



GLOBAL IMPACT



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Dear Friends:

Oil spill prevention and response are in the news again.

A bipartisan bill currently before Congress would increase the limits on liability previously set for responsible vessels by the Oil Pollution Act of 1990. Inspired by last fall's spill on the Delaware River, the bill has a good chance of passage (p. 1-2).

Under an unrelated law passed last year, nontank vessels of 400 gross tons or more must submit spill response plans to the Coast Guard for approval. The August 8 deadline is fast approaching (p. 3).

Finally, as we head into the summer boating season, recreational boaters are cautioned not to overlook the dangers and liabilities present when passengers drink on board (p. 4).

We hope you enjoy this issue and, as always, we welcome your comments.

Sincerely,

John A. Rowney
Division President
Ocean Marine Division

A CRACK IN OPA'S HULL? OIL SPILL LIABILITIES MAY FINALLY BE ON THE RISE

Sixteen years after the *Exxon Valdez* disaster, another high-profile oil spill in U.S. waters may again prompt higher limits on liability for responsible parties—if a bipartisan bill currently in Congress has its way.

The 1989 spill that wreaked havoc on the Alaskan coast brought about the Oil Pollution Act of 1990 (OPA), which imposed stiffer liabilities and generally improved the federal government's ability to respond to spills. But the limits on liability put in place back then are now much too low, especially for aging single-hull tankers still in service, some lawmakers say.

Throwing light on the issue is the continuing cleanup of a spill that occurred on the Delaware River last November, when the Greek-owned *Athos I* released 265,000 gallons of oil after underwater debris ripped two holes in her single hull. The OPA formula capped liability for the accident at \$45.5 million, although cleanup costs to date have exceeded \$90 million. That fact alone has prodded many angry members of Congress into action.

In December, New Jersey Senators Frank Lautenberg and Jon Corzine, both democrats, introduced a bill that sought to accelerate the industry's conversion to double-hull tankers by phasing out liability caps for single-hull vessels over six years. "The law on the books is not doing enough to protect the environment and local



businesses when an oil spill occurs," said Lautenberg, an original co-sponsor of the OPA. His 2004 bill, as well as its companion bill in the House, died quickly with the end of the 108th Congress. But the spirit behind both bills carried over to the new year.

RESPONSIBILITY AND RISK

Following hearings in January about the *Athos I* incident, Rep. Frank LoBiondo (R-N.J.) and four co-sponsors—two from each side of the aisle—picked up the cause and introduced the Delaware River Protection Act (DRPA). "This bipartisan legislation will go a long way towards preventing future oil spills not only in the Delaware River and Bay, but across the nation," LoBiondo said in March.

While not as aggressive as the earlier Lautenberg bill where limits on liability are concerned, the new bill would make dramatic increases in limits; and unlike its predecessor, this bill appears to have legs. As of mid-May, it had passed out of the

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House Committee on Transportation and Infrastructure with “strong support” and was on its way to full consideration by the House, a spokesman in LoBiondo’s office told *Global Impact*.

Among other provisions, the DRPA would boost liability limits beginning this year, with additional increases in 2006 and 2007. Although any vessel responsible for a spill



would see an increase, single-hull vessels would bear the greatest cost. For a tanker larger than 3,000 gross tons, for example, the OPA currently limits liability to \$1,200 per gross ton or \$10 million, whichever is greater. The DRPA would

change the limit for single-hull vessels to the greater of \$1,550 per gross ton or \$14 million this year, then balloon to \$2,250 per gross ton by 2007—an 87 percent increase over OPA limits. The increases for double-hull vessels, on the other hand, would be less than half of those for single-hull vessels.

As before, the bill would waive all limits if the vessel owner or operator is found to be negligent or in violation of the law at the time of the accident. Also, it would not preempt the existing right of states to establish additional spill liabilities.

For the years beyond 2007, the bill would reiterate a long-ignored OPA provision that allows the president to adjust limits on liability every three years based on significant increases in the Consumer Price Index. Such an increase has never occurred, despite a 47 percent rise in the CPI since the OPA’s passage. That fact alone justifies at least some inflation in liability, advocates say.

But will Congress and an industry-friendly Bush administration ultimately stomach such sharp increases? The answer is a qualified yes. The 16-year-old limits on liability may have finally reached their breaking point, particularly in a public mind shaped by recent scenes in the befouled Delaware. If Congress can remain focused on the bipartisan LoBiondo bill amid the ongoing energy and Social Security debates, passage is possible, if not likely.

TRUST FUND IN TROUBLE

Weighing on the minds of some lawmakers will be the question of financial responsibility for the next catastrophic spill. That’s because the coffers that pay for cleanup beyond a responsible party’s liability are running out of money. The Oil Spill Liability Trust Fund, set up under the OPA, collected most of its revenue prior to 1995 from a since-discontinued fee on imported and domestic oil. The Fund has provided money for hundreds of cleanup operations around the country since the early 1990s, particularly when the responsible party is unknown or when damages exceed a vessel’s liability, as is the case with the *Athos I* spill. But the Coast Guard has said the Trust Fund may be depleted by 2010.

Without higher liability limits for industry and a solvent Trust Fund, the federal government might be stuck with a hefty out-of-pocket tab following the next major disaster.

Also working in the DRPA bill’s favor is a dose of preventive medicine. First, it would require mariners to notify the Coast Guard immediately following the release from a vessel of any object that creates an obstruction in navigable waters. (A large section of iron pump housing, completely hidden and previously uncharted, likely caused the breaches in the *Athos I* hull.)

Second, the bill would charge the Army Corps of Engineers with detecting submerged obstructions in U.S. waterways using advanced



technologies, and would appropriate millions of dollars over the next three fiscal years for cleaning up the Delaware.

But the increased limits on liability would be the most significant provision if the bill were to pass, especially if the increases succeed in pushing the industry toward double hulls. The OPA currently requires all tankers over 5,000 gross tons to have double hulls by 2010, with exceptions for some vessels until 2015. Nevertheless, many oil shippers have yet to update their fleet. By the end of this year, they may have one more reason to do so. ■

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NONTANK VESSELS MUST ALSO BE SPILL-READY

Before long, tankers won't be the only vessels with federally approved plans for responding to an oil spill. Under a new law, nontank vessels of 400 GRT or greater must develop and submit plans for action following a discharge, or the threat of a discharge—and the clock is ticking.

By August 8 of this year, owners and operators of nontank vessels must submit such plans to the Coast Guard as



directed by the Coast Guard and Marine Transportation Act of 2004. The new law defines "nontank vessel" as a "self-propelled vessel of 400 gross tons or greater, other than a tank vessel, that carries oil of any kind as fuel for main propulsion and that is a vessel of the United States or that

operates on the navigable waters of the United States."

Hurrying to honor the August date are not only the vessels but also the Coast Guard itself, which under the law must issue regulations governing the response plans. Given the fast-approaching deadline and the time needed to prepare and publish regulations, the Coast Guard has issued interim guidelines for the development and review of the plans until regulations are in place.

The 37-page guidelines, published as Navigation and Vessel Inspection Circular No. 01-05, are available online at www.uscg.mil/hq/g-m/nvic/. Vessel owners may also contact the Vessel Response Plan Program staff for more information at (202) 267-6714.

READY TO RESPOND

In general, according to the Coast Guard, a response plan must:

1. be consistent with the requirements of the National Contingency Plan and Area Contingency Plans;
2. identify the qualified individual with authority to implement removal actions;
3. identify and ensure by contract the availability of private personnel and equipment necessary to remove "to the maximum extent practicable a worse case discharge," and to "mitigate or prevent a substantial threat of such a discharge";
4. describe the training, equipment testing, periodic drills and response actions of the vessel crew that will

5. carry out the plan;
 6. be updated periodically; and
 7. be resubmitted for approval of each significant change.
- The guidelines note that a variety of incidents may create a significant risk of oil discharge, including groundings, strandings, collisions, hull damage, fire, explosion, loss of propulsion, flooding and on-deck spills.

The interim guidelines parallel, with some minor differences, existing regulations for tank vessel response plans, mandated by the Oil Pollution Act of 1990 (*see page 1*). Vessel owners and operators should refer to the new guidelines for more detailed direction on all six of the points above. Note, however, that the final regulations may deviate from the interim guidelines, at which time vessel owners may have to revise their plans in order to comply.

And what will all of this cost? "Expenses related to this new requirement are not addressed in the guidance but may be relatively substantial—particularly for small operators with minimal infrastructure," observed attorney Dennis L. Bryant of Holland & Knight LLP. He points out costs for staffing one or more "qualified individual" positions at all times, retaining response contractors, and conducting training and drills.

DOWN TO THE WIRE

Because it is likely the regulations will not be in place by early August, the Coast Guard may issue a letter authorizing a nontank vessel to operate for two years without an approved response plan, provided the submitted plan meets certain basic criteria. But the Coast Guard admits it may not be able to review the huge number of plans in time to issue such letters by August 9. Therefore, to avoid a disruption in vessel operations, it may issue an *interim* authorization letter, but even these may take up to a month to process.



Both the Coast Guard and Bryant strongly encourage vessel owners to avoid the rush (and the bureaucratic mayhem) by submitting plans as soon as possible—no later than early July. The bottom line: Vessels must have a valid letter of authorization to operate on or after the ninth of August. ■

PASSENGERS & ALCOHOL: A DEADLY MIX

For many recreational boaters, the summer boating season just wouldn't be complete without that cooler of beer for the guests on board. Sure, everyone knows it's a bad idea (and illegal) to operate a boat under the influence, but is there any harm in letting the passengers kick back and have a good time?

Yes, according to studies, which indicate that recreational boat passengers are just as likely as operators to die as a result of drinking alcohol. What's more, skippers who are stone-cold sober but who serve alcohol on board can be held liable for the injury or death of passengers who have been drinking.

FALSE IMPRESSIONS

Many in the boating world still think of alcohol-related boating accidents in terms of drunk driving on the road—loss of control, collision, violent injury—when in reality the two are very different. About 80 percent of boating fatalities result from drowning, and the majority of them involve someone falling overboard, often when the boat is not even moving, according to researchers at the Uni-

versity of North Carolina and Johns Hopkins University. Alcohol is the chief cause of such falls.

It doesn't take much, either, to send an impaired passenger tumbling into the drink. A blood alcohol content of only .01 can increase the risk to passengers by 30 percent over people with no alcohol in their blood, research shows. And the risk of death is more than 50 times greater when passengers show a blood alcohol content of .25. Safety campaigns that take a "designated driver" approach often overlook this risk, and in fact, can give the false impression that a sober captain means it's safe to drink on deck.

Furthermore, case files show that in certain alcohol-related accidents where a drunk passenger is injured or killed, courts can apportion all or a portion of liability with the sober captain, depending on the degree of perceived negligence, according to BoatU.S., the Boat Owners Association of the United States. The potential for this liability could easily surpass \$300,000, the amount of the average boating liability policy, said Bob Adriance, BoatU.S.



damage avoidance program director.

"The lessons here are that you are responsible for the safety of all aboard; you should do whatever you can to discourage excessive drinking by anyone on your boat, and you should seriously consider adding umbrella coverage," Adriance said.

THE BEST APPROACH

In addition to covering potential liability with adequate insurance, skippers should consider these alternatives to serving alcohol while afloat (as recommended by the Coast Guard Office of Boating Safety):

- Take along a variety of cool drinks, such as soda, water, iced tea, lemonade or non-alcoholic beer.
- If you want to make alcohol part of your fun, plan to have a party on shore *after* your outing on the water.
- If you dock for lunch or dinner and passengers drink alcohol with their meal, wait a reasonable time (a minimum of one hour per drink) before allowing them to reboard. ■

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