Deepwater Horizon and the Patchwork of Oil Spill Liability Law*, Resources for the Future discussion paper, June 2010.

¹⁶ OPA §1002(b)(1)(B). The NCP is codified in 40 CFR Part 300. For further information on the NCP see CRS Report RL33705, *Oil Spills in U.S. Coastal Waters: Background and Governance*, by Jonathan L. Ramseur.

¹⁷ OPA § 1002(b)(2)(A).

¹⁸ OPA § 1002(b)(2)(B).

¹⁹ OPA § 1002(b)(2)(C).

²⁰ OPA § 1002(b)(2)(D).

²¹ OPA § 1002(b)(2)(E).

safety, or health hazards, caused by a discharge of oil, which shall be recoverable by a State, or a political subdivision of a State.”²²

OPA provided limited defenses from liability: Act of God, act of war, and act or omission of certain third parties.²³ These defenses are similar to those of the Comprehensive Environmental, Response, Compensation, and Liability Act (CERCLA), enacted in 1980 for releases of hazardous substances and pollutants or contaminants (but not oil).

Liability Limits

OPA provides liability limits (or caps) for those responsible for a spill. Liability limits are not unique to OPA and limits existed in several federal statutes preceding OPA. (For a historical comparison of liability limits see **Table A-2** in the **Appendix** to this report.) However, the limits are not automatic, but conditional. First, the liability limits do not apply to situations involving acts of gross negligence or willful misconduct. Second, liability limits do not apply if the violation of a federal safety, construction, or operating requirement proximately caused the spill. Third, parties must report the incident and cooperate with response officials to maintain their liability caps.²⁴ According to the National Pollution Funds Center—an office of the U.S. Coast Guard that manages the Oil Spill Liability Trust Fund (discussed below)—liability limits are “not usually well defined until long after response,” and litigation may be required to resolve the issue.²⁵

The liability limits differ based on the source of the oil spill (**Table A-2**). The limits for most sources are simple dollar amounts.

- Vessel liability limits are generally based on the size of the vessel (measured in gross tonnage). For example, a tank vessel matching the size of the *Exxon Valdez* (95,000 gross tons) would have a cap of either \$304 million (single-hull) or \$190 million (double hull).
- Onshore facility (which includes pipelines) liability is limited to \$350 million. Although OPA allows the President to decrease this limit through regulations, this authority has not been exercised.
- Deepwater port (e.g., Louisiana Offshore Oil Port, LOOP)²⁶ liability is limited to \$350 million. OPA authorizes the Secretary of the department in which the Coast Guard is operating (i.e., Homeland Security)²⁷ to adjust this limit to not less than

²² OPA § 1002(b)(2)(F).

²³ OPA § 1003.

²⁴ OPA § 1004(c).

²⁵ National Pollution Funds Center, *FOSC Funding Information for Oil Spills and Hazardous Materials Releases, April 2003*, p. 4.

²⁶ The Louisiana Offshore Oil Port (LOOP) is the only offshore deepwater port for oil in U.S. coastal waters. According to the U.S. Department of Transportation’s Maritime Administration, three other deepwater ports are in operation that accept liquefied natural gas. See <http://www.marad.dot.gov>.

²⁷ The Homeland Security Act of 2002 (P.L. 107-296) transferred the Coast Guard to the Department of Homeland Security. The Coast Guard was formerly within the Department of Transportation.

\$50 million. This authority was exercised in 1995, setting the liability limit at \$62 million,²⁸ and subsequently increased to \$87 million in 2009.²⁹

- Offshore facilities (like the BP oil well involved in the 2010 Gulf of Mexico spill) have unlimited liability for oil removal (cleanup) costs³⁰ and a \$75 million limit on other damages—natural resources and the five categories of economic damages (listed above).
- Mobile offshore drilling units (MODUs), like the *Deepwater Horizon*, are first treated as tank vessels for their liability cap. If removal and damage costs exceed this liability cap, a MODU is deemed to be an offshore facility for the excess amount.³¹

OPA requires the President to issue regulations to adjust the liability limits at least every three years to take into account changes in the consumer price index (CPI).³² Despite this requirement, adjustments to liability limits were not made until Congress amended OPA in July 2006 (**Table A-2**). As of the date of this report, onshore and offshore facility liability limits remain at the same level established in 1990. If the adjustments had been made, offshore facility liability limits for economic and natural resource damages would be approximately \$125 million (plus unlimited removal costs).³³

Financial Responsibility

To ensure that parties responsible for an oil spill can provide funding for oil spill response and compensation to affected parties, OPA requires that vessels and offshore facilities maintain evidence of financial responsibility (e.g., insurance or financial statements documenting significant revenue). OPA does not have an analogous requirement for onshore facilities.

The current levels of financial responsibility are related to the current liability limits for various sources (e.g., vessels, offshore facilities) of potential oil spills. The liability limits differ by potential source. In the case of vessels, whose liability limits are a single dollar amount encompassing both removal costs and other damages, the financial responsibility levels are

²⁸ 60 *Federal Register* 39849, August 4, 1995.

²⁹ 74 *Federal Register* 31368, July 1, 2009. Codified in 33 CFR § 138.230(b).

³⁰ OPA § 1002 defines removal costs as “the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.” Relatedly, OPA § 1002 defines remove or removal as “containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.”

³¹ 33 USC § 2704(b). For further interpretation see National Pollution Funds Center, “Oil Pollution Act Liabilities for Oil Removal Costs and Damages as They May Apply to the Deepwater Horizon Incident” (undated).

³² With Executive Order 12777 (October 18, 1991), President George H.W. Bush delegated this responsibility to several federal agencies. Executive Order 13286 (signed by President George W. Bush on March 5, 2003) reorganized duties in response to the creation of the Department of Homeland Security. The Coast Guard covers vessels, deepwater ports (including associated pipelines), and transportation-related onshore facilities; the Department of Transportation (DOT) covers onshore pipelines, motor carriers, and railways; the Environmental Protection Agency (EPA) covers non-transportation-related onshore facilities; the Department of the Interior (DOI) covers offshore facilities and associated pipelines, other than deepwater ports.

³³ CRS prepared this estimate using Consumer Price Index figures from the U.S Department of Labor Bureau of Labor Statistics, at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>.

directly tied to the corresponding liability caps. Current law requires responsible parties for vessels to demonstrate the “maximum amount of liability to which the responsible party could be subjected under [the liability limits in OPA Section 1004; 33 U.S.C. § 2704].”

Because the structure of offshore facility liability limit is different than vessels (liability for removal costs is unlimited), the corresponding financial responsibility limit provisions differ. Responsible parties for offshore facilities in federal waters must demonstrate \$35 million financial responsibility, unless the President determines a greater amount (not to exceed \$150 million) is justified (33 U.S.C. § 2716(c)). The federal regulations that implement this statutory provision (30 CFR Part 254) base the financial responsibility amount—between \$35 million and \$150 million—on a facility’s worst-case discharge volume (as defined in 30 CFR Section 253.14). For example, a facility with a worst-case discharge volume over 105,000 barrels—the highest level of worst-case discharge listed in the regulations—must maintain \$150 million in financial responsibility.

The Coast Guard’s National Pollution Funds Center (NPFC) implements the financial responsibility provisions for vessels; the Bureau of Ocean Energy Management, Regulation, and Enforcement (formerly the Minerals Management Service, MMS) implements this requirement for offshore facilities.

The Oil Spill Liability Trust Fund

Prior to OPA’s passage, a topic of debate concerned the mechanisms and hurdles of private parties recovering damages resulting after an oil spill.³⁴ To address this and other concerns,³⁵ Congress established the Oil Spill Liability Trust Fund (OSLTF). Although Congress created the OSLTF in 1986,³⁶ Congress did not authorize its use or provide its funding until after the 1989 *Exxon Valdez* oil spill. In 1990, OPA provided the statutory authorization necessary to put the fund in motion.³⁷

In complementary legislation, Congress imposed a 5-cent-per-barrel tax on domestic and imported oil to support the fund.³⁸ Collection of this fee started January 1, 1990, and ceased on December 31, 1994, due to a sunset provision in the law. However, in April 2006, the tax resumed as required by the Energy Policy Act of 2005 (P.L. 109-58). In addition, the Emergency Economic

³⁴ See, e.g., U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 35.

³⁵ Another key function of the OSLTF is to provide a source of immediately accessible funds to support federal agencies, such as the Coast Guard or EPA, conducting oil spill response activities. Access to such funds is especially important if the responsible party is unknown or is unwilling or unable to pay for response activities.

³⁶ Omnibus Budget Reconciliation Act of 1986 (P.L. 99-509).

³⁷ Pursuant to OPA authorization, Congress transferred monies from other federal liability funds into the OSLTF, including the CWA Section 311(k) revolving fund; the Deepwater Port Liability Fund; the Trans-Alaska Pipeline Liability Fund; and the Offshore Oil Pollution Compensation Fund. According to the trust fund managers (the National Pollution Funds Center), no additional funds remain to be transferred to the OSLTF. National Pollution Funds Center, *Oil Spill Liability Trust Fund (OSLTF) Annual Report FY 2004–FY 2008*.

³⁸ Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239). Other revenue sources for the fund include interest on the fund, cost recovery from the parties responsible for the spills, and any fines or civil penalties collected.

Stabilization Act of 2008 (P.L. 110-343) increased the tax rate to 8 cents through 2016. In 2017, the rate is set to increase to 9 cents. The tax is scheduled to terminate at the end of 2017.³⁹

The National Pollution Funds Center (NPFCC), an office within the Coast Guard, manages the trust fund.⁴⁰ The trust fund plays a substantial role in the liability and compensation framework, as discussed below.

Compensation or Claims Process

OPA established a claims process for compensating parties affected by an oil spill. In general, before claims for removal costs and other costs/damages can be presented to the OSLTF, they must be presented first to a responsible party.⁴¹ If the party to whom the claim is presented denies all liability, or if the claim is not settled by payment within 90 days after the claim was presented, the claimant may elect either to initiate an action in court against the responsible party or present the claim directly to the OSLTF.⁴² If a responsible party denies a claim that is subsequently processed and awarded with monies from the OSLTF, the federal government may seek to recover these costs from the responsible party.⁴³

Regulations implementing the OSLTF claims process are found in 33 C.F.R. Part 136. The NPFCC's guidance document—*Claimant's Guide: A Compliance Guide for Submitting Claims Under the Oil Pollution Act of 1990* (November 2009)—provides assistance to those submitting claims.

OSLTF managers are limited in the amount of payments that may be awarded for each incident.⁴⁴ Under current law, the per-incident cap is \$1 billion.⁴⁵ Because of this per-incident cap on the OSLTF, a scenario could arise in which the trust fund managers would be prohibited from compensating claimants who were initially denied by a responsible party. Such a scenario has not occurred in OPA's history.

Costs (including, for example, natural resource damages, economic losses, etc.)⁴⁶ beyond this per-incident limit could be addressed in several ways. One mechanism would be for parties to use

³⁹ Section 405 of P.L. 110-343.

⁴⁰ Pursuant to Executive Order 12777, 56 *Federal Register* 54,757 (1991).

⁴¹ 33 U.S.C. § 2713(a). Under OPA, the term “claim” means “a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an [oil spill] incident.” 33 U.S.C. § 2701(3).

⁴² 33 U.S.C. § 2713(c). Claims for removal costs must be presented to the Fund within six years after the date of completion of all removal activities related to the oil spill incident. 33 U.S.C. § 2712(h)(1). Damage claims must be “presented within 3 years after the date on which the injury and its connection with the discharge in question were reasonably discoverable with the exercise of due care.” 33 U.S.C. § 2712(h)(2).

⁴³ The federal government may also seek cost recovery from the responsible party's guarantor, “or any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the cost or damages for which the compensation was paid.” 33 U.S.C. § 2715(c).

⁴⁴ “Incident” means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil. 33 U.S.C. § 2701(14).

⁴⁵ 26 U.S.C. § 9509(c).

⁴⁶ Although offshore facilities are liable for all removal costs, liability for removal costs for other responsible party categories (e.g., tank vessels, onshore facilities) is limited. Thus, a significant oil spill from a tank vessel could potentially encounter the per-incident trust fund cap, based solely on its response costs.

state laws. OPA does not preempt states from imposing additional liability or requirements relating to oil spills, or establishing analogous state oil spill funds.⁴⁷ OPA legislative history⁴⁸ and statements from OPA drafters⁴⁹ indicate the intention that state laws and funds would supplement (if necessary) the federal liability framework under OPA.

Alternatively, existing federal authorities could be used to provide assistance in some circumstances. For example, an emergency declaration under the Stafford Act would appear to be a potential approach for the current situation, because it is intended to lessen the impact of an imminent disaster. Such a declaration in the context of a manmade disaster is unprecedented: during the *Exxon Valdez* spill, the President turned down the governor of Alaska's two requests for an emergency declaration.⁵⁰ CRS is not aware of similar requests made during the *Deepwater Horizon* incident.

Issues for Policymakers

The 2010 *Deepwater Horizon* oil spill generated considerable interest in the existing oil spill liability and compensation framework. The incident placed a spotlight on multiple elements of the framework, in particular the liability limits and the size and limitations of the OSLTF.

The issues raised by the spill highlight a central policy debate: how should policymakers allocate the costs associated with a catastrophic oil spill? What share of costs should be borne by the responsible party (e.g., oil vessel owner/operators) compared to other groups, such as the oil industry (e.g., through the per-barrel tax), and/or the general treasury (assuming Congress would appropriate funds to compensate for unpaid costs/damages)?

Policymakers may want to consider the magnitude of the *Deepwater Horizon* incident and the liability and compensation issues raised under a scenario in which BP had refused to finance response activities or establish a claims process to comply with the relevant OPA provisions. BP has either directly funded oil spill response operations or reimbursed the federal government for actions taken by various agencies. According to BP, response costs have tallied over \$10 billion.⁵¹ BP has paid damage claims well above its liability limit of \$75 million (assuming it would apply) and outside the scope of its liable damages (e.g., human health-related claims). BP and the Obama Administration jointly announced on June 16, 2010, the creation of the Gulf Coast Claims Facility (GCCF), an independent claims facility that BP will finance with incremental payments eventually totaling \$20 billion.

⁴⁷ 33 U.S.C. § 2718.

⁴⁸ U.S. Congress, House Committee on Merchant Marine and Fisheries, Report accompanying H.R. 1465, Oil Pollution Prevention, Removal, Liability, and Compensation Act of 1989, 1989, H.Rept. 101-242, Part 2, 101st Cong., 1st sess., p. 36.

⁴⁹ See George Mitchell, "Preservation of State and Federal Authority under the Oil Pollution Act of 1990," *Environmental Law*, Vol. 21, no. 2 (1991).

⁵⁰ The rationale for the turndowns was that a declaration by the President would hinder the government's litigation against Exxon that promised substantial compensation for the incident. See CRS Report R41234, *Potential Stafford Act Declarations for the Gulf Coast Oil Spill: Issues for Congress*, by Francis X. McCarthy.

⁵¹ For details, see BP, Fourth quarter and full year 2010 financial statement, February 1, 2011, at <http://www.bp.com/>.

Liability Limits

In the aftermath of the *Deepwater Horizon* spill, many Members of the 111th Congress expressed concern about the level of the liability limit for offshore facilities. Several Members offered proposals that would have either significantly increased the offshore facility liability limit or removed the limit entirely. These increases (e.g., to \$10 billion) would have been well above the inflation adjustment increase required by OPA (if implemented would have raised the limit to \$125 million). In July 2010, the House passed legislation that would have removed the liability limit for offshore facilities.⁵² The Senate placed a comparable bill (S. 3663) on its Legislative Calendar in late July 2010, but did not vote on its passage. In the 112th Congress, several Members have offered proposals that would eliminate the liability limit for offshore facilities.⁵³

Liability limits have been a part of the oil spill framework for decades (**Table A-2**). Eliminating the offshore facility liability limit altogether would constitute a substantial change in U.S. oil spill policy. In the current system, costs from a major spill are shared between the responsible party (an individual company) and the OSLTF (largely financed through a tax on oil). Until the *Deepwater Horizon* incident, no individual spill threatened the framework.⁵⁴

Unlimited liability for offshore facilities would shift the burden to the individual company. Although such a shift would likely reduce the risk of depleting the OSLTF during a catastrophic spill, the OSLTF would continue to provide multiple functions, including a role as a compensation backstop. Within a system of unlimited liability, the risk remains that the responsible party would fail to meet its compensation obligations (for whatever reason), and the OSLTF would continue to provide funds.

Indeed, raising or removing the liability limits would not guarantee that a company would be able to fund all response costs and compensate all affected parties. If Congress increases or eliminates the liability cap without making a corresponding change to the financial responsibility requirements, a responsible party could comply with its financial responsibility requirements and still go bankrupt before paying even a small fraction of the damage associated with a spill.⁵⁵

Some proponents of increasing (or abolishing) the liability limit have argued that the current cap distorts economic decisions and provides incentives that may increase the likelihood of an oil spill.⁵⁶ Others point out that a liability cap represents a subsidy to the offshore oil industry—the lower the cap, the greater the subsidy.⁵⁷

⁵² H.R. 3534, the Consolidated Land, Energy, and Aquatic Resources Act (CLEAR Act), passed July 30, 2010. For more information, see CRS Report R41453, *Oil Spill Legislation in the 111th Congress*, by Jonathan L. Ramseur.

⁵³ See CRS Report R41684, *Oil Spill Legislation in the 112th Congress*, by Jonathan L. Ramseur.

⁵⁴ A 2007 GAO report examined occurrences of vessel liability limits being exceeded and resulting trust fund vulnerability. GAO found that “major oil spills [defined by GAO as those with response costs and damage claims exceeding \$1 million] that exceed the vessel’s limit of liability are infrequent, but their impact on the Fund could be significant.... Of the 51 major oil spills that occurred since 1990 [which accounted for 2% of all oil spills since 1990], 10 spills resulted in limit of liability claims on the Fund.” GAO, *Maritime Transportation: Major Oil Spills Occur Infrequently, but Risks to the Federal Oil Spill Fund Remain*, Sept. 7, 2007.

⁵⁵ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Liability and Compensation Requirements under the Oil Pollution Act*, Staff Working Paper No. 10, March 2011.

⁵⁶ Michael Greenstone (Massachusetts Institute of Technology), Testimony before the House Committee on Transportation and Infrastructure, June 9, 2010.

⁵⁷ Thomas W. Merrill (Columbia Law School), “Insurance and Safety Incentives,” Working Paper for the National (continued...)

Others argue that a significant increase in the liability cap (or its removal) would be problematic from an insurance standpoint, depending, in part, on whether the financial responsibility requirements have corresponding increases.⁵⁸ Some contend that the insurance market does not have the capacity to meet a significant increase in the liability limit (e.g., to \$10 billion).⁵⁹ These concerns are based on current market conditions, but the market may be able to adjust to different requirements. To what degree it can adjust is beyond the scope of this report, but some initial evidence suggests the market is adjusting. The January 2011 final report from the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling highlighted a September 2010 announcement from an insurance company (Munich Re) advertising coverage in the \$10 billion to \$20 billion range.⁶⁰

Some have argued that higher liability limits would be a disadvantage to the companies that cannot self-insure (as BP has done), because insurance may become cost-prohibitive or even unobtainable (as argued above). Along this line of reasoning, increased liability provisions (and corresponding financial responsibility demonstrations) may preclude (relatively) smaller companies from offshore operations and increase the marketshare of the small group of major oil companies. Others counter that if companies cannot afford to bear the potential costs of their activities, they should not be in operation.⁶¹

OSLTF Limitations

Per-Incident Cap

Although reaching the OSLTF's per-incident (\$1 billion) cap would be an unprecedented event in the fund's history, it is a conceivable occurrence with the *Deepwater Horizon* incident. As of November 7, 2010, the trust fund expenditures and obligations have exceeded \$690 million.⁶² As reported on the federal government's *Deepwater Horizon* response website,⁶³ BP has reimbursed the federal government through multiple payments, totaling over \$600 million.⁶⁴ Although the

(...continued)

Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling, January 2011.

⁵⁸ For a more thorough discussion of these issues, see CRS Report R41320, *Deepwater Horizon Oil Spill Disaster: Risk, Recovery, and Insurance Implications*, by Rawle O. King.

⁵⁹ Robert P. Hartwig (Insurance Information Institute), Testimony before the House Committee on Transportation and Infrastructure, June 9, 2010; Ron Baron (Willis, Global Energy Practice), Testimony before the Senate Committee on Environment and Public Works, June 9, 2010.

⁶⁰ Press Release from Munich Re, September 12, 2010, at http://www.munichre.com/en/media_relations/press_releases/2010/2010_09_12_press_release.aspx.

⁶¹ See e.g., Thomas W. Merrill (Columbia Law School), "Insurance and Safety Incentives," Working Paper for the National Commission on the BP *Deepwater Horizon* Oil Spill and Offshore Drilling, January 2011.

⁶² Personal communication with the U.S. Coast Guard, November 22, 2010.

⁶³ See <http://www.restorethegulf.gov>.

⁶⁴ According to the federal government's response website (as of January 11, 2011), BP has provided 8 reimbursement payments totaling \$606 million. A further bill for over \$25 million is pending. See <http://www.restorethegulf.gov/release/2011/01/11/oil-spill-cost-and-reimbursement-fact-sheet>.

reimbursement payments would be transferred into the OSLTF,⁶⁵ they have no effect on the trust fund expenditures and obligations and their relationship with the per-incident cap.⁶⁶

Several proposals from the 111th Congress would have increased the per-incident cap to varying amounts. Often these proposals were coupled with provisions to bolster the revenues in the trust fund (discussed below). In the 112th Congress, several Members have offered proposals that would increase the per-incident cap.⁶⁷

Level of Funding

The magnitude of the costs associated with *Deepwater Horizon* has spurred concern regarding the level of funding in the OSLTF. As **Figure 1** illustrates, the OSLTF unobligated balance was approximately of \$1.7 billion at the end of FY2010.⁶⁸ The National Pollution Funds Center projects the fund will reach approximately \$2.7 billion at the end of FY2014.⁶⁹ Although these projected levels are substantially higher than historic levels, they are unlikely to be sufficient to mitigate impacts—finance response activities and compensate injured parties—from a catastrophic spill akin to the *Deepwater Horizon* incident.

However, data from a 2007 GAO report suggest that the projected levels may be sufficient to address the more common mix of spills that have historically occurred. In 2007, GAO examined occurrences of vessel liability limits being exceeded and resulting trust fund vulnerability. GAO found that “major oil spills [defined by GAO as those with response costs and damage claims exceeding \$1 million] that exceed the vessel’s limit of liability are infrequent, but their impact on the Fund could be significant.... Of the 51 major oil spills that occurred since 1990 [which accounted for 2% of all oil spills since 1990], 10 spills resulted in limit of liability claims on the Fund.”⁷⁰

⁶⁵ Pursuant to 26 U.S.C. § 9509(b)(3), referencing OPA § 1015 (33 U.S.C. § 2715), which concerns cost recovery actions.

⁶⁶ 33 U.S.C. § 9509(c)(2). See also GAO, *Deepwater Horizon Oil Spill: Preliminary Assessment of Federal Financial Risks and Cost Reimbursement and Notification Policies and Procedures: Briefing for Congressional Requesters*, November 9, 2010.

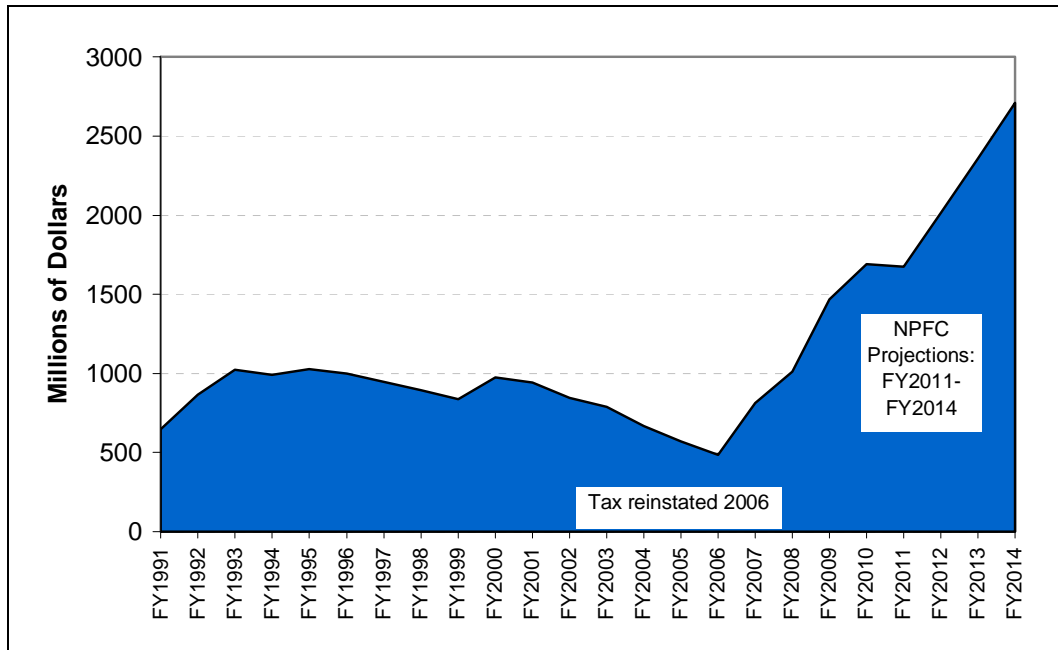
⁶⁷ See CRS Report R41684, *Oil Spill Legislation in the 112th Congress*, by Jonathan L. Ramseur.

⁶⁸ Office of Management and Budget, *Budget of the U.S. Government for Fiscal Year 2012*, Appendix, pp. 529-530.

⁶⁹ Personal communication with the NPFC, February 2011.

⁷⁰ GAO, *Maritime Transportation: Major Oil Spills Occur Infrequently, but Risks to the Federal Oil Spill Fund Remain*, Sept. 7, 2007.

Figure I. Oil Spill Liability Trust Fund
Historical, Current, and Projected Balance



Source: Prepared by CRS; FY1991-FY2010 end-of-year unobligated balances from Office of Management and Budget, Budget of the United States Government, Appendix. FY2011-FY2014 projections from the National Pollution Funds Center, prepared January 18, 2011, and provided to CRS in personal communication February 2011.

Notes: Most of the trust fund's revenue has come from a per-barrel tax on domestic and imported oil. The Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239) initiated the tax in January 1990 at 5 cents-per-barrel. Due to a sunset provision in the law, collection ceased December 31, 1994. In April 2006, the tax resumed as required by the Energy Policy Act of 2005 (P.L. 109-58). In 2008, pursuant to the Emergency Economic Stabilization Act of 2008 (P.L. 110-343), the tax rate increased to 8 cents through 2016. In 2017, the rate will increase to 9 cents, but is scheduled to terminate at the end of 2017.

The apparent plateau in the data between FY2010 and FY2011 is due to the transition between OMB observed values and NPFC projections. The NPFC projections include several assumptions: (1) Fines/penalties receipts based on recent annual averages; (2) claims based on recent averages; (3) 100% cost recovery for expenses associated with *Deepwater Horizon* incident.

In the 111th Congress, Members offered several proposals that would have increased the per-barrel tax that finances the OSLTF. Some of these proposals would have increased the rate substantially, and over time, provided substantial revenue to the OSLTF.⁷¹ In the 112th Congress, Members have offered at least one bill that would alter the OSLTF tax rate.⁷²

Potential CWA penalties may play a role in increasing the level of funding in the OSLTF.⁷³ Unless specifically addressed otherwise, the Miscellaneous Receipts Act (31 U.S.C. §3302(b)) provides that all court, or administratively imposed penalties are paid to the U.S. Treasury. The underlying

⁷¹ For example, S. 3793 (Baucus) would have increased the tax from 8 to 78 cents, raising \$31.4 billion over 10 years (Summary of the Baucus Job Creation and Tax Cuts Act, September 16, 2010).

⁷² See CRS Report R41684, *Oil Spill Legislation in the 112th Congress*, by Jonathan L. Ramseur.

⁷³ See CRS Report R41370, *Federal Civil and Criminal Penalties Possibly Applicable to Parties Responsible for the Gulf of Mexico Oil Spill*, by Robert Meltz.

statutory provisions of the OSLTF effectively override this general provision by transferring CWA Section 311 penalties (among others)⁷⁴ into the OSLTF.⁷⁵ CWA penalties from the *Deepwater Horizon* incident could be substantial. Sections 311(b)(7)(A) and 311(b)(7)(D)⁷⁶ provide for the maximum civil penalties under the CWA. The amount of revenue generated by applying these provisions depends on several key factors, including (1) the estimate of the amount of oil discharged;⁷⁷ (2) a determination of whether the oil spill was a result of “gross negligence or willful misconduct;”⁷⁸ (3) a decision of whether the oil that was directly captured—approximately 820,000 barrels—by BP via a pipeline-to-surface-vessel system is subtracted from the total estimate; and (4) the application of the CWA factors that must be considered by the “EPA Administrator, the Secretary [of Homeland Security], or the court, as the case may be,” when determining penalty amounts.⁷⁹

The recent National Commission report included a range of \$4.5 billion to \$21.5 billion for possible CWA penalty revenue.⁸⁰ Providing a more precise estimate is impossible, due to the four factors identified above. Moreover, several Members of Congress (with support from the Administration)⁸¹ have offered legislation that would redirect any CWA *Deepwater Horizon* penalties to fund Gulf restoration efforts. The degree to which this goal is met will impact the level of funding in the OSLTF.

Claims Process

The OPA oil spill claims process has generated considerable interest in the aftermath of the *Deepwater Horizon* incident. BP is seeking to fulfill its OPA claims obligations through the Gulf Coast Claims Facility (GCCF, see text box below). Many have voiced concerns that claimants were/are not receiving adequate payments for their losses or receiving payments in a timely

⁷⁴ 26 U.S.C. § 9509(b)(8) states “any penalty paid pursuant to section 311 of the Federal Water Pollution Control Act, section 309(c) of such Act (as a result of violations of such section 311), the Deepwater Port Act of 1974, or section 207 of the Trans-Alaska Pipeline Authorization Act.”

⁷⁵ The relationship between trust funds, such as the OSLTF, and the general treasury is complex and beyond the scope of this report. For more information, see GAO, *Federal Trust and Other Earmarked Funds: Answers to Frequently Asked Questions*, January 2001.

⁷⁶ 33 U.S.C. § 1321(b)(7); see also 40 C.F.R. § 19.4, which increased various penalty amounts to account for inflation.

⁷⁷ See CRS Report R41531, *Deepwater Horizon Oil Spill: The Fate of the Oil*, by Jonathan L. Ramseur.

⁷⁸ Such a determination would increase the maximum per-barrel penalty from \$1,100/barrel to \$4,300/barrel.

⁷⁹ As listed in CWA § 311(b)(8), these include “the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.”

⁸⁰ See Commission Report, p. 211. The low end of this range is achieved by multiplying 4.1 million barrels (amount of discharge after removing the 17% directly captured by BP) by \$1,100/ barrel. The upper end of range is achieved by multiplying 4.9 million barrels (total discharge amount) by the maximum penalty of \$4,300/barrel, which presumes a determination of either gross negligence or willful misconduct.

⁸¹ See the Obama Administration’s *America’s Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill* (sometimes referred to as the “Mabus Report”), September 2010.

fashion.⁸² The 111th Congress held at least four hearings on compensation and claims process issues.⁸³ Some interest has remained in the 112th Congress.⁸⁴

Evaluating the validity of criticism expressed toward the GCCF presents challenges. A key reason for difficulty is the lack of information (i.e., transparency) available to assess the GCCF process. Indeed, some have pointed to the lack of transparency as a substantial concern.⁸⁵

The Gulf Coast Claims Facility

In the early weeks of the spill response, the issue of BP's liability limit received considerable attention. On many occasions BP executives stated that the company would pay all "legitimate claims,"⁸⁶ but some Members of Congress were skeptical about BP's application of the term "legitimate." For example, would legitimate claims entail only those within BP's liability limit? A complicating factor in the debate was the uncertainty regarding whether BP would be subject to a liability limit. At least in part to address this uncertainty,⁸⁷ BP agreed (after discussions with the Obama Administration) to establish a \$20 billion fund to compensate those affected by the spill.⁸⁸ The claims would be processed through an independent claims facility, administered by Kenneth Feinberg. This facility—the Gulf Coast Claims Facility (GCCF)—began accepting claims August 23, 2010. Prior to that time, BP processed and awarded claims. According to BP, the company awarded \$399 million in claims from May 3 until the August 23 transition to the GCCF.⁸⁹

To address transparency concerns, the GCCF offered its final claim payment methodology for public comment February 2, 2011. The final claim methodology includes several assumptions about the expected recovery of the Gulf ecosystem and economy. For example, the GCCF states that "it is anticipated that, for all businesses other than oyster harvesting, recovery will continue in 2011 with full recovery expected in 2012."⁹⁰ Final claim payments are based on this future losses assumption, which the GCCF states will be reassessed every four months and thus may decrease/increase over time. It is unclear how the future losses assumption was derived.⁹¹ The final methodology includes an expert opinion (as an appendix) which provides some basis for the

⁸² See, e.g., Letter from Thomas Perrelli (U.S. Associate Attorney General) to Kenneth Feinberg (GCCF Administrator), September 17, 2010; and a subsequent letter from Perrelli to Feinberg, February 4, 2011.

⁸³ E.g., House Committee on Small Business (June 30, 2010); House Committee on the Judiciary (July 21, 2010); Senate Committee on Homeland Security and Governmental Affairs (July 22, 2010); and the House Committee on Energy and Commerce (July 27, 2010).

⁸⁴ The Senate Ad Hoc Subcommittee on Disaster Recovery of the Senate Committee on Homeland Security and Governmental Affairs held a hearing January 27, 2011. See also CRS Report R41684, *Oil Spill Legislation in the 112th Congress*, by Jonathan L. Ramseur.

⁸⁵ See, e.g., Letter from Congressman Scalise to Kenneth Feinberg, January 24, 2011; and Thomas Perrelli (U.S. Associate Attorney General) to Kenneth Feinberg (GCCF Administrator), February 4, 2011.

⁸⁶ See, e.g., Testimony of Lamar McKay (Chairman & President, BP America) before the Senate Committee on Energy and Natural Resources, May 11, 2010.

⁸⁷ Other motivations may have played a role, but that discussion is beyond the scope of this report.

⁸⁸ White House Press Release, June 16, 2010, at <http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow>. See also Deepwater Horizon Oil Spill Trust Agreement between BP Exploration and Production, Inc. as grantor of the funds, and individual and corporate trustees, dated Aug. 6, 2010.

⁸⁹ BP Press Release (August 23, 2010), at <http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7064597>.

⁹⁰ The methodology is available at the GCCF website, <http://www.gulfcoastclaimsfacility.com>.

⁹¹ In a February 19, 2011 interview with CBS News, Kenneth Feinberg stated that the assumption was based on "gathering together all the best expertise," reiterating that his assumption is a "reasonable estimate."

assumption.⁹² Regardless of one’s perspective concerning this assumption, payment of final claims (that award claimants with expected losses in upcoming years) necessitates some projection of the timing of ecosystem recovery and associated economic losses.

The GCCF does provide some statistical data on its website,⁹³ allowing for a limited evaluation. For example, GCCF data indicate that (as of February 10, 2011) approximately 38% of submitted claims have been paid, with percentages varying by state (**Table 1**).

Table 1. Deepwater Horizon Oil Spill Claims Data by State
As of February 10, 2011—States Listed In Order of Claims Submitted

	Louisiana	Florida	Alabama	Mississippi	Texas	Other	Total
Number of claims submitted	270,000	210,938	94,180	69,506	12,015	23,561	680,200
Number of claims paid	89,767	94,035	37,521	22,014	3,237	9,040	255,614
Percent of submitted claims receiving some level of payment	33%	45%	40%	32%	27%	38%	38%
Amount paid	\$1,099,355,733	\$1,205,226,776	\$558,111,338	\$281,526,529	\$96,026,300	\$134,083,900	\$3,374,330,576

Source: Prepared by CRS with data from the GCCF website, at <http://www.gulfcoastclaimsfacility.com/>.

Notes: Above data reflect claims by state of residence (as opposed to state of loss). Above data only include claims paid through the GCCF, which began processing claims August 23, 2010. Prior to that date, BP paid approximately \$400 million in claims.

Some have argued that the percent of claims receiving some payment (38%) may be overstating the effectiveness of the GCCF to pay out claims.⁹⁴ The basis for this argument is that a substantial portion of the paid claims (86,835 or 34%) are so-called “quick payments.” These are expedited final claims (i.e., additional documentation not required) for individuals (\$5,000) and businesses (\$25,000) who received emergency advance payments (or would qualify for interim payments). If these expedited claims are not included in the data in **Table 1**, the percent of total paid claims decreases to 29%.

A key piece of information that emerged in a January 2011 Senate hearing raised the issue of whether BP (until August 23, 2010) and the GCCF (on and after August 23, 2010) have processed claims in accordance with procedures of the NPFC. During the hearing, the Director of the NPFC (Craig Bennett) stated that the NPFC has received approximately 500 claims related to the Gulf spill.⁹⁵ The Director stated that the NPFC has adjudicated 200 of these claims, all of which were denied. In the hearing this fact was presented as evidence that the GCCF was processing claims in

⁹² Dr. John W. (Wes) Tunnell, Jr., (Harte Research Institute for Gulf of Mexico Studies, and Texas A&M University-Corpus Christi), “An Expert Opinion of when the Gulf of Mexico will return to pre-spill harvest status following the BP Deepwater Horizon MC 252 oil spill,” January 31, 2011.

⁹³ <http://www.gulfcoastclaimsfacility.com>.

⁹⁴ See e.g., Senator Vitter’s remarks at a hearing in the Senate Ad Hoc Subcommittee on Disaster Recovery in the Senate Committee on Homeland Security and Governmental Affairs, January 27, 2011. Data related to this argument were published in a story by David Hammer in the *Times-Picayune* January 26, 2011.

⁹⁵ In accordance with OPA, these would all be claims already filed with either BP or the GCCF. The claims would have been denied or the claimants were not satisfied with the outcome.

accordance with NPFC protocols. However, the status of the claims that have not been adjudicated was not discussed. Without this information, an assessment of the BP/GCCF claims process and its consistency with the NPFC would be premature.

Although OPA does provide authority to the Comptroller General to audit claim activities of the NPFC,⁹⁶ OPA does not provide a federal agency with the authority to oversee or audit the claims activities of the responsible party. At least one proposal from the 111th Congress included provisions that would have addressed this issue.⁹⁷

A related concern shared by some Members of Congress is the time period embedded in the OPA claims process. Before seeking compensation from the OSLTF, claimants must first submit their claim to the responsible party. If the claim is not settled within 90 days, the claimant may either pursue the claim through the OSLTF or seek recourse through litigation. Many argued that the 90-day clock was too long for impacted parties to wait, and several proposals from the 111th Congress would have altered the waiting period (many shortening the clock to 45 days).⁹⁸ At least one proposal in the 112th Congress would amend this provision.⁹⁹

During the GCCF claims process, several stakeholders have criticized the “proximate cause” language of various GCCF protocols, arguing that such provisions are not consistent with OPA and its claims process.¹⁰⁰ The issue has evolved, with the GCCF Administrator addressing the concerns to some degree. The GCCF’s August 2010 Emergency Advance Payment Protocol text read:

The GCCF will only pay for harm or damage that is proximately caused by the Spill. The GCCF’s causation determinations of OPA claims will be guided by OPA and federal law interpreting OPA and the proximate cause doctrine. Determinations of non-OPA claims will be guided by applicable law. The GCCF will take into account, among other things, geographic proximity, nature of industry, and dependence upon injured natural resources.¹⁰¹

In October 2010, Administrator Feinberg announced the GCCF was removing the geographic proximity text (referred to as the “geographic test”) for claim eligibility that is part of the above protocol. The interim and final claim protocol now reads:

The GCCF will only pay for harm or damage that is proximately caused by the Spill. The GCCF’s causation determinations of OPA claims will be guided by OPA and federal law interpreting OPA. Determinations of physical injury and death claims will be guided by applicable law.

⁹⁶ OPA § 1012 (33 U.S.C. § 2712).

⁹⁷ See e.g., H.R. 6016 (Brady) and H.R. 3534 (“CLEAR Act,” Section 707). Both bills passed the House in 2010.

⁹⁸ Bills that passed the House with a 45-day clock include H.R. 5629 (Oberstar) and H.R. 3534 (“CLEAR Act,” Section 722). S. 3663 (Reid) would have shortened the wait-period to 30 days.

⁹⁹ CRS Report R41684, *Oil Spill Legislation in the 112th Congress*, by Jonathan L. Ramseur.

¹⁰⁰ See e.g., Letter from Bill McCollum (Attorney General of Florida) to Kenneth Feinberg (GCCF Administrator), August 20, 2010. See also Letter from Thomas Perrelli (Associate Attorney General) to Kenneth Feinberg (GCCF Administrator), February 4, 2011.

¹⁰¹ GCCF, “Protocol for Emergency Advance Payments” (August 23, 2010).

The relevant OPA provision does not specifically address geographic proximity, but states that “each responsible party for a vessel or a facility from which oil is discharged, or which poses the threat of a discharge of oil is liable for the removal costs and damages ... that *result from* such an incident.”¹⁰² Moreover, neither the implementing regulations (33 C.F.R. Part 136) nor OSLTF claim guidance documents indicates that proximate cause is a consideration. Of course, as a practical matter the OSLTF must apply *some* cut-off akin to proximate cause so that injuries far down the causal chain of events following a spill are not compensated.

On this matter, the Presidential Deepwater Commission concluded:

There is no easy legal answer to the question of how closely linked those lost profits or earnings must be to the spill before they should be deemed compensable. The search for such a rational endpoint for liability has already stymied the Gulf Coast Claims Facility in its processing of claims.¹⁰³

Potential Options for Policymakers

The current combination of liability limits and \$1 billion per-incident cap is not sufficient to withstand a spill with damages/costs that exceed a responsible party’s liability limit (assuming it would apply) by \$1 billion. Even if the per-incident cap were increased, the current (and projected) level of funds in the OSLTF may not be sufficient to address costs from a catastrophic spill.

The options available to address these issues depend upon on the overall objective of Congress. One objective—which has been expressed by many in and outside Congress—is to provide full restoration and timely compensation for the impacts from a catastrophic spill, without directly burdening the general taxpayers. In the context of this objective, “timely” compensation means that an injured party would have access to compensation without going through a court system, which would likely require more of a claimant’s time and resources. With that objective in mind, several options are discussed below.

Potential options for Congress include (but are not limited to) the following, many of which were proposed in various legislation in the 111th Congress and some of which are included in proposals in the 112th Congress:¹⁰⁴

- Increase the liability limits, so that the responsible party would be required to pay a greater portion of the total spill cost before accessing trust fund dollars. Congress may consider different limits for different offshore activities. Precedent exists in OPA for setting different liability limits to account for different oil spill risks: The liability limit for single-hulled tank vessels is approximately 50% higher than for double-hulled vessels. In the outer continental shelf (OCS) oil exploration and development sector, policymakers may consider a wide array of factors that could influence (1) the risk of an oil spill occurring and (2) the risk

¹⁰² OPA § 1002; 33 U.S.C. § 2702 (emphasis added).

¹⁰³ National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, Report to the President, January 2011, p. 186.

¹⁰⁴ CRS Report R41684, *Oil Spill Legislation in the 112th Congress*, by Jonathan L. Ramseur.

that the oil spill could not be contained before impacting sensitive ecosystems and/or affecting large populations. Policymakers could then structure the liability limit framework based on certain behavior, the use of specific technologies, and/or the location of the activity. However, CRS is not aware of a comprehensive risk assessment of individual factors (or their combinations) regarding OCS drilling activities. A rigorous analysis of possible risk factors could be instructive to policymakers.¹⁰⁵

- Increase the required financial responsibility coverage, either matching the increased liability limit (as OPA requires for vessels) or setting the coverage at a level based on other factors, such as capacity in the insurance market. Congress could increase coverage amounts through a staggered approach, to allow more time for the market to adjust.
- Remove or raise the per-incident cap on the trust fund. If removed entirely, the fund could be at risk of depletion with one incident.
- Increase the per-barrel oil tax to more quickly raise the fund's balance.
- Authorize "repayable advances" to be made (via the appropriations process) to the trust fund, so that the fund would have the resources to carry out its functions (cleanup efforts, claim awards). Up until 1995, the fund had this authority, in order to ensure it could respond to a major spill before the fund had an opportunity to grow (via the per-barrel tax).
- Require industry to establish a pool of funds (of significant magnitude) that would be available to finance response actions, injured party compensation, or both. Such a fund could either replace or complement the existing OPA system of individual liability and support from the OSLTF. This would be analogous to the framework for the nuclear power industry created by the Price-Anderson Act (primarily Section 170 of the Atomic Energy Act of 1954, 42 U.S.C. § 2210).¹⁰⁶

Another objective might be to maintain the existing system, which may be sufficient to address all but the most extreme scenarios. Catastrophic spills in U.S. waters have historically been rare. Some may argue that establishing a system that can withstand a catastrophic event would impose costs and yield consequences that would not justify the (expected) ability to address a catastrophic event.

Interest in issues raised by the 2010 Gulf oil spill has waned in recent months. However, Members in the 112th Congress have introduced multiple proposals, many of which would address liability and compensation framework issues.¹⁰⁷ Legislative activity in the 112th Congress may be influenced by several factors, including (but not limited to) assessments of conditions in

¹⁰⁵ According to a recent Resources for the Future discussion paper, "the literature on oil offshore exploration and production, and fixed platforms specifically, remains relatively underdeveloped." The same paper included a "preliminary" analysis and found (among other things) "for an average platform (i.e., a platform with the sample's average age, annual production, number of producing wells, and other characteristics), each 100 feet of added depth increases the probability of a company-reported incident by 8.5 percent." See Lucija Muehlenbachs *et al.*, "Preliminary Empirical Assessment of Offshore Production Platforms in the Gulf of Mexico," Resources for the Future Discussion Paper, January 2011.

¹⁰⁶ See CRS Report RL33558, *Nuclear Energy Policy*, by Mark Holt.

¹⁰⁷ CRS Report R41684, *Oil Spill Legislation in the 112th Congress*, by Jonathan L. Ramseur.

the Gulf region, reports from other independent inquiries,¹⁰⁸ further information regarding the claims process, and results from the natural resource damage assessment process. Moreover, it may be worth noting that passage of the Oil Pollution Act of 1990 occurred 18 months after the *Exxon Valdez* spill.

¹⁰⁸ For example, the U.S. Coast Guard and the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEM) are conducting a joint investigation into the *Deepwater Horizon* incident to develop conclusions and recommendations as they relate to the explosion and loss of life on April 20, 2010. The final report is due no later than July 27, 2011. For more details, see <http://www.deepwaterinvestigation.com>.

Appendix. Liability Tables—Historical Perspectives

Table A-1. Evolution of the Scope of Oil Spill Liability

Pre-OPA Clean Water Act ^a	Pre-OPA Outer Continental Shelf Lands Act Amendments ^b	Pre-OPA Deepwater Port Act ^c	Pre-OPA Trans-Alaska Pipeline Authorization Act ^d	OPA 1990
<p>Liability applied to vessels and facilities that discharge oil into or on U.S. navigable waters, adjoining shorelines, and other specified areas.</p> <p>Applicable parties liable for removal costs and natural resource damages.^e</p>	<p>Liability applied to offshore facilities and vessels transporting oil from offshore facilities.</p> <p>Applicable parties liable for removal costs, natural resource damages, and economic damages, including (1) real or personal property; (2) loss of use of real or personal property; (3) subsistence use; (4) profits and earning capacity; and (5) tax revenue.</p>	<p>Liability applied to deepwater ports and vessels operating in their vicinity. Applicable parties liable for cleanup costs and for damages that result from a discharge of oil. “Damages” is defined to as “all damages (except cleanup costs) suffered by any person, or involving real or personal property, the natural resources of the marine environment, or the coastal environment of any nation, including damages claimed without regard to ownership of any affected lands, structures, fish, wildlife, or biotic or natural resources.”</p>	<p>Liability applied to the holder of a pipeline right-of-way and vessels transporting oil from the trans-Alaska pipeline. The vessel was liable for “all damages, including clean-up costs.” The right-of-way holder was “liable to all damaged parties, public or private.”</p>	<p>Liability applies to vessels and facilities that discharge oil into or upon navigable waters or adjoining shorelines or the exclusive economic zone.</p> <p>Applicable parties liable for removal costs, natural resource damages (and their assessments), and economic damages, including (1) real or personal property; (2) subsistence use; (3) public revenues; (4) profits and earning capacity; and (5) public services.</p>

Source: Prepared by CRS.

Notes:

- a. The Clean Water Act contains liability limits for vessels and facilities in §311(f) (33 U.S.C. §1321(f) that were in place before OPA’s enactment in 1990. These provisions remain. However, OPA §2002 states that the CWA provisions do not apply to incidents that fall under OPA’s liability.
- b. Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA, 43 U.S.C. § 1801 *et seq*). OPA Section 2003 repealed the liability provisions in the OCSLAA (43 U.S.C. §§1811-1824).
- c. Deepwater Port Act of 1974 (DWPA, 33 U.S.C. § 1501 *et seq*). OPA Section 2003 repealed the liability provisions in the Deepwater Port Act (33 U.S.C. §1517).
- d. Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA, 43 U.S.C. § 1651). OPA §§ 8101-8102 amended provisions of TAPAA, repealing 43 U.S.C. §1653(c), which applied to vessels transporting oil from the trans-Alaska pipeline.
- e. 33 U.S.C. §1321(f)(4) states that removal costs include the costs of restoration or replacement of natural resources damaged by an oil spill.

Table A-2. Evolution of Oil Spill Liability Limits

	Pre-OPA CWA ^a	Other Pre-OPA Statutes ^b	OPA 1990	Current Limit
Tank Vessels/Barges				
-Single-hull	The greater of: \$125/gross ton or \$125,000 for inland oil barges; \$150/gross ton or \$250,000 for other tank vessels/barges	OCSLAA: the greater of \$300/gross ton or \$250,000 ^c DWPA: the lesser of \$150/gross ton or \$20 million TAPAA: \$14 million	The greater of \$1,200/gross ton or (1) \$10 million if vessel is more than or equal to 3,000 gross tons; (2) \$2 million if vessel is less than 3,000 gross tons	The greater of \$3,200/gross ton or (1) ~\$23.5 million if vessel is more than or equal to 3,000 gross tons (2) ~\$6.4 million if vessel is less than 3,000 gross tons. ^d
-Double-hull	Same as single-hull	Same as single-hull	Same as single-hull	The greater of \$2,000/gross ton or (1) ~\$17.1 million if vessel is more than or equal to 3,000 gross tons (2) ~\$4.3 million if vessel is less than 3,000 gross tons. ^e
Non-Tank Vessels	\$150/gross ton	NA	The greater of \$600/gross ton or \$500,000	The greater of \$1,000/gross ton or \$854,000. ^f
Offshore Facilities	\$50 million	OCSLAA: \$35 million for natural resource damages and covered economic damages; removal costs not limited.	\$75 million for natural resource damages and covered economic damages; <i>removal costs not limited</i>	Same as OPA 1990 ^g
Onshore Facilities (includes pipelines)	\$50 million	TAPAA: Trans-Alaska pipeline right-of-way holder liable for “total removal of the pollutant.” Liability limited to \$50 million for other damages.	\$350 million for removal costs, natural resource damages, and covered economic damages; allows President to decrease limit through regulations, but this authority has not been exercised.	Same as OPA 1990 ^h
Deepwater Ports Louisiana Offshore Oil Port (LOOP) ⁱ	\$50 million ⁱ	DWPA: \$50 million	\$350 million for removal costs, natural resource damages, and covered economic damages, but allowed the Secretary (of the department in which the Coast Guard operates) ^k to adjust this limit to not less than \$50 million. In 1995, the Department of Transportation set the liability limit for the LOOP at \$62 million. ^l	\$87.6 million for the LOOP. ^m

Source: Prepared by CRS.

Notes:

- a. The Clean Water Act contains liability limits for vessels and facilities in §311(f) (33 U.S.C. §1321(f)). These were in place before OPA's enactment in 1990 and were not repealed by OPA. However, OPA §2002 states that the CWA provisions do not apply to incidents that fall under OPA's liability.
- b. In addition to the CWA, three other statutes had liability provisions that applied to some oil spills before OPA's passage: the Trans-Alaska Pipeline Authorization Act of 1973 (TAPAA, 43 U.S.C. § 1651), the Deepwater Port Act of 1974 (DPA, 33 U.S.C. § 1501 *et seq*), and the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLAA, 43 U.S.C. § 1801 *et seq*). These statutes were limited to covering special spills related to specific oil spill events. OPA Section 2003 repealed the liability provisions in the Deepwater Port Act (33 U.S.C. §1517) and the OCSLAA (43 U.S.C. §§1811-1824). OPA §§ 8101-8102 amended provisions of TAPAA, repealing 43 U.S.C. §1653(c), which applied to vessels transporting oil from the trans-Alaska pipeline.
- c. OCSLAA §1814 (repealed by OPA §2003).
- d. The Coast Guard and Maritime Transportation Act of 2006 (P.L. 109-241) increased limits to \$1,900/gross ton for double-hulled vessels and \$3,000/gross ton for single-hulled vessels. The Coast Guard made further adjustments (pursuant to the consumer price index provision in OPA §1004(d)(4)) in 2009: The limits are codified in 33 CFR §138.230.
- e. 33 CFR §138.230.
- f. 33 CFR §138.230.
- g. Although OPA §1004(d)(4) requires the President to issue regulations to increase the liability limit (per the consumer price index), the offshore facility limit has remained constant.
- h. Although OPA §1004(d)(4) requires the President to issue regulations to increase the liability limit (per the consumer price index), the onshore facility limit has remained constant.
- i. There is only one deepwater port for oil in U.S. coastal waters: the Louisiana Offshore Oil Port (LOOP). According to the U.S. Department of Transportation's Maritime Administration, three other deepwater ports are in operation that accept liquefied natural gas. See <http://www.marad.dot.gov>.
- j. Deepwater ports are not specifically identified in CWA §311(f), but would likely meet the definition of offshore facility.
- k. The Homeland Security Act of 2002 (P.L. 107-296) transferred the Coast Guard to the Department of Homeland Security. The Coast Guard was formerly located within the Department of Transportation.
- l. 60 *Federal Register* 39849, August 4, 1995.
- m. 33 CFR §138.230(b).

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