REPORT

To: Jay Smith
From: Jonathan Gutoff
Date: October 17, 2017
Re: Potential Unlimited Liability for Violation of the Coast Guard's SMFF Regulations

I. INTRODUCTION

This is the independent Report of Jonathan Gutoff, Professor of Law at Roger Williams University School of Law, on the potential liability of vessel owners under the Oil Pollution Act of 1990, PL 101-380, 104 Stat. 484, *codified as amended, in part, at* 33 U.S.C. §§ 2701-2720 ("OPA 90") as a result of the use of contracts that rely on the services of subcontractors who promise their resources on an "as available" basis ("'as available' contracts"), to satisfy the requirements of the Coast Guard's salvage and marine firefighting regulations, *see* 33 C.F.R. pt. 155, in particular 33 C.F.R. 155.4010(c) (the "Regulation").

As detailed in an accompanying Report on "'As available' contracts and the SMFF Regulations," the use by parties, including vessel owners, required to have a vessel response plan, of "as available" contracts, or contracts relying on "as available" sub-contracts, for salvage and marine firefighting services, fails to satisfy OPA 90 and the Regulation's requirement that a plan holder "ensure" by contract or other approved means the availability of private personnel and equipment necessary to respond to the maximum extent practicable a worse case discharge (including a discharge resulting from fire or explosion). Further, as discussed in this report, the failure to launch an adequate response in and of itself is evidence of noncompliance, the outcome of which is exposure of the vessel owner to unlimited liability.

OPA 90 limits the liability of responsible parties, which includes vessel owners and operators, *see* 33 U.S.C. § 2701(32), for each incident of oil pollution based on the tonnage and

type of vessel involved in causing the discharge of oil. *See* 33 U.S.C. 2704(a). However, where an incident of oil pollution was proximately caused "the violation of an applicable Federal safety, construction, or operating regulation by, the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party" then the limits on liability do not apply. 33 U.S.C. § 2704(c)(1)(B).[1]

Accordingly, where a violation of the Regulation proximately results in the discharge of oil, as would happen in a case where a the owner of vessel filled with oil either as cargo or bunkers has failed to "ensure" an adequate response, such as the failure to ensure the timely arrival of adequate firefighting resources, and that failure results in the discharge of oil from the vessel as a result of such inadequate resources or resources not ensured by contract to be available to respond, then the vessel owner would face unlimited liability for the full extent of damages available under OPA 90.

This report reviews the damages available under OPA 90; the limitation of liability under OPA 90; how the limitations of OPA90 may be asserted; and three recent cases in which vessel owners were unable to take advantage of those limits as a result of the violation of an applicable federal safety regulation. These cases illustrate how the violation of safety regulations will make vessel owners, and their insurers, susceptible to unlimited liability.

II. DAMAGES UNDER OPA 90

[1] Courts have held that the language in 33 U.S.C. § 2702(a), imposing liability on responsible parties for various types of damage, "[n]otwithstanding any other provision or law," has removed the liability for damages under OPA 90 from the protections of the Limitation of Liability Act, 46 U.S.C. §§ 30501-30512. *See, e.g., In re Oil Spill by Oil Rig Horizon in Gulf of Mexico, on April 20, 2010,* 21 F.Supp.3d 657, 753 text at n.280 (E.D. La. 2014) (citing *In re MetLife Capital Corp.,* 132 F.3d 818, 821–22 (1st Cir.1997) (explaining that "a plain reading of the subsection [2702(a)] suggests that the OPA repealed the Limitation Act with respect to removal cost and damages claims against responsible parties").

Under OPA 90 responsible parties are subject to a huge potential liability, including: the removal cost incurred by federal and State governments and Indian tribes, 33 U.S.C § 2702(b)(1)(a); damages to natural resources suffered by the federal government, States, and Indian tribes, *id.* § 2702(b)(2)(A); damages to real and personal property, *id.* § 2702(b)(2)(B); damages to subsistence users of natural resources, *id*. § 2702(b)(2)(C); lost revenue by the federal government, States, and Indian tribes, *id.* § 2702(b)(2)(D); damages resulting from lost profits and lost earning capacity by "any claimant" including individuals and businesses, *id.* § 2702(b)(2)(E); and damages resulting from the need to provide increased public services by a State, county or municipality. *Id.* § 2702(b)(2)(F). As noted above, *supra* note 1, the liability under OPA 90 is not subject to the Limitation of Liability Act. However, OPA 90 contains its own limitation provisions, which may serve to protect vessel owners and other "responsible parties," but which are subject to several exceptions, including the violation of federal safety regulations.

III. LIMITATION UNDER OPA 90

The limitation provisions of OPA 90 are set out in 33 U.S.C. § 2704. OPA 90 grants responsible parties limitation of liability to an amount based on the whether a vessel is a tank vessel or not, if a tank vessel whether it is double-hulled or not, and the gross tonnage of the vessel. *See id*. § 2704(a)(1), (2). However, under the same section, there are exceptions to limitation for the acts and failures or refusal to act of a responsible party. *See id.* § 2704(c)(1), (2). Notably for the purposes of this Report, OPA 90's limitation provisions do not apply if a release of oil was

> proximately caused by … the violation of an applicable Federal safety, construction, or operating regulation by the responsible party, an agent or

> employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party….

Id. § 2704(c)(1)(B).

IV. ASSERTING LIMITATION UNDER OPA 90

A. Reimbursement from the NPFC

When a responsible party has paid more in clean up and restoration than its limit of liability it may seek reimbursement from the National Pollution Funds Center (the "NPFC"). 33 U.S.C. 2708 In such a case the responsible party bears the burden of demonstrating that it was entitled to limit its liability under 33 U.S.C. § 2704, *see id.* § 2708(a)(2) ("[t]he responsible party for a vessel … may assert a claim for removal costs and damages … *only if the responsible party demonstrates that* -- … the responsible party is entitled to a limitation of liability under § 2704 of this title")(emphasis added). The NPFC is not bound by findings of a Coast Guard hearing on the incident giving rise to the responsible party's liability. As the District Court for the District of Columbia has explained:

> [I]t is nonetheless clear that the NPFC [is] under no obligation to reach the same conclusions as reflected in [a] MICR [Marine Casualty Investigative Report]. As the NPFC correctly explained in its final decision, ''the NPFC is not bound by such reports of investigation,'' and ''can reach not only different facts but also different opinions or conclusions than the opinions and conclusions in the MCIR.''
>
> …The NPFC was free to conduct a de novo review of the evidence and to reach its own conclusions.

Bean Dredging, LLC v. U.S., 699 F.Supp.2d 118, 129 (D.D.C. 2010) (citations omitted)

Thus, even were a Coast Guard hearing to absolve a vessel owner of all responsibility and find no regulatory violation, the NPFC could still conclude that a vessel owner was not entitled to limit its liability.

B. A Defense in Civil Actions

The limitation of liability provisions may also be used as an affirmative defense, in civil actions under OPA 90. The party seeking to assert an affirmative defense bears the burden of proof, *See, e.g., Pennsylvania v. Lockheed Martin Corp.,* 684 F.Supp.2d 564 (M.D. Pa. 2010) (explaining that an where a defendant was relying on exception to liability under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 the exception was an affirmative defense and "the party claiming the defense not only has the initial burden of proof, but also the ultimate burden of proving the applicability of the exception.") (Citations omitted). So, a vessel owner attempting to seek the benefit of OPA 90's limitation provisions would bear the burden, as it would before the NPFC, that it is entitled to limit its liability.

Also, there is no ability to force all plaintiffs into a single civil action in a *concursus* to allocate a single limitation fund as with under the Limitation of Liability Act and Supplemental Rules for Certain Admiralty or Maritime Claims and Forfeiture Actions, Rule F. *See Bouchard Transp. Co., Inc. v. Updegraff,* 134 F.3d 1344, 1350-51 (11th Cir. 1998); *Complaint of MetLife,* 132 F.3d at 822-24. Accordingly, a vessel owner could face multiple actions asserting claims exceeding the limits of liability and would need fully to litigate the issue in each action. As in claims brought to the NPFC, a finding by a Coast Guard Hearing that there was no violation of a federal safety regulation would not be binding in individual civil actions. *See* 46 U.S.C. § 6308(a) (barring Coast Guard marine casualty reports from use in a civil action).

V. RECENT INSTANCES WHERE THE VIOLATION OF A FEDERAL SAFTY REGULATION RESULTED IN UNLIMITED LIABILITY

This section provides a brief review of recent cases where a court has either refused to allow a party in civil action to maintain the defense of limited liability under 33 U.S.C. § 2702, or in an action for judicial review of an administrative decision, has upheld the decision of the NPFC to deny a claim by a responsible party for limitation of liability, based on the responsible party's violation of a federal safety regulation.

- **In Re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010, 21 F.Supp.3d 657 (E.D. La. 2014).** The incident famously involved the fire on and blow out from a mobile rig in the Gulf of Mexico. Reversing an earlier ruling in the same action, the court concluded that the violation of 30 C.F.R. § 250.420(a)(2), which in 2010 had provided "You must case and cement all wells.... Your casing and cementing programs must: ... Prevent the direct or indirect release of fluids from any stratum through the wellbore into offshore waters," which was a proximate cause of the release of oil giving rise to the action, served to remove OPA 90's limit of liability from BP Exploration and Production, Inc. *See* 21 F.Supp.3d at 754-55.

- ***Bean Dredging, LLC v. U.S.*, 777 F.Supp.2d 73 (D.D.C. 2011).** The incident involved the release of fuel oil from a fracture in a dredging vessel's fuel tank, which had been caused by the one of the vessel's dredge heads hitting the fuel tank during a dredging operation in Humboldt Bay, California. The court upheld the NPFC's denial of limitation based on a violation of 46 C.F.R. § 44.340(a)(1), which prohibited the operation of the vessel in seas greater than 10 feet.

- **Water Quality Ins. Syndicate v. U.S., 632 F.Supp.2d 108 (D. Mass. 2009).** The incident involved the capsize and sinking of a tug, containing fuel oil and other pollutants, in Massachusetts Bay. The court upheld the decision of the NPFC not to apply OPA 90's limits on liability. The NPFC had concluded that the master of the tug had violated 46 C.F.R. § 15.405, which requires ship personnel to be familiar with the characteristics of the vessel prior to assuming duties. Also, the NPFC had found that the master had been grossly negligent,[2] in part as a result of the master's violation of 46 C.F.R. § 15.705(d), which permits an individual operating a towing vessel "to work not more than 12 hours in a consecutive 24-hour period except in an emergency." The court based its ruling on the NPFC's finding of gross negligence and did not consider the violation of 46 C.F.R. § 14.405 separately.

VI. CONCLUSION

The violation of a federal safety regulation can expose, and has exposed, vessel operators

[2] As does the violation of a federal safety regulation, gross negligence removes OPA 90's limitation of liability. 33 U.S.C. 2704(c)(1)(A).

to unlimited liability under OPA 90. Failure of vessel owners to "ensure" an adequate response to on-board fires, as required by the regulation, threatens them, and their insurers, with unlimited liability.