Senate Committee on Environment and Public Works

Legislative Hearing on S. 3305 and Issues Relating to Modifications on Caps on Liability in the Oil Pollution Act of 1990

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Good Morning,

My name is Barry Hartman and I am a partner with the firm of K&L Gates LLP. I am here today to provide the Committee with information that may assist it in connection with its consideration of S. 3305, including issues relating to the modification of caps on liability in the Oil Pollution Act of 1990. I understand I have been asked to testify because I previously served as Acting Assistant Attorney General, at which time I oversaw the Exxon Valdez civil and criminal prosecutions and represented the Department of Justice with respect to the development of Oil Pollution Act ("OPA"), and because since that time I have represented various interests in oil spills that involved OPA.

Please note that the views I am giving you today are based on my past experience in this area. I am not representing any clients on this matter nor do my views reflect those of my firm.

Summary

Everyone would like the world to be free from all risks associated with any activity, be it providing medical care, building a house, driving a car, or producing oil. But none of us is perfect, nor can we guarantee that there will never be an accident or mistake made that will harm innocent persons, and after all, most of us benefit in some way from these activities. As a result, we create liability regimes that are designed to assure, for example, that businesses interested in benefiting from the production and transport of oil in our waters are ready, willing and able to be fully responsible for damages and harm that might be caused by their business activities.

Currently, there are multiple mechanisms available for addressing liability from oil spills. These include federal, state, civil, criminal, private, and administrative regimes. These various mechanisms are complex and interrelated in subtle ways, so changing one could impact the effectiveness of another.[1] In addition, there are very different kinds of entities that would be potentially subject to these regimes, including domestic and international vessels, and domestic and international fixed platforms. I am familiar with many of these but by no means an expert in all of them. For example, I am not addressing international liability schemes that might be relevant to your consideration.

I respectfully suggest that before adding additional liability structures, changing current ones, or removing any, there must be a thorough examination of whether the existing ones work. One must also define the criterion for what it means to "work." Sadly, there have been a number of spills since enactment of OPA, and so a solid assessment based on actual

[1] For example, increasing liability limits could impact the bidding process for offshore leases by vastly reducing eligible bidders.

experience should be possible. GAO Report 04-114R, "Oil Spill Liability Trust Fund Claims" (2003) might provide a starting point on some aspects of this issue. For the most part, I think it is just too early to make an informed decision with regard to how these various regimes will work with respect to the Gulf Spill. It would be unfortunate to make changes without the necessary information and unwittingly impact this regime in unintended ways.

Background

My experience regarding the U.S. liability regime surrounding oil spills is several-fold. My c.v may be found at http://www.klgates.com/professionals/detail.aspx?professional=856.[2] I have represented the federal government, companies, and individuals in connection with oil spills. For example:

- From 1989 to 1992, I served as Deputy Assistant Attorney General (DAAG) and then Acting Assistant Attorney General (AAAG) for the Environment and Natural Resources Division at the United States Department of Justice. Among other things, during my tenure I was responsible for overseeing and managing the civil and criminal cases arising from the *Exxon Valdez* oil spill. In addition, in my capacity as DAAG and AAAG, I led the DOJ group that advised the Administration regarding the development of the Oil Pollution Act of 1990.

- In 1996, my partner Tom Holt and I represented the over 100 businesses, mostly in the lobster industry, seeking damages as a result of the *North Cape* Oil Spill off Pt. Judith, Rhode Island. These claims were initially processed under the system established by the Oil Pollution Act.

- In 2006, I was named to serve on a group established under the Federal Advisory Committee Act by the Department of Interior to review issues relating to the assessment of natural resource damages ("NRD"). While that Committee focused primarily on NRD issues arising under the Superfund law, the same issues exist with respect to NRD issues under OPA.

[2] K&L Gates LLP comprises nearly 2,000 lawyers who practice in 36 offices located on three continents: Anchorage, Austin, Beijing, Berlin, Boston, Charlotte, Chicago, Dallas, Dubai, Fort Worth, Frankfurt, Harrisburg, Hong Kong, London, Los Angeles, Miami, Moscow, Newark, New York, Orange County, Palo Alto, Paris, Pittsburgh, Portland, Raleigh, Research Triangle Park, San Diego, San Francisco, Seattle, Shanghai, Singapore, Spokane/Coeur d'Alene, Taipei, Tokyo, Warsaw and Washington. For more information, please see www.klgates.com.

- In 2008, my partner Jeff Bornstein and I represented the pilot of the *Cosco Busan* in connection with the criminal prosecution resulting from the allision of the vessel with the Oakland Bay Bridge. Capt. Cota was named in multiple proceedings.

Overview of Liability Issues Arising from Oil Spills

This hearing is focusing on S. 3305, which would increase the liability cap under the Oil Pollution Act from $75,000,000 to $10,000,000,000. That law addresses one of the many liability regimes that currently exist. I define "liability regime" to include all available legal processes through which responsibility, compensation and punishment for the spill might be determined. Defined this way, the liability regimes are multi-dimensional, and many of these dimensions overlap. One way to list them might be as follows:

- **Liability under federal law**
  - Civil liability to the government ("regulatory liability," such as OPA);
  - Criminal liability (e.g., Clean Water Act, Migratory Bird Treaty Act, Refuse Act, Endangered Species Act, Title 18);
  - Civil liability to "victims" of the spill under OPA.
- **Liability under state law**
  - Civil liability to the government;
  - Criminal liability;
  - Common law liability (to private parties);
  - Commercial liability involving other business entities (insurers, contractors).

The scope and extent of remedies available under these liability regimes is also multi-dimensional. They include:

- requiring response and removal action by the responsible party to address immediate effects of the spill;
- obtaining financial recoveries to ensure that those damaged by the spill are compensated for their losses;
- obtaining restoration of natural resources damaged by the spill either through projects to restore or replace resources, and providing financial payments or other compensation to mitigate for interim losses, until the resources can be restored or replaced;

- punishing those responsible for the spill by imposing civil and or criminal sanctions.

To fully assess whether the liability scheme (or caps) works, one must understand the scope of remedies that those liability schemes cover. In the case of OPA, that scope is not necessarily clear to those unfamiliar with it. An example best illustrates the many-layered nature of the remedies issues. These layers are both vertical and horizontal. Suppose a fish was killed. That fish represents several values of "vertical" losses. Most obviously, it represents lost profits to fishermen. But the same fish may have a different, intrinsic value as a natural resource. That value is lost to the trustee of that resource, which may be a state, the federal government, an Indian tribe, or all three. Further, that fish may also have cultural value to particular groups. Each of those groups may be victims entitled to recover separate damages equal to the lost value of that resource to each of them. Monetization of those differing losses is difficult. While the lost profits for the fisherman (pure economic losses) are well understood, the lost natural resources value is more complex. In many cases it is measured by the cost of replacing the resource.

However, the person causing the loss is not only liable for replacing the value of that fish as a natural resource and for compensating the victims for the interim losses suffered until the resource is replaced or restored. Depending on the nature of the damage, there could be generations of fish that are lost. (For example, the *North Cape* spill damaged a very large and valuable lobster nesting area that impacted not just catchable lobsters, but juveniles, eggs, and nesting areas, meaning that several generations (and seasons of fishing) would be impacted before the population returned to its pre-spill levels.)

There are also "horizontal losses" associated with the dead fish. Obviously, the fishermen lost profits when the fish died as a result of the spill. But what about the bait and fuel shop because the fishermen could not fish? What about the restaurants that fed the fishermen? What about the municipality and state that collected sales tax on these transactions? Many of these economic losses are compensable under OPA.

Prior to OPA there really was no established way to assess some of these losses and quantify them. Many people (including the trustees of natural resources) were frustrated by the slowness of the compensation process. Essentially, they had to file suits and go through a formal legal process to be compensated. Lawsuits are slow, and rarely address immediate needs arising from direct losses. They require proof of liability. In addition, those seeking natural resource damages had to determine how to present these claims in ways that would be acceptable in court, under formal rules of evidence. The government, meanwhile, wanted to make sure there was a clear responsible party who was financially able and ready to respond to a spill and to claims for damages.

How the Oil Pollution Act addresses these issues

For purposes of this discussion, in its broadest sense, OPA was in part designed to create a mechanism that would (a) assure that those responsible for oil spills had the financial ability to pay the damages; (b) make it easier and quicker for persons suffering these losses to obtain recovery of losses, by eliminating the need to prove negligence (or some other theory of liability) and by lessening the evidentiary burden that exists in a court for documenting losses; and (c) identify the responsible party and assure its financial soundness, so that neither the government nor anyone else has to chase after multiple parties in order to ensure that someone is responsible for liability issues. This last point is key. The theory behind the designation of a responsible party is to give the government and others a single clear and viable target. Prior to OPA, that did not really exist. Under OPA, it may be possible for a responsible party to be reimbursed by others, but that does not delay its responsibility to the government, to victims, and to the public.

Under OPA, a process was also set up to address certain compensation concerns through use of the Oil Spill Liability Trust Fund ("Fund"). The National Pollution Funds Center is the entity that was created to administer this. Basically, the responsible party sets up a claims process for people to file claims for losses. The documentation requirements are less stringent than required by a court and provide for immediate and interim payments for immediate losses. If the claimant is unhappy, he or she can proceed to the Fund for consideration. (If the Fund pays, the Fund may then seek recovery from the responsible party.) In exchange for that presumably easier process, the law also provides that if a person decides to go to court, they cannot take advantage of this process, and if they settle their claims in this process, they cannot then go to court. Also, in exchange for this quicker and easier process, the OPA process through the Fund does not pay nonfinancial losses such as punitive damages.

The Fund has been in place for almost 20 years. As I understand it, it has been used for a number of oil spills. In 2003, the GAO did a report concluding that it was functioning effectively but needed controls to reduce the risk of improper payments. ("GAO-04-114R Oil Spill Liability Trust Fund Claims").

Must current laws be amended because the current liability regime does not work right?

An assessment of the current liability regime requires that several questions be answered, including:

1. Have there been instances in which responsible parties have not adequately addressed claims for damages?

2. To what extent are those who have pursued claims under the OPA structure satisfied with the results?

3. Has there ever been a prosecution or other enforcement action arising from a spill that has been lost or declined because of the lack of adequate legal remedies?

4. Does the current system, which allows for multiple federal and state civil and criminal claims, and private civil claims, need additional liability mechanisms?

Without answers to these questions, it would difficult to make an informed decision on whether the system needs to be changed, and if so, what kinds of changes would be appropriate.

While there is some existing research addressing some of these questions, findings are far from conclusive. Some studies criticize caps for (at least in theory) allowing companies to avoid full liability for their activities and, as a result, for providing incentives for risky or dangerous behavior.[3] Other researchers suggest that the cap is irrelevant because of the various alternative mechanisms for imposing liability listed above.[4] Still others argue that without a reasonable cap, liability may be so high that it will bankrupt companies—leading to little or no compensation at all—or unreasonably increase the costs of insurance or render it unavailable.[5] A study by Resources for the Future points to the OPA's financial assurance provisions, which require companies to show that they can meet the liability obligations within the cap, as a model for international lawmakers, because those provisions allow compensation for victims without allowing or encouraging responsible parties to avoid

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[3] *See* Michael Faure & Hui Wang, *Financial Caps for Oil Pollution Damage: A Historical Mistake?* (Maastricht Working Papers No. 2007-6, 2007), *available at* http://www.unimaas.nl/bestand.asp?id=9883; Inho Kim, *Who Bears the Lion's Share of a Black Pie of Oil Pollution Costs?* 41 OCEAN DEV. AND INT'L L., 55–76 (2010), *abstract available at* http://www.informaworld.com/smpp/content~content=a919332913~db=all~jumptype=rss.

As the Committee knows, under Section 1004(c) of OPA, the current cap can be pierced if, among other things, the responsible party or its agent violates any applicable Federal safety, construction, or operating regulation or fails to provide all reasonable cooperation and assistance requested by a responsible official. These provisions would seem to be a counterweight to the theory that caps create incentives for risky behavior.

[4] *E.g.*, NATHAN RICHARDSON, *DEEPWATER HORIZON* AND THE PATCHWORK OF OIL SPILL LIABILITY LAW (Resources for the Future, 2010), *available at* http://www.rff.org/publications/pages/publicationdetails.aspx?publicationid=21163.

[5] *See generally* Richard R.W. Brooks, *Liability and Organizational Choice*, 45 J. OF L. AND ECON. 91-125 (2002), *available at* www.sfu.ca/~allen/brooks.pdf.

liability through bankruptcy.[6] These studies and others illustrate the enormous complexity of this issue and underscore the need for careful and thorough analysis in order for informed judgments to be made.

There is one area in which it appears that OPA may not be working the way it should be. One purpose of OPA was to create an administrative mechanism to ensure prompt and complete settlement of claims for damages, and avoid the spectre of years of litigation. Unfortunately, there have already been hundreds of lawsuits filed as a result of the Gulf Spill, potentially rendering those plaintiffs essentially ineligible for the OPA fund process.[7] One cannot help but wonder whether they were advised of the consequences of following this route. I raise this issue because if the OPA cap is increased, one should also consider whether there should be greater incentives to have damage claims processed through the OPA system rather than through typical civil litigation.

The other question that should be considered is more fundamental: OPA requires that anyone subject to liability demonstrate financial assurance that it can meet its liability. Under the proposed legislation, that would mean demonstrating the ability to pay $10,000,000,000. Current regulations impose specific requirements for demonstrating that financial ability. 33 C.F.R. Part 138. What will be the impact on competitive bidding for off-shore leases if there are few entities that can qualify financially to meet higher liability caps? Will there be concern that only foreign companies can qualify?

I hope this information has been helpful. Please let me know if you have any questions.

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[6] JAMES BOYD, GLOBAL COMPENSATION FOR OIL POLLUTION DAMAGES: THE INNOVATIONS OF THE AMERICAN OIL POLLUTION ACT (Resources for the Future, Discussion Paper No. 04–36, 2004), *available at* http://www.rff.org/Publications/Pages/Global-Compensation-for-Oil-Pollution-Damages.aspx.

[7] Section 1013(b)(2) of OPA provides, " No claim of a person against the Fund may be approved or certified during the pendency of an action by the person in court to recover costs which are the subject of the claim."“