



**TESTIMONY OF
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**ON "THE RESTORE ACT" (H.R. 3096):
RELATIONSHIP TO THE OSLTF AND OPA'90**

**BEFORE THE
HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

DECEMBER 7, 2011

Good morning Chairman Mica and distinguished members of the Committee. I am grateful for the opportunity to testify before you regarding H.R. 3096, the "Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2011" (the RESTORE Act). My testimony today will focus on how the "Gulf Coast Restoration Trust Fund," established under SEC. 3 of the RESTORE Act, would impact the Oil Spill Liability Trust Fund (OSLTF) and the liability and compensation regime established by Title I of the Oil Pollution Act of 1990 (OPA '90) (33 U.S.C. § 2701, *et seq.*).

THE BP DEEPWATER HORIZON OIL SPILL

On the evening of April 20, 2010, an explosion aboard the Mobile Offshore Drilling Unit (MODU) DEEPWATER HORIZON, located in the Gulf of Mexico approximately 50 miles from the coast of Louisiana, led to the sinking of the MODU, the tragic loss of 11 lives, and the worst oil spill in U.S. history.

The Federal government responded immediately with all resources available. Within the first 24 hours the Federal On Scene Coordinator (FOSC) accessed the OSLTF to ensure funds were available to speed the Federal response. The BP DEEPWATER HORIZON oil spill, designated a Spill of National Significance (SONS), impacted the marine environment and many lives along the Gulf of Mexico. The containment effort to secure the well was an almost three-month process (87 days) and the resulting spill response effort became extraordinarily large and complex.

The magnitude of the spill clean-up required numerous resources, including two drilling ships and numerous oil containment vessels used to control the source. Using the framework provided for in the National Contingency Plan (NCP), a monumental response was undertaken through the unified efforts of more than 47,000 Federal, State, local, and private sector responders. The U.S. Coast Guard employed over 835 oil skimmers, over 6,100 response boats and 3,190 vessels of opportunity, and over 120 aircraft.

ROLE OF THE OIL SPILL LIABILITY TRUST FUND

In the wake of the Exxon Valdez spill Congress passed OPA '90 to serve as the comprehensive prevention, response, liability, and compensation regime to deal with vessel- and facility-caused oil pollution to U.S. navigable waters. OPA '90 authorized use of the OSLTF, which had been

previously established by Congress in the U.S. Treasury, and consolidated the liability and compensation requirements of certain prior Federal oil pollution laws and their supporting funds.

Under Section 1012(a) (1) of OPA '90, whenever there is a discharge, or substantial threat of discharge, of oil to the navigable waters, adjoining shorelines or the Exclusive Economic Zone (EEZ), the OSLTF is utilized to pay the expenses for the Federal response under the Federal Water Pollution Control Act (FWPCA) (33 U.S.C. § 1321(c)), and to compensate claimants for oil removal costs and certain oil pollution damages authorized by OPA'90. These OSLTF expenditures are recoverable under OPA'90 from the liable responsible parties, and collection efforts are pursued consistent with the "polluter pays" public policy of the Act. The OSLTF is, however, intended to be available even when a responsible party does not pay.

OPA'90 provides that the OSLTF is available for certain purposes (33 U.S.C. § 2712(a)). These purposes include:

- **The payment of Federal removal costs consistent with the National Contingency Plan (NCP) (33 U.S.C. §2712(a)(1)):** Under 33 U.S.C. § 2752(b), the President may make available up to \$50 million annually to carry out 33 U.S.C. § 1321(c) (provides the legal authority for Federal response) and for Federal trustees to initiate the assessment of natural resource damages. This \$50 million "emergency fund" amount is available until expended. If the emergency fund is deemed insufficient to fund Federal response efforts, an additional \$100 million may be advanced, annually, from the OSLTF subject to notification of Congress no later than 30 days after the advance. (33 U.S.C. § 2752(b)). This additional \$100 million was advanced on May 4, 2010, with Congressional notification. In addition, Public Law 111-191 authorized further advances for the purposes of responding to the BP DEEPWATER HORIZON oil spill, and this authority has been exercised six times. To date, an additional \$700 million (including the initial May, 2010 advance) has been made available to the emergency fund. Any additional amounts may be made available from the OSLTF for Federal removal subject to further appropriation.
- **The payment of OPA'90 claims for uncompensated removal costs consistent with the NCP and uncompensated damages (33 U.S.C. §§ 2712(a)(4) and 2713):** Under OPA'90 Section 6002(b), OPA'90 claims payments from the OSLTF are not subject to the annual appropriations requirement in OPA'90 Section 6002(a). (33 U.S.C. § 2752(b)).
- **Payment of Federal administrative, operating and personnel costs to implement and enforce the broad range of oil pollution prevention, response and compensation provisions addressed by the OPA'90 and FWPCA Section 311 (33 U.S.C. §2712(a)(5)):** Under OPA'90 Section 6002(a), this use of the OSLTF is subject to annual appropriations to the various responsible Federal agencies.

In the 20 years since it was established, the FOSCs have accessed the OSLTF to respond to over 11,000 oil spills or significant threats of oil spills. The liability and compensation regime contained in Title I to the Oil Pollution Act of 1990 is well integrated into the daily operation of the FOSC. Use of the OSLTF, oversight of the "responsible party's" obligation to respond to, and advertise for and receive claims resulting from, an oil spill incident, and cost recovery from the responsible party of the Federal funds expended, are all part of the pollution response cycle.

NATIONAL POLLUTION FUND CENTER (NPFC) ROLE

The Coast Guard's NPFC manages use of the emergency fund. In a typical scenario, an FOSC accesses the emergency fund to remove an oil discharge, or prevent or mitigate a substantial threat of discharge of oil, into or on the navigable waters, and the adjoining shoreline or the EEZ. Costs are documented and provided to NPFC for reconciliation and payment. In addition, Federal trustees may request funds to initiate an assessment of natural resource damages and the NPFC will provide those funds from the OSLTF emergency fund. These amounts are recoverable against the liable responsible parties. All funds expended from the emergency fund to conduct Federal removal operations and initiate natural resource damage assessments are billed to the responsible parties. It also is important to note that recovered funds are deposited into the OSLTF principal fund, not the emergency fund.

The NPFC also pays qualifying removal costs and damage claims against the OSLTF for amounts that are not compensated by the responsible party. The categories of claims for which the responsible party is liable under OPA'90, and that may be paid from the OSLTF if uncompensated by the responsible party, are removal costs consistent with the NCP and six categories of damages: (1) natural resource damages, (2) real and personal property damages, (3) loss of subsistence use of natural resources, (4) lost government revenues that may be recovered by the United States, a State, or a political subdivision of a State, (5) the lost profits and earnings capacity of businesses and individuals, and (6) the net costs of increased or additional public services which may be recovered by a State or political subdivision of a State. (33 U.S.C. § 2702).

As a general matter, claims may be submitted to the NPFC for payment from the OSLTF within the following limitation periods under OPA'90 (33 U.S.C. § 2712(h)):

- For Removal Costs: Six years after date of completion of all removal actions.
- For Damages: Three years after the date on which the injury and its connection with the discharge are reasonably discovered with due care.
- For Natural Resource Damages (NRD): Three years after the date on which the injury and its connection with the discharge are reasonably discovered with due care or, if later, three years from the date of completion of the NRD assessment under the damage assessment regulations.

OPA'90 claims must (with certain limited exceptions) be presented first to the responsible party. If the responsible party denies liability for the claim, or the claim is not settled within 90 days after it is presented, a claimant may elect to commence an action in court against the responsible party or present the claim to the NPFC for payment from the OSLTF. Among the express exceptions to this order of presentment, States may present removal cost claims directly to the NPFC for payment from the OSLTF. These and other general claims provisions are delineated in 33 U.S.C. § 2713 and the implementing regulations for claims against the OSLTF in 33 C.F.R. Part 136. In addition, NPFC maintains information to assist claimants on its website at www.uscg.mil/npfc.

NPFC pursues cost recovery for all OSLTF expenses for removal costs and damages against liable responsible parties pursuant to Federal claims collection law including the Debt Collection Act and implementing regulations. Vigorous collection efforts are consistent with the "polluter pays" public policy underlying the OPA'90. Nevertheless, the OSLTF is intended to be available to pay claims even when a responsible party does not pay.

OSLTF REVENUES, BALANCE AND LIMITS ON EXPENSES

The OSLTF is established under Internal Revenue Code Section 9509 (26 U.S.C. § 9509), which also describes the authorized revenue streams and certain broad limits on its use. The principal revenue stream is an 8 cent per barrel tax on oil produced or entered into the United States (see the tax provision at 26 U.S.C. § 4611). The current barrel tax increases to 9 cents for one year beginning on January 1, 2017, and expires at the end of 2017.

Two other revenue streams are oil pollution-related civil administrative and judicial penalties under FWPCA Section 311, and criminal penalties under FWPCA Section 309 for Section 311(b) violations, and recoveries from liable responsible parties under OPA'90.

Three sections of law address the required deposit of FWPCA penalties to the OSLTF. Internal Revenue Code Section 9509, the section of the Internal Revenue Code that establishes the OSLTF, provides, in relevant part, that amounts equivalent to any penalties under Section 311 of the FWPCA, and any penalties under Section 309(c) of the FWPCA resulting from violations of Section 311, shall be appropriated to the OSLTF. Section 4304 of OPA'90 reinforces that these penalties "shall be deposited in the [OSLTF]." In addition, Section 311(s) of the FWPCA provides that "Any amounts received by the United States [under Section 311 of the FWPCA] shall be deposited in the OSLTF."

The current OSLTF balance is approximately \$2.3 billion. Although there is no cap on the OSLTF balance, there are limits on its use per oil pollution incident. The maximum amount that may be paid from the OSLTF for any one incident is \$1 billion. Of that amount, no more than \$500 million may be paid for natural resource damages. (26 U.S.C. § 9509(c)(2)). Although the magnitude and corresponding expense of the BP DEEPWATER HORIZON SONS response has scaled down in recent months, it is too early to project what the final Federal costs are likely to be, or when the \$1 billion cap on total per-incident expenditures from the OSLTF might be reached.

OVERVIEW OF SEC. 3 OF THE RESTORE ACT (H.R. 3096)

Section 3 of the RESTORE Act would, among other things, establish the "Gulf Coast Restoration Trust Fund" (GCRTF) in the U.S. Treasury. The GCRTF would be funded by directing the Secretary of the Treasury to deposit in the GCRTF "an amount equal to 80 percent of all administrative and civil penalties" paid by the responsible parties for the BP DEEPWATER HORIZON spill in accordance with Section 311 of the FWPCA, irrespective of whether the penalties are pursuant to court order or negotiated settlement.

The GCRTF Funds would be allocated and available for projects in the Gulf Coast states of Alabama, Florida, Louisiana, Mississippi, and Texas. The funds would be available for ecological and economic activities including, but not limited to:

- Coastal restoration;
- Mitigation of damage to and restoration of fish, wildlife and natural resources;
- Implementation of a comprehensive conservation management plan approved by a Federal Restoration Council established under the act;
- Promoting tourism including fishing and Gulf Coast fisheries;
- Mitigation of ecological impact of Outer Continental Shelf activities in general and the BP DEEPWATER HORIZON oil spill in particular;

- Coastal flood protection directly affected by long-term wetland losses or beach erosion as well as the BP DEEPWATER HORIZON oil spill; and
- Work force development, job creation, and other economic development projects.

OPA'90 AND OSLTF IMPLICATIONS OF THE RESTORE ACT

1. Impacts on the OSLTF balance.

The OSLTF is financed, in part, from FWPCA Section 311 penalties. The redirection of 80 percent of the administrative and civil FWPCA Section 311 penalties associated with DEEPWATER HORIZON to the GCRTF is the most direct impact the RESTORE Act would have on the OSLTF. It is important to note that the RESTORE Act would divert only the penalties and not the amounts recovered from the responsible parties for reimbursement of Federal removal and other OSLTF expenses.

2. Overlapping funding by the Gulf Coast Restoration Trust Fund.

The scope of the activities eligible to be funded by the GCRTF leads to potential overlap with categories of damages specified under OPA'90. Responsible parties are strictly liable, jointly and severally, for these damages under OPA'90, in addition to their liability for any FWPCA penalty. If the responsible parties do not pay damage claims, then the OSLTF may be available to compensate claimants, and the United States would seek to recover any amounts paid to claimants from the responsible parties. Arguments by a responsible party that its penalty payment has been used to compensate damages may complicate that recovery. Also because of the potential for overlapping damage compensation from penalty amounts and the OSLTF, the NPFC's adjudication of some claims may be more burdensome on claimants who must establish that their claimed damages have not or will not be compensated from the penalty amounts.

CONCLUSIONS

Through the unprecedented response to the DEEPWATER HORIZON incident, the Coast Guard has ensured that all capabilities and resources—government, private, and commercial—are being leveraged to protect the environment and facilitate a rapid, robust response effort. OPA'90 and its claims provisions also provide a cornerstone for compensation to the tens of thousands of residents of the Gulf region who suffered losses as a result of this tragedy and for funding trustee efforts to restore injury to, destruction of, loss of, or loss of use of, natural resources. Every effort is being made to ensure that those damaged by the BP DEEPWATER HORIZON oil spill are compensated, and that the “polluter pays.”

The Coast Guard looks forward to working with the Committee on these very important issues.

Thank you for the opportunity to testify today. I look forward to your questions.