
Under OPA 90, the responsible party for an offshore facility from which oil is discharged into or upon U.S. navigable waters, or the exclusive economic zone, is liable for the removal costs and damages resulting from such incident up its limits of liability. Responsible parties for an offshore facility can include the lessee, owner, holder of operating rights, the designated operator or agent of the lessee(s) for areas leased on the Outer Continental Shelf (“OCS”) under the Outer Continental Shelf Lands Act, or a state lessee granted a right-of-use on the OCS. OPA 90 limits this liability, however, with certain exceptions, to “the total of all removal costs plus $75,000,000.” The $75 million liability limit only applies to OPA 90 damages though the Oil Spill Liability Trust Fund (“OSLTF”) may compensate claimants for damages that exceed this liability limit.

Since OPA was enacted, it has contained a provision that requires the President to adjust the limits of liability “not less than every three years,” by regulation, to reflect increases in the Consumer Price Index (“CPI”) and ensure that the real value of the OPA 90 limits were not declining over time and thereby shifting the financial risks of an oil spill to the OSLTF. Pursuant to Executive Order 12777, as amended, authority to adjust the liability limits for inflation was delegated to and divided between several federal agencies with the relevant jurisdiction, including the Secretary of the Department of the Interior (“DOI”), which is responsible in part for the regulation of offshore facilities, including associated pipelines, other than deepwater ports. In dividing responsibility among federal agencies, Executive Order 12777 also delegated authority for adjusting liability limits for inflation to the U.S. Coast Guard for vessels and deepwater ports (including associated pipelines), as well as onshore facilities.
On July 1, 2009, the U.S. Coast Guard, in consultation with the DOI, published an Interim Final Rule with Request for Comments (“IFR”), which implemented the first set of regulatory adjustments to the limits of liability for vessels and deepwater ports, and established the methodology the U.S. Coast Guard would use to adjust the liability limits in the future.

**ANALYSIS OF THE PROPOSED RULE**

BOEM originally indicated that only a 30-day comment period would be needed as it did not anticipate receiving adverse comments on the rulemaking, but later extended the deadline an additional 30-days (to its current deadline of April 25), reflecting the unanticipated volume of public comments received.

Following publication of the Notice, BOEM Director Tommy Beaudreau commented that “[t]his adjustment helps to preserve the deterrent effect and the ‘polluter pays’ principle embodied in [OPA 90].” The administrative adjustment of the limit of liability keeps in line with directives contained in the language of OPA 90. Although regulatory adjustments were implemented in 2009 for vessels and deepwater ports, BOEM’s proposed liability limit increase will represent the first liability limit increase for offshore facilities since set at the current level of $75 Million in 1990. The BOEM proposal will use those measurements previously established by the U.S. Coast Guard for the current increase and the same metrics for increasing the liability limit in the future.

The proposed increase reflects a 78.2% increase is the largest increase allowed by regulatory action under OPA 90 and the proposed methodology would provide BOEM with the flexibility to further increase the liability limits as the CPI increases. It is important to note that the proposed rulemaking addresses only limits of liability for offshore facilities (other than deepwater ports) and does not affect the level of oil spill financial responsibility required by vessel owners and operators.

This proposed increase comes three years after the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling recommended to Congress that a significant raise in the liability cap was needed. No legislative action has been taken on the recommendation.

**CONCLUSIONS AND RECOMMENDATIONS**

Stakeholders involved in OCS activities should review the proposal to raise the liability limit for offshore facilities, evaluate potential impacts on current operations, and consider providing comments with regard to this proposed increase in liability, as well as the process for future potential increases.

If you have questions or desire assistance, please contact:

Jonathan Waldron  
202.772.5964  
Waldron@BlankRome.com

Jeanne M. Grasso  
202.772.5927  
Grasso@BlankRome.com

Michael K. Clare  
202.772.5842  
MClare@BlankRome.com

Patricia M. O’Neill  
202.772.5825  
PONeill@BlankRome.com

www.BlankRome.com/Maritime