

Liability for Oil Pollution Cleanup and the Water Quality Improvement Act of 1970

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NOTES

LIABILITY FOR OIL POLLUTION CLEANUP AND THE WATER QUALITY IMPROVEMENT ACT OF 1970

Recent events, particularly the wreck of the *Torrey Canyon* and the Santa Barbara drilling disaster, have focused attention on the problems of oil pollution of the sea and adjacent shorelines. The Water Quality Improvement Act of 1970¹ represents the congressional response to these problems. Although the Act is a major improvement over existing law, particularly with regard to conditions and limitations of liability for cleanup costs² and prevention of pollution following a discharge of oil,³ its provisions should be extended further.

I

POLLUTION BY VESSELS

A. *Liability for Violations*

The first statute dealing specifically with oil pollution was the Oil Pollution Act of 1924,⁴ which outlawed discharges of oil upon the navigable waters of the United States.⁵ The 1966 amendments to this Act extended its coverage⁶ but also rendered it almost impossible to enforce by defining "discharge" as a grossly negligent or willful act.⁷

¹ Pub. L. No. 91-224 (April 3, 1970). The Act also deals with control of hazardous polluting substances, control of sewage from vessels, mine pollution control demonstrations, Great Lakes pollution control, and cooperation by all federal agencies in pollution control.

² See text at notes 42-57 and 65-71 *infra*.

³ See text at notes 40-41, 51-53, and 66-68 *infra*.

⁴ Act of June 7, 1924, ch. 316, 43 Stat. 604, *as amended*, Act of Nov. 3, 1966, Pub. L. No. 89-753, § 211(a), 80 Stat. 1252 (repealed 1970). This is the only act repealed by the 1970 Act.

⁵ Exceptions were made for situations of emergency imperilling life or property, unavoidable accident, collision or stranding, and discharges permitted under regulations issued by the Secretary of the Interior. Act of June 7, 1924, ch. 316, § 3, 43 Stat. 605 (repealed 1970).

⁶ The amendments extended the Act to cover discharges upon shorelines (Act of Nov. 3, 1966, Pub. L. No. 89-753, § 211(a), 80 Stat. 1253 (repealed 1970)), and discharges upon or into internal as well as coastal navigable waters. *Id.*

⁷ *Id.* An official of the Justice Department testified that none of the agencies that refer oil pollution violations to the Justice Department had been able to provide evidence of gross negligence or willfulness. *Water Pollution—1967, Hearings on S. 1591 and S. 1604 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public*

The effect of this amendment was to compel enforcement agencies to utilize the Refuse Act of 1899,⁸ which prohibits the dumping of refuse into navigable waters of the United States.⁹ Recently held applicable to discharges of oil,¹⁰ this statute provides as a maximum penalty for violation a fine of \$2,500 and imprisonment for one year.¹¹ Although these provisions are identical to those of the amended 1924 Oil Pollution Act,¹² the latter also provided for a \$10,000 fine on any vessel from which oil was discharged.¹³ Moreover, this fine constituted a maritime lien on the vessel, and clearance from any American port could be withheld until the fine was paid.¹⁴ These remedies are not available under the Refuse Act.

Congress implemented the 1954 International Convention for the Prevention of Pollution of the Sea by Oil¹⁵ by enacting the Oil

Works, 90th Cong., 1st Sess., pt. 1, at 248 (1967). These agencies include the Federal Water Pollution Control Administration, the Corps of Engineers, and the Coast Guard. *Id.* at 238.

⁸ Act of March 3, 1899, ch. 425, 30 Stat. 1121 (codified in scattered sections of 16, 33 U.S.C.).

⁹ 33 U.S.C. § 407 (1964).

¹⁰ *United States v. Standard Oil Co.*, 384 U.S. 224 (1966).

¹¹ 33 U.S.C. § 411 (1964).

¹² The amended 1924 Act provided for a fine of up to \$2,500 and/or imprisonment not to exceed one year as punishment for violations. Act of June 7, 1924, ch. 316, § 4, 43 Stat. 605, *as amended*, Act of Nov. 3, 1966, Pub. L. No. 89-753, § 211(a), 80 Stat. 1253 (repealed 1970).

¹³ *Id.*

¹⁴ *Id.* The amended 1924 Act also provided that United States officials could arrest offenders who committed violations within their presence with or without a warrant. *Id.*, 80 Stat. at 1254.

¹⁵ May 29, 1961, [1961] 3 U.S.T. 2989, T.I.A.S. No. 4900, 327 U.N.T.S. 3. The Convention establishes certain zones (annex A) in which discharges of oil or of oily mixtures (at least 100 parts oil per 1,000,000 parts mixture) by tankers are prohibited. Article III. (Ships other than tankers are required to make any discharges as far from land as possible. Three years after adoption of the Convention, such ships are to be subject to the same provisions as govern tankers.) Exceptions are provided for discharges made for the purpose of securing the safety of the ship, preventing damage to the ship or cargo, or saving life at sea; a further exception is made for discharges resulting from damage to the ship or unavoidable leakage, provided all reasonable precautions have been taken after the occurrence of the damage or discovery of the leakage to prevent or minimize the discharge. Article IV. Enforcement of these provisions is to be conducted by the contracting flag state, and penalties for violations outside the territorial waters of the state in question are required to be at least as strict as those for violations within such territorial waters. Article VI. Moreover, each contracting government is under an obligation to conduct an investigation of any ship registered in that country if another contracting government furnishes particulars of a violation. If such an investigation produces sufficient evidence to prove the violation, the flag state is required to institute proceedings against the owner or master of the ship in question. Article X.

Pollution Act of 1961.¹⁶ Amended in 1966¹⁷ to conform to the 1962 amendments to the 1954 Convention,¹⁸ the Act prohibits the discharge of oil or oily mixtures¹⁹ by ships of American registry within fifty miles of land unless otherwise provided by the Convention.²⁰ Like the 1899 Refuse Act,²¹ the statute makes illegal discharges punishable by a fine of not more than \$2,500 and imprisonment of up to one year.²² The 1961 Act is more extensive than either the Refuse Act or the 1924 Act, however, in that it authorizes regulations for installation of equipment²³ and requires maintenance of an oil record book.²⁴ Viola-

Ships are required to install oily ballast water separators (article VII), and facilities for reception of such water are to be constructed in each main port of each contracting state. Article VIII. Finally, each ship is required to carry an oil record book, which is to be available for inspection by any contracting government when the ship is in port in that country and which is to be admissible in any judicial proceeding. Article IX.

For a treatment of international approaches to the problem of oil pollution, see Note, *Continental Shelf Oil Disasters: Challenge to International Pollution Control*, 55 CORNELL L. REV. 113 (1969).

¹⁶ 33 U.S.C. §§ 1001-15 (1964).

¹⁷ 80 Stat. 372 (1966).

¹⁸ International Convention for the Prevention of Pollution of the Sea by Oil, 1962, Sept. 9, 1966, [1966] 2 U.S.T. 1523, T.I.A.S. No. 6109, 600 U.N.T.S. 332. The amendments expand the coverage of the convention from tankers of over 500 gross registered tons to those over 150 gross registered tons (article II); allow discharge of residue resulting from purification or clarification of fuel oil or lubricating oil, provided that such discharge is made as far from land as is practicable (article IV); provide that penalties, in addition to being at least as severe as those imposed within territorial waters, shall be of adequate severity to discourage any unlawful discharge (article VI); eliminate the oily ballast water separator requirement in favor of a provision that water may be discharged into bilges only if effective means are provided to ensure that oil in bilges is not discharged (article VII); list specific required entries for the oil record book (article IX); and redefine the zones in which discharges are prohibited. Annex A. See note 20 *infra*.

¹⁹ 33 U.S.C. § 1001(e) (1964) (at least 100 parts oil per 1,000,000 parts mixture).

²⁰ *Id.* § 1011. For the exceptions to the 50-mile rule, see maps in *Water Pollution—1967*, *supra* note 7, pt. 1, at 199-202.

The statute incorporates the Convention's exceptions as to tonnage of ships (33 U.S.C. § 1001(i) (1964); note 18 *supra*), discharges from purification or clarification of fuel or lubricating oil, and emergency situations. *Id.* § 1003; notes 15 & 18 *supra*.

²¹ Text at note 11 *supra*.

²² 33 U.S.C. § 1005 (1964).

²³ *Id.* § 1007(b).

²⁴ Operations bearing on possible pollution sources are to be recorded, and the book is to be available for inspection. The particular operations to be recorded are: (1) ballasting of and discharge of ballast from cargo tanks of tankers; (2) cleaning of cargo tanks of tankers; (3) settling in slop tanks and discharge of water from tankers; (4) disposal from tankers of oily residues from slop tanks or other sources; (5) ballasting, or cleaning during voyage, of bunker fuel tanks of ships other than tankers; (6) disposal of oily residues from ships other than tankers; and (7) accidental or other exceptional discharges or escapes of oil from tankers or other ships. In addition, any prohibited discharge or a discharge for a purpose such as saving life is to be recorded. *Id.* §§ 1008, 1012.

tions of these regulations are also punishable by fine and imprisonment.²⁵

The 1970 Act prohibits the discharge²⁶ by vessels²⁷ of oil²⁸ into or upon the navigable waters of the United States, adjoining shorelines, or the waters of the contiguous zone,²⁹ except where permitted either by presidential regulation³⁰ or by the 1954 Convention.³¹ Although the Act does not provide imprisonment for illegal discharges, a knowing discharge is punishable by a civil penalty³² of not more than \$10,000, assessed by the Secretary of Transportation.³³ This penalty may not be

²⁵ The penalty for failure to install proper equipment is a fine of \$100 (*id.* § 1007); failure to keep an oil record book is punishable by a fine of between \$500 and \$1,000 (*id.* § 1008(b)); and the penalty for a knowing entry of a false or misleading item in the record book is a fine of not less than \$500 and not more than \$1,000 and/or imprisonment for up to six months. *Id.*

²⁶ "Discharge" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping" Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(a)(2) (April 3, 1970). The discharge must be in harmful quantities, as determined by the President. *Id.* § 11(b)(2).

²⁷ A vessel is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water . . ." *Id.* § 11(a)(3). Excluded from this definition are public vessels—vessels "owned or bareboat chartered and operated by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when such vessel is engaged in commerce . . ." *Id.* § 11(a)(4).

²⁸ Oil is defined as "oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil . . ." *Id.* § 11(a)(1).

²⁹ The contiguous zone is defined by reference to article 24 of the Convention on the Territorial Sea and the Contiguous Zone, 1958, March 24, 1961, [1964] 2 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

³⁰ The regulations issued by the President must "be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards." Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(b)(2) (April 3, 1970).

³¹ *Id.* For the exceptions under the 1954 Convention, see notes 15 & 18 *supra*.

³² Whereas previous statutes imposed fines and imprisonment for illegal discharges and violations of regulations (notes 4-25 and accompanying text *supra*; notes 58-62 and accompanying text *infra*), the 1970 Act uses these sanctions only in the event of failure to notify the government of a discharge. Notes 40-41 and accompanying text *infra*. All other violations are punishable by civil penalties. These penalties differ from criminal sanctions in the method of assessment and possibility for compromise. Notes 33-36, 38-39, and accompanying text *infra*. For example, one factor in compromise of the penalty for violation of a presidential regulation is the good faith effort at compliance made by the owner or operator following notice of a violation. Note 39 *infra*. In addition, imposition of a civil penalty does not subject the offender to the stigma that accompanies criminal sanctions. The use of civil penalties thus reflects a statutory emphasis on preventing or mitigating pollution following a discharge rather than punishing the offender.

³³ Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(b)(5) (April 3, 1970). The Secretary of the Treasury is authorized to withhold clearance for any vessel

assessed until the owner or operator³⁴ charged has had a hearing³⁵ and may be compromised by the Secretary.³⁶

In addition to prescribing the regulations pertaining to prohibited discharges, the President is authorized to promulgate regulations establishing methods for removal of oil, requiring equipment for the prevention of discharges, and governing inspection procedures.³⁷ Violation of any of these regulations is punishable by a civil penalty not to exceed \$5,000, assessed by the President.³⁸ As with the penalty for prohibited discharges, a hearing must be held prior to assessment, and the penalty may be compromised.³⁹

Finally, the 1970 Act requires any person in charge of a vessel from which oil is illegally discharged to notify the appropriate governmental agency as soon as he learns of the discharge.⁴⁰ Failure to comply is punishable by a fine of up to \$10,000 and one year's imprisonment,⁴¹ the most severe sanction authorized by the Act.

B. *Liability for Cleanup Costs*

Under the Limited Liability Act of 1851,⁴² the owner or charterer of a vessel, in the absence of privity or knowledge, could limit his liability to the value of his interest in the vessel and pending freight.⁴³ This limitation was severely restricted by the ruling that

whose owner or operator is liable to the government for the penalty. *Id.* This is a stronger provision than that in the amended 1924 Act, which authorized clearance to be withheld only from the offending vessel. *See* text at note 14 *supra*. The 1970 Act is also strengthened by authorizing officials to board and inspect vessels, as well as to arrest without warrant offenders who commit a violation in their presence. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(m) (April 3, 1970). For a corresponding provision in the amended 1924 Act, see note 14 *supra*.

³⁴ An owner or operator, in the case of a vessel, means "any person owning, operating, or chartering by demise, such vessel." Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(a)(6) (April 3, 1970).

³⁵ *Id.* § 11(b)(5).

³⁶ *Id.* For the purposes of a compromise, the Secretary may consider the following factors: the size of the owner's or operator's business, the effect of the penalty on the owner's or operator's ability to continue in business, and the gravity of the violation *Id.*

³⁷ *Id.* § 11(j)(1).

³⁸ *Id.* § 11(j)(2).

³⁹ *Id.* The relevant factors affecting a presidential compromise are the gravity of the violation and the demonstrated good faith of the offender to comply following notification of a violation. *Id.*

⁴⁰ *Id.* § 11(b)(4).

⁴¹ *Id.*

⁴² REV. STAT. §§ 4282-89 (1875), 46 U.S.C. §§ 182-89 (1964).

⁴³ *Id.* § 4283, 46 U.S.C. at § 183.

Following the *Morro Castle* disaster of 1934 (*Morro Castle*, 17 A.M.C. 895 (S.D.N.Y. 1939)), the Act was amended to provide that an owner would be liable up to \$60 per ton of the vessel's gross tonnage for loss of life or personal injury. Act of Aug. 29, 1935,

the vessel and pending freight were to be valued after the accident had occurred.⁴⁴ The limitation extended to owners of foreign vessels who were sued in the United States,⁴⁵ and following the *Torrey Canyon* disaster the owners of that vessel were permitted to file a petition to limit their liability to fifty dollars, the value of the one surviving lifeboat.⁴⁶

The first change in this limitation was made in 1966 when the Oil Pollution Act of 1924⁴⁷ was amended to require that any person discharging oil upon navigable waters remove it immediately.⁴⁸ If the oil was not removed, the Secretary of the Interior was authorized to arrange for its removal; the person responsible for the discharge was to be liable for costs reasonably incurred in such removal⁴⁹ but only if the discharge was willful or grossly negligent.⁵⁰

Under the 1970 Act, whenever oil is discharged into or upon the

ch. 804, § 1, 49 Stat. 960, *amending* 46 U.S.C. § 183 (1964). This amendment did not affect liability for property damage.

⁴⁴ *The City of Norwich*, 118 U.S. 468 (1886); *The Scotland*, 105 U.S. 24 (1881). Liability was formerly even more restricted by the locality test announced in *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865), but this case was overruled in 1948 by passage of the Admiralty Extension Act, 46 U.S.C. § 740 (1964).

⁴⁵ *Oceanic Steam Nav. Co. v. Mellor*, 233 U.S. 718 (1914); *La Bourgogne*, 210 U.S. 95 (1908).

⁴⁶ *In re Barracuda Tanker Corp.*, 281 F. Supp. 228 (S.D.N.Y. 1968), *modified*, 409 F.2d 1013 (2d Cir. 1969). Both the Barracuda Tanker Corporation, which owned the *Torrey Canyon*, and the Union Oil Company, which had chartered the vessel for 20 years, sought to limit their liability and filed petitions in the Southern District of New York to do so. On September 22, 1967, an *ex parte* order was entered enjoining the prosecution of all independent actions in the United States and approving the interim stipulation for the value of Barracuda's and Union's interest at \$50. Having filed claims against Union alone, the governments of Britain, France, and the States of Guernsey on November 13, 1967, moved to reappraise the value of Union's interest and to modify the *ex parte* order insofar as it enjoined independent actions against Union, on the ground that Union was neither an owner nor a charterer within the meaning of the Limited Liability Act. The district court, finding that Union was not a charterer within the meaning of the Act, held that Union could be liable only if it were determined to be an owner, and that any action against Union had to await the trial of the limitation of liability. 281 F. Supp. at 236. The claimants appealed this ruling, arguing that liability could be "predicated upon Union's 'status as author and architect of the schemes and entities, including Barracuda, which were designed to further the ultimate business purposes of Union.'" 409 F.2d at 1015. The court of appeals held that the claimants could proceed upon this theory prior to the trial concerning limitation of liability, and modified the injunction to permit the claimants to assert claims against Union unrelated to the navigation of the *Torrey Canyon*. *Id.*

⁴⁷ Act of June 7, 1924, ch. 316, 43 Stat. 604, *as amended*, Act of Nov. 3, 1966, Pub. L. No. 89-753, § 211(a), 80 Stat. 1252 (repealed 1970). *See* text at notes 4-14 *supra*.

⁴⁸ Act of Nov. 3, 1966, Pub. L. No. 89-753, § 211(a), 80 Stat. 1253 (repealed 1970).

⁴⁹ *Id.*

⁵⁰ *Id.*, 80 Stat. at 1252. The effect of this provision was to render enforcement nearly impossible. *See* note 7 *supra*.

navigable waters or shorelines of the United States or into the waters of the contiguous zone, the President is authorized to have the oil removed unless he determines that removal will be properly undertaken by the owner or operator of the vessel in question.⁵¹ This action is not limited to cleaning up after a discharge; whenever an actual *or potential* discharge poses a substantial threat of a pollution hazard,⁵² the United States is authorized to coordinate all efforts to eliminate the threat and, if necessary, to remove or destroy the vessel causing the threat.⁵³

In the event of a discharge caused by willful negligence or willful misconduct within the privity or knowledge of the owner or operator of a vessel, the government may recover the entire cost of cleanup from the owner or operator.⁵⁴ If the discharge is not the result of such conduct, the government may recover removal costs unless the owner or operator can prove that the discharge was caused solely by an act of God,⁵⁵ an act of war, negligence on the part of the government, or any act or omission of a third party.⁵⁶ Unlike liability for willful discharges, however, this liability is limited to one hundred dollars per gross ton of the vessel or \$14 million, whichever is less.⁵⁷

⁵¹ Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(c)(1) (April 3, 1970). This provision covers spills not prohibited under the Act, and thus reflects a concern for the cleanup aspects of oil pollution. The Act also establishes a revolving fund not to exceed \$35 million for the purpose of effecting this removal. *Id.* § 11(k).

⁵² Such a threat must be to "the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and the public and private shorelines and beaches of the United States . . ." *Id.* § 11(d).

⁵³ *Id.*

⁵⁴ *Id.* § 11(f)(1).

⁵⁵ An act of God is defined as "an act occasioned by an unanticipated grave natural disaster. *Id.* § 11(a)(12).

⁵⁶ *Id.* § 11(f)(1). The conditions and limits of liability are identical for the third party causing a discharge except that in the event the third party was not the owner or operator of a vessel that caused the discharge, his liability is limited to what the liability would have been for the owner or operator of the vessel from which the oil was discharged. *Id.* § 11(g). The Act is ambiguous in that it does not specify who shall be liable if the owner and the operator are not the same person. This ambiguity is also present with regard to third party liability, willful discharges (text at note 54 *supra*), and discharges from onshore or offshore facilities. Text at note 69 *infra*. Where the owner and operator are separate, it would seem that the government could proceed against either or both.

⁵⁷ Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(g) (April 3, 1970). As was provided in the 1966 amendments to the Oil Pollution Act of 1924 (Act of Nov. 3, 1966, Pub. L. No. 89-753, § 211(a), 80 Stat. 1253 (repealed 1970)), the 1970 Act stipulates that these costs shall constitute a maritime lien on the vessel from which oil was discharged. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(f)(1) (April 3, 1970). The 1970 Act goes further, however, and requires that any owner of a vessel over 300 gross tons, including any barge of equivalent size, using United States

II

POLLUTION FROM ONSHORE AND OFFSHORE FACILITIES

Under the Outer Continental Shelf Lands Act,⁵⁸ the Secretary of the Interior is authorized to administer leasing arrangements for the shelf and to promulgate rules and regulations for the prevention of waste and the conservation of natural resources.⁵⁹ Violation of any such rule or regulation is a misdemeanor punishable by a fine of not over \$2,000 and imprisonment of not more than six months.⁶⁰ In addition, the Secretary may, in the event of a violation of lease terms or of regulations promulgated under the Act, revoke the lease⁶¹ subject to judicial review.⁶²

The Water Quality Improvement Act of 1970 goes beyond the Outer Continental Shelf Lands Act in two important respects. First, its provisions apply to all onshore and offshore facilities,⁶³ not just those on or over the continental shelf.⁶⁴ Second, it imposes liability for cleanup costs as well as penalties for violations of the Act and regulations issued under it.⁶⁵ As with a discharge from a vessel, the President is authorized to arrange for the removal of any oil discharged by an onshore or offshore facility, unless he determines that such

ports or navigable waters, shall establish and maintain evidence of financial responsibility equal to \$100 per gross ton or \$14 million, whichever is less. An owner or operator of more than one vessel need establish responsibility only for his largest vessel. Financial responsibility may be established by evidence of insurance, surety bonds, qualification as a self-insurer, or other acceptable evidence. *Id.* § 11(p)(1). In any action against such a vessel, the government may proceed directly against the insurer, who shall have the benefit of all defenses to which the vessel owner or operator would have been entitled. *Id.* § 11(p)(3).

⁵⁸ 43 U.S.C. §§ 1331-43 (1964).

⁵⁹ *Id.* § 1334(a).

⁶⁰ *Id.* § 1334(a)(2).

⁶¹ *Id.* § 1334(b)(1).

⁶² *Id.* §§ 1334(b)(1), 1337(j).

⁶³ An onshore facility is "any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land within the United States other than submerged land . . ." Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(a)(10) (April 3, 1970). An offshore facility is "any facility of any kind located in, on, or under, any of the navigable waters of the United States other than a vessel or a public vessel . . ." *Id.* § 11(a)(11).

⁶⁴ The Act covers all discharges by facilities into or upon the navigable waters of the United States, adjoining shorelines, or waters of the contiguous zone. *Id.* §§ 11(b)(5), (c)(1), (f)(1)-(2).

⁶⁵ Except where they are clearly not applicable to facilities (as in the case of destruction of a vessel or withholding clearance for a vessel), the penalties provided for the owner or operator of a vessel are also the penalties provided for the owner or operator of an offending onshore or offshore facility. Text at notes 26-41 *supra*.

removal will be properly undertaken by the owner or operator.⁶⁶ In addition, when the President determines that there is an imminent and substantial threat to the public health or welfare⁶⁷ because of an actual or potential discharge of oil from a facility, he may require the United States Attorney in the district in which the threat occurs to secure whatever relief is necessary to abate such threat.⁶⁸

In the event of a discharge, the conditions of liability for an owner or operator of an onshore or offshore facility are the same as those for the owner or operator of a vessel.⁶⁹ The limit of liability for a non-willful discharge, however, is \$8 million,⁷⁰ as opposed to the \$14 million ceiling for a vessel owner or operator.⁷¹

III

INADEQUACIES OF THE 1970 ACT

Clearly, the Water Quality Improvement Act's greatest contribution to the law is its emphasis on cleanup and prevention of pollution following a discharge of oil. Situations may arise, however, in which parties other than the owner or operator of a tanker from which oil is discharged will be forced to pay some cleanup costs.⁷²

The *Torrey Canyon* was a 60,000 gross registered ton tanker⁷³ and

⁶⁶ Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(c)(1) (April 3, 1970).

⁶⁷ The public health or welfare of the United States includes, but is "not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States . . ." *Id.* § 11(e).

⁶⁸ *Id.* The district courts are vested with jurisdiction to grant such relief as may be necessary. *Id.*

⁶⁹ *Id.* §§ 11(f)(2)-(3). See notes 54-56 and accompanying text *supra*. Third party liability is limited to what the liability would have been for the owner or operator of the facility from which the oil was discharged. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(g) (April 3, 1970).

⁷⁰ *Id.* §§ 11(f)(2)-(3).

⁷¹ Text at note 57 *supra*. In contrast to the provisions concerning vessels, there is no requirement that owners or operators of facilities establish evidence of financial responsibility. This defect in the Act could lead to the formation of corporations with minimal assets, effectively putting a low limit on the owner's or operator's liability. It should therefore be remedied, either through provisions in the relevant leases, or by an amendment to the Act.

⁷² It is unclear whether the 1970 Act's liability limits are sufficient to cover spills of fuel from vessels other than tankers. However, the relatively small amounts of oil carried as fuel by such vessels (compared to that carried as cargo by tankers) and their ratio of gross tonnage to amount of fuel indicate that the \$100 per gross ton or \$14 million limit would be sufficient to cover cleanup costs.

⁷³ *Water Pollution—1969, Hearings on S. 7 and S. 544 Before the Subcomm. on Air*

was carrying some 118,000 tons of oil, half of which was estimated to have been released when the vessel broke up.⁷⁴ Although the tanker's owners settled with the British and French governments for \$7.2 million to cover cleanup costs,⁷⁵ the actual costs were over \$16 million.⁷⁶ Since the 1970 Act's liability limit for the *Torrey Canyon* would have been \$6 million,⁷⁷ \$10 million in costs would have fallen on someone other than the owner or operator of the vessel. Indeed, liability limited to \$100 per gross registered ton will rarely, if ever, be sufficient to cover cleanup costs.⁷⁸ The \$14 million ceiling, on the other hand, effectively limits cleanup cost liability to 52,000 tons of oil.⁷⁹ Six

and Water Pollution of the Senate Comm. on Public Works, 91st Cong., 1st Sess., ser. 91-2, App., at 1544 (1969) [hereinafter cited as *1969 Hearings*].

⁷⁴ N.Y. Times, March 28, 1967, at 1, col. 5.

⁷⁵ *1969 Hearings*, pt. 4, at 1389; Mendelsohn, *Maritime Liability for Oil Pollution—Domestic and International Law*, 38 GEO. WASH. L. REV. 1, 2 (1969).

⁷⁶ Britain originally sought \$8,156,400, while France hoped to recover \$8 million. E. COWAN, *OIL AND WATER: THE TORREY CANYON DISASTER* 195, 200 (1968). This figure is supported by testimony given by Richard A. Frank, Acting Deputy Legal Advisor of the State Department, in *1969 Hearings*, App., at 1544 and by a statement by the Department of the Interior, in *Federal Water Pollution Control Act Amendments—1969, Hearings on H.R. 4148 and Related Bills Before the House Comm. on Public Works*, 91st Cong., 1st Sess. 316 (1969).

⁷⁷ At \$100 per gross ton, a 60,000 gross ton tanker has a liability limit of \$6 million. The \$14 million limitation thus would not apply. Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11(f)(1) (April 3, 1970).

⁷⁸ Using the *Torrey Canyon* figures (59,000 tons of oil cleaned up at a cost of \$16 million), it costs about \$270 to clean up one ton of oil. Since the ratio of deadweight tonnage (cargo capacity) to gross tonnage on the *Torrey Canyon* was about two to one (Sweeney, *Oil Pollution of the Oceans*, 37 *FORDHAM L. REV.* 155, 157-58 (1968)), the cleanup costs were approximately \$540 per gross ton.

The \$100 per gross ton limit is inadequate even if one assumes, as did the American Petroleum Institute (*1969 Hearings*, pt. 4, at 1318), the cost of cleanup following the *Torrey Canyon* wreck to be \$7.2 million. Using that figure, the costs come to \$244 per gross ton.

A study conducted by the Federal Water Pollution Control Administration also indicates the insufficiency of the \$100 per gross ton figure. It was found that cleanup costs range from under \$1.00 to over \$5.00 per gallon of oil. There may be from 240 to 300 gallons of oil in one ton, depending upon specific gravity and temperature. Finally, the ratio of carrying capacity to gross tonnage varies from 2.7:1 to 1.5:1. Using figures of \$1.00 per gallon, 250 gallons per ton, and a ratio of 1.8:1, cleanup cost was calculated to be \$450 per gross ton. *1969 Hearings*, pt. 1, at 133-34.

Although gross tonnage has traditionally been used to calculate liability, it is more meaningful to speak in terms of deadweight tonnage. The latter is the cargo carrying capacity of the vessel, and the ratio between the two varies from vessel to vessel. Thus, although a liability figure based on gross tonnage could accurately reflect cleanup costs of the oil carried on one vessel, it might be very inaccurate when applied to another vessel. The amount of oil, not the vessel's gross tonnage, determines the cleanup costs. See Mendelsohn, *supra* note 75, at 10-11 & n.34.

⁷⁹ At \$270 a ton, \$14 million would clean up 51,851 tons.

tankers capable of discharging more than that amount of oil already exist.⁸⁰ Two of these, the *Universe Island* and the *Universe Kuwait*, could each spill over 300,000 tons of oil;⁸¹ the cleanup costs following such a discharge could be approximately \$80 million.⁸² Moreover, even larger tankers are planned, some as large as 500,000 deadweight tons.⁸³

The liability provided for the owner or operator of an onshore or offshore facility may also be insufficient to cover all cleanup costs. Although the costs of cleanup at Santa Barbara, about \$3.4 million,⁸⁴ are within the \$8 million limit, the recent spillage in the Gulf of Mexico indicates that little can be done to prevent pollution when control over an offshore well is lost.⁸⁵ Whether the Gulf cleanup costs exceed \$8 million or not, it is clear that the technological skills for controlling such a spill are inadequate,⁸⁶ and that a spill in which costs exceed the limit could occur. The problem then, with regard to both tankers and facilities, is allocating expenses in excess of the limits for owner or operator liability set by the 1970 Act. Such expenses could be imposed upon the private person who is injured, the government, the owner or operator, or another party.

⁸⁰ These tankers are the *E. Maersk* (100,600 D.W.T.), the *Iyoharu Maru* (103,000 D.W.T.), the *Bergebig* (149,500 D.W.T.), the *Esso Scotia* (250,000 D.W.T.), and the *Universe Island* and the *Universe Kuwait* (312,000 D.W.T. each). Mendelsohn, *supra* note 75, at 10-11 & n.34. For more detailed information on future tankers, see E. COWAN, *supra* note 76, at 224-25.

⁸¹ Mendelsohn, *supra* note 75, at 10-11 & n.34.

⁸² The \$14 million ceiling is inadequate even if one assumes that the *Torrey Canyon* cleanup costs were \$7.2 million. Using that figure, cleanup costs were about \$122 per ton of oil; thus a discharge of 300,000 tons of oil would cost approximately \$36 million to clean up. Thus, both of the Act's ceilings are deficient. See note 78 *supra*.

⁸³ E. COWAN, *supra* note 76, at 225; N.Y. Times, March 28, 1970, at 45, col. 6.

⁸⁴ N.Y. Times, March 4, 1970, at 1, col. 1.

⁸⁵ There, one of Chevron Oil Company's drilling platforms caught fire on February 10, 1970. *Id.*, March 10, 1970, at 28, col. 1. Until March 10, when the fire was extinguished, there was little pollution. Ryan, *A Gooney Sickness Smears the Gulf*, SPORTS ILLUSTRATED, March 30, 1970, at 53. For the next 20 days the wells spewed between 600 and 1,000 barrels of oil into the Gulf daily. N.Y. Times, March 24, 1970, at 27, col. 1. Efforts to contain the discharged oil were largely unsuccessful, and only unseasonable winds kept the oil away from land. New Orleans Times-Picayune, March 15, 1970, at 1, col. 8; *id.*, March 16, 1970, at 1, col. 8; *id.*, March 17, 1970, at 1, col. 8; N.Y. Times, March 12, 1970, at 23, col. 1; *id.*, March 13, 1970, at 22, col. 2; *id.*, March 14, 1970, at 30, col. 2 (editorial). The well was finally capped on March 31. *Id.*, April 1, 1970, at 47, col. 1. The Gulf spill has already exceeded the Santa Barbara discharge both in terms of amount of oil discharged and length of time required for cleanup. Remarks of Interior Secretary Hickel, in New Orleans Times-Picayune, March 15, 1970, at 1, col. 8. Thus, it seems likely that the cost of cleanup will also exceed that incurred at Santa Barbara.

⁸⁶ See text at notes 98-100 *infra*.

IV

COST ALLOCATION CONSIDERATIONS

As between the owner or operator of a tanker or facility and a private individual, it is clear that the owner or operator should bear the costs of cleanup. Similar accountability has been imposed under the theory of enterprise liability when three criteria have been met. The first is that the activity involved be one in which there is an abnormal danger to the community,⁸⁷ particularly if the danger is one that cannot be eliminated;⁸⁸ the second is the intentional subjection by the party engaged in the activity of other persons to the risk involved;⁸⁹ the third is the profit motive of the party engaged in the risk-producing activity.⁹⁰

Shipping oil always involves the risk of spills,⁹¹ and the incidents in the Santa Barbara channel and the Gulf of Mexico have revealed how little is known about avoiding accidents during underwater drilling operations.⁹² Because the technology for preventing pollution once a discharge has occurred is inadequate,⁹³ the risk of pollution is one that cannot be eliminated from the business of the owner or operator of either a tanker or a facility. That a private individual is subjected to this risk is due to intentional conduct on the part of the owner or operator. Moreover, the owner or operator engages in the enterprise precisely for the purpose of making a profit.⁹⁴ When all three criteria are met, the cost of an accident should be a cost of doing business; the owner or operator is in a much better position to bear and distribute the risk than is the private individual. Moreover, a situation could arise in which neither the government nor the owner or operator involved removed the oil from a private individual's property,⁹⁵ and the

⁸⁷ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 74, at 508 (3d ed. 1964).

⁸⁸ RESTATEMENT OF TORTS §§ 519-20 (1938).

⁸⁹ W. PROSSER, *supra* note 87, § 74, at 508.

⁹⁰ *Id.* at 509.

⁹¹ See E. COWAN, *supra* note 76, at 37.

⁹² See N.Y. Times, Feb. 2, 1969, § 1, at 54, col. 2.

⁹³ See text at notes 98-100 *infra*.

⁹⁴ In fact, subsidies such as the import quota system, which contribute to the ability of domestic oil companies to operate, make gasoline and heating oil more expensive for consumers. Knoll, *The Oil Lobby Is Not Depleted*, N.Y. Times, March 8, 1970, § 6 (Magazine), at 26, 106.

⁹⁵ The owner or operator might cease his cleanup efforts when he had expended \$8 or \$14 million. The Act does not make it clear whether the government has a duty to remove oil from private property; the President is merely *authorized* to do so.

individual would be forced to sue the owner or operator.⁹⁶ Due to litigation expenses and burden of proof, the private claimant could be forced to settle for a relatively small amount unless enterprise liability were imposed on the owner or operator.⁹⁷

There is another reason for imposing liability on the owner or operator rather than the private individual: to the extent that it is possible to prevent discharges, the owner or operator is in a much better position to do so than is the private individual. A need for technological improvement in preventive measures⁹⁸ is dictated by the lack of effective techniques for containment and removal of oil after discharge.⁹⁹ Because private individuals are in no position to develop preventive or restorative techniques, impetus for this improvement must be directed at the owner or operator of the facility or vessel; motivation will increase as the amount of prospective liability for cleanup costs rises.¹⁰⁰

The position of the government vis-à-vis the owner or operator of a facility is different from that of the private individual. In maintaining import quotas¹⁰¹ and leasing outer continental shelf lands,¹⁰²

⁹⁶ For possible theories of liability, see Sweeney, *supra* note 78, at 164-206.

⁹⁷ Mendelsohn, *supra* note 75, at 25-26.

⁹⁸ Better compartmentalization and improved navigation and regulation of shipping lanes would reduce the chances of discharges from tankers. Nanda, *The Torrey Canyon Disaster: Some Legal Aspects*, 44 DENVER L.J. 400, 420-22 (1967). Safety in drilling operations would be increased by the use of additional casing. 1969 *Hearings*, pt. 2, at 344-45. New methods may be developed, such as the use of underwater barges for transporting oil (M. CAIDIN, *HYDROSPACE* 105-08 (1964); Note, *supra* note 15, at 116 n.19), and the transfer of oil from tankers to smaller vessels in order to avoid the necessity of bringing tankers into harbor.

⁹⁹ Booms have proved ineffective (E. COWAN, *supra* note 76, at 137-39; New Orleans Times-Picayune, March 12, 1970, at 1, col. 6; N.Y. Times, March 13, 1970, at 22, col. 2) as have suction devices (1969 *Hearings*, pt. 4, at 934; E. COWAN, *supra* note 76, at 139-40) and skimmers. 1969 *Hearings*, pt. 4, at 934. Detergents, which are perhaps the most effective dispersal and removal agents, are also the most dangerous to marine life. "[R]esearch done by scientists after [the *Torrey Canyon*] disaster . . . showed that spilled oil killed about 30 percent of the tiny organisms on which fish feed. The detergents used to remove the oil were even worse, killing 96 percent of those creatures." *Water Pollution—1967*, *supra* note 7, pt. 1, at 10. See also E. COWAN, *supra* note 76, at 146-56; Ryan, *supra* note 85, at 48, 53; Note, *supra* note 15, at 119. The most effective way to deal with oil that has reached land may be to spread straw on it as an absorbent and then remove the straw with pitchforks. New Orleans Times-Picayune, March 18, 1970, at 1, col. 4; N.Y. Times, March 14, 1970, at 30, col. 2 (editorial).

¹⁰⁰ See E. COWAN, *supra* note 76, at 221-22; Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 645-55 (1969).

¹⁰¹ Knoll, *supra* note 94, at 26.

¹⁰² Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-41 (1964).

the government is an intentional participant in the activity that produces the risk of pollution. The government also receives substantial income from both the sales of leases¹⁰³ and royalty payments.¹⁰⁴ During 1968 the total value to the government of rentals, royalties, and bonus payments from the platforms in the Santa Barbara channel was \$1.6 billion.¹⁰⁵ Because of this income and its position as sovereign, the government is more able to bear the costs of cleanup and to spread the risk involved than is the private individual.

In addition to these enterprise considerations, the government's powers of inspection and enforcement of regulations pertaining to offshore oil operations¹⁰⁶ suggest that it should share liability for cleanup costs where, as in the recent Gulf of Mexico disaster, violations of regulations contribute to the discharge.¹⁰⁷ Just as owner or operator liability would provide an impetus to improve preventive and restorative technology, government liability would dictate improvement of inspection and enforcement measures.¹⁰⁸ Under the 1970 Act as it stands, however, the government, if liable at all,¹⁰⁹ will only be liable if cleanup costs exceed \$8 million.¹¹⁰ A more sensible provision would hold the government liable for a certain percentage (based upon its financial interest in the enterprise) of costs in any spill and for a

¹⁰³ The leases for the 75 tracts in the Santa Barbara channel were sold for \$603,204,284. The previous year, 158 tracts in the Gulf of Mexico were sold for \$93,125,000. *Channel Sale Swamps Offshore Records*, 66 OIL & GAS J., Feb. 12, 1968, at 66; Note, *supra* note 15, at 113 n.2. For more detailed information on the Santa Barbara oil and gas lease sale, see 1969 *Hearings*, pt. 3, at 788-92 (tables).

¹⁰⁴ The royalty is fixed by the terms of the lease. For a sample lease see 1969 *Hearings*, pt. 3, at 735-38.

¹⁰⁵ TIME, Feb. 14, 1969, at 23; Note, *supra* note 15, at 113 n.2.

¹⁰⁶ E.g., Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-41 (1964).

¹⁰⁷ Investigations by the United States Geological Survey have revealed that Chevron Oil Company failed to maintain required storm chokes on 137 of its wells in the Gulf, including well number 6 on platform Charlie which poured oil into the Gulf for 20 days before being capped on March 31, 1970. N.Y. Times, April 1, 1970, at 47, col. 1. Had the well been equipped with a storm choke, the fire probably would have been extinguished quickly, and the oil spill would not have occurred. *Id.*, March 26, 1970, at 21, col. 1. The investigations also revealed 210 alleged violations of other regulations by Chevron. *Id.* Grand jury indictments have charged Chevron with 900 separate offenses. *Id.*, May 6, 1970, at 1, col. 1 (city ed.).

¹⁰⁸ Present inspection procedures are such that in the seven months following August 1969, officials were able to inspect only 20% of the oil fields in the Gulf of Mexico. Ryan, *supra* note 85, at 47. The need for increased manpower and improved procedures is underscored by Chevron's unwarranted removal of the required storm chokes. N.Y. Times, March 26, 1970, at 21, col. 1.

¹⁰⁹ Note 95 *supra*.

¹¹⁰ Water Quality Improvement Act of 1970, Pub. L. No. 91-224, §§ 11(f)(2)-(3) (April 3, 1970).

higher percentage where the spill results from its failure to adequately enforce the applicable regulations.¹¹¹

Concerning discharges from tankers, on the other hand, the government's position is similar to that of the private individual;¹¹² it is not involved in intentionally performing an act that subjects the public to risk or in making an economic profit. Unlike the situation with regard to facilities,¹¹³ the government derives no direct benefit; the cost of cleanup resulting from an accident should be imposed upon neither the private individual nor the government. It must therefore fall either on the owner or operator, as a cost of doing business, or on some other party.

V

LIABILITY OF CARGO OWNERS

During the hearings prior to passage of the 1970 Act, extensive arguments were made that the proposed liability would be uninsurable. Representatives of the American Institute of Merchant Shipping testified that the maximum insurance obtainable by owners of American vessels for absolute liability would be \$67 per gross registered ton with a ceiling of \$5 million.¹¹⁴ For liability based on negligence, it was asserted that the limits could not exceed \$100 per gross registered ton or \$10 million, whichever was less.¹¹⁵ Representatives of the London Group of Protection and Indemnity Associations asserted that the highest liability limits for which insurance could be available would be \$100 per gross registered ton with a ceiling of between \$12 and \$15 million.¹¹⁶

A possible response to such arguments is to decide what the liability should be, write the law, and worry about the insurance aspect only if it becomes a problem.¹¹⁷ This approach recognizes the impossibility of predicting exactly what insurance will be available.¹¹⁸ It is

¹¹¹ See note 108 *supra*.

¹¹² Text at notes 87-100 *supra*.

¹¹³ Text at notes 101-10 *supra*.

¹¹⁴ 1969 *Hearings*, pt. 4, at 1445.

¹¹⁵ *Id.*

¹¹⁶ *Id.*, pt. 1, at 141. Protection and indemnity insurance covers "liability claims for personal injury and death, cargo loss or damage, and property damage including oil pollution." Mendelsohn, *supra* note 75, at 4 (footnote omitted).

¹¹⁷ This suggestion was made by Senator Muskie during the 1969 hearings. 1969 *Hearings*, pt. 4, at 1327.

¹¹⁸ *Id.* at 1326-27.

unlikely that tanker owners and operators would scrap their ships because they could not be insured; establishment of unlimited liability, or of liability with very high limits, would probably prompt these owners and operators to demand a revision of existing insurance schemes or to create a scheme of self-insurance. Nevertheless, it would be preferable to impose liability only after a determination that the party concerned is capable of bearing such liability.

Notwithstanding the fear of absolute liability that is apparently shared by all the relevant underwriters,¹¹⁹ there appears to be little reason for the limits on available protection and indemnity insurance.¹²⁰ The limits on American vessels are the result of higher construction and maintenance costs, which in turn necessitate higher hull insurance.¹²¹ Any law that imposes pollution liability on owners of American vessels and requires a showing of increased financial responsibility will severely handicap American vessels by multiplying already burdensome insurance needs.¹²² A possible solution to this problem would be to eliminate the requirement of a showing of financial responsibility, thus freeing vessel owners to obtain as much insurance as they thought necessary. Any claims beyond that amount would have to be directed at the vessel owner's assets. The effect of such a scheme, however, would be to re-enact the Limited Liability Act of 1851:¹²³ vessel owners would form one-ship corporations with little or no insurance for each corporation, and the only asset against which claims could be asserted would be the vessel after the accident.

A solution that would not handicap the American vessel owner would be to impose liability on the owner of the cargo.¹²⁴ In the event of a discharge the vessel owner or operator would continue to be liable

¹¹⁹ *Id.* at 1370; Mendelsohn, *supra* note 75, at 25.

¹²⁰ *See* Mendelsohn, *supra* note 75, at 25-26.

¹²¹ Construction and repair costs in the United States are approximately three times as high as they are in Japan, for example. Hull insurance premiums are thus also three times as high for American vessels. *1969 Hearings*, pt. 4, at 1340.

¹²² As a result of high hull insurance, the percentage of operating costs taken by insurance for American vessels is higher than the comparable percentage for foreign vessels. It is therefore argued that any increase in required insurance would hurt the American vessel owner more than the foreign vessel owner, even though the costs of cleanup insurance would be the same for both. *Id.*

¹²³ Text at notes 42-46 *supra*.

¹²⁴ This was suggested several times during the 1969 hearings. *1969 Hearings*, pt. 4, at 1368; *id.*, App., at 1552.

Where the cargo owner is the owner or operator of the vessel, the effect of this proposal is to subject the cargo owner to unlimited liability. This does not, however, invalidate any of the reasons for imposition of liability beyond the limits of the Act on the cargo owner. *See* text at notes 127-31 *infra*.

for cleanup costs within the Act's limits, but the cargo owner would be liable for any additional costs. Since the vessel owner or operator will already have established proof of financial responsibility for \$14 million or \$100 per gross ton,¹²⁵ the cargo owner would have only to establish proof of financial responsibility for cargo not covered by the vessel owner's or operator's liability. This solution would effectively secure financial responsibility for the total amount of oil being transported and would thus reflect actual costs of cleanup more accurately than do figures based on gross tonnage.¹²⁶

Imposition of liability on the owner of the cargo is consistent with the principles of enterprise liability.¹²⁷ The oil companies are intentionally engaged in a risk-creating venture. They profit heavily from their activity, especially from use of the large tankers that create the greatest risk,¹²⁸ and they are in an excellent position to bear and distribute the risk involved.¹²⁹ Furthermore, a showing of financial responsibility by the cargo owner in terms of the amount of oil being transported would preclude a limitation or evasion of liability by one-vessel or one-cargo corporations.¹³⁰ Because of their potential liability for cleanup costs following negligent discharges, the oil companies would be given an incentive to select responsible carriers.¹³¹

There are two major arguments against cargo-owner liability. The first is that the major oil companies are a small percentage of those who are qualified to import oil¹³² and that the smaller companies could not cover high or unlimited liability. It would not be necessary, how-

¹²⁵ Note 57 *supra*.

¹²⁶ Using the Federal Water Pollution Control Administration's figures (note 78 *supra*), the cost of cleaning up one ton of oil can be calculated. Thus, for any given vessel, the amount of the cargo (in terms of potential cleanup costs) actually covered by the owner's or operator's liability can be determined. The cargo owner would have to establish proof of financial responsibility for the potential cleanup costs of the remaining cargo. This showing of responsibility would be calculated in terms of the cargo carried, not the vessel's tonnage. See note 78 *supra*.

¹²⁷ Text at notes 87-97 *supra*.

¹²⁸ This is not to say that large tankers are necessarily not as safe as small ones. See E. COWAN, *supra* note 76, at 211-12. What is certain is that a large tanker has the potential for much more extensive pollution than a small tanker.

¹²⁹ A small oil importer who deals with consumers is in a better position to distribute the risk from pollution than is a small vessel owner who deals with an oil company.

¹³⁰ Using the Federal Water Pollution Control Administration's figures (note 78 *supra*), the exact amount of financial responsibility that would have to be shown is not clear. However, it should reflect the cost of cleanup, and thus would have to be between \$240 and \$300 per ton of oil actually carried.

¹³¹ The owner or operator is liable for the full cleanup costs in the event of a willful discharge. Text at note 54 *supra*. Thus, cargo-owner liability would be predicated upon owner or operator negligence.

¹³² See 1969 *Hearings*, pt. 4, at 1416.

ever, for the smaller companies to face this liability alone. The Tankers Owners Voluntary Agreement Concerning Liability for Oil Pollution is evidence that a self-insurance scheme is possible;¹³³ there are indications that such a scheme could insure unlimited liability.¹³⁴ Since the major companies import the preponderance of oil,¹³⁵ they could bear the major burden of a self-insurance plan. In addition, because the cost of transporting a ton of oil decreases as the size of the tanker increases,¹³⁶ insurance premiums could be on a sliding scale, with the companies that save by the use of larger tankers paying proportionately more.

The second objection to the proposal arises from the frequent

¹³³ Known as TOVALOP, this scheme provides that a Participating Tanker Owner will reimburse national governments for expenses reasonably incurred by them to prevent or clean up pollution of coast lines as the result of the negligent discharge of oil from one of his tankers. The tanker causing the discharge is presumed to be negligent unless the owner can establish that discharge occurred without the tanker's fault. The Participating Owners would not, under TOVALOP, reimburse prevention or clean-up costs incurred by private parties. However, if a national government spends monies to remove oil from privately owned coast lines, it could, in the case of negligence of the discharging tanker, recover these expenses from the tanker owner.

In the event of a negligent discharge of oil, . . . the tanker owner involved is obligated to reimburse the national government concerned for oil removal costs reasonably incurred by it up to a maximum of \$100.00 (U.S.) per gross registered ton of the tanker discharging the oil, or \$10,000,000 (U.S.), whichever is lesser. If the owner himself also helps remove the oil, his costs in effect result in prorating the government's claim where the combined costs exceed these limits.

Id., pt. 1, at 258.

The companies that originally sponsored TOVALOP were British Petroleum Company Limited, Gulf Oil Corporation, Mobil Oil Corporation, Shell International Petroleum Company Limited, Standard Oil Company of California, Standard Oil Company (New Jersey), and Texaco, Inc. *Id.* at 257.

¹³⁴ One self-insurance scheme covering unlimited liability is the proposed Air Transport Insurance, designed to insure potential liability caused by the operation of the new Boeing 747 jets. *Id.*, pt. 4, at 1323-24, 1332-33. On international flights, liability is limited to \$75,000 per person; on domestic flights, on the other hand, liability is unlimited. *Id.* at 1332; Mendelsohn, *supra* note 75, at 16. Because a 747 can carry up to 490 people, an accident involving only one such plane could result in more than \$100 million of liability. 1969 *Hearings*, pt. 4, at 1332. The position of the airlines is similar to that of the oil companies in that Air Transport Insurance would only insure beyond the limits of the market. *Id.* at 1324-25. In addition, although airline liability is not absolute, "virtually the only time that the airlines have a chance of not paying is in the case of a sabotage accident." *Id.* at 1329. The similarities between the circumstances of the airlines and the oil companies suggest that the oil companies could also implement a self-insurance scheme. Indeed, Clarence Pell, Director of Airline Transport Insurance, S.A., indicated that he would rather form such an insurance scheme with oil companies than with airlines because of the former's more readily available capital. *Id.* at 1326.

¹³⁵ 1969 *Hearings*, pt. 4, at 1422 (testimony of Everett S. Checket on behalf of the American Petroleum Institute). See also *id.* at 1434-39 (tables).

¹³⁶ E. COWAN, *supra* note 76, at 13-14.

changes in ownership of oil during a voyage.¹³⁷ This could make enforcement of compulsory insurance impossible. However, notification of proposed changes in ownership could be made compulsory, with buyers required to prove their financial responsibility prior to actual exchange.¹³⁸

The 1970 Act's strength is its emphasis on cleanup and prevention of pollution following a discharge; establishment of cargo owner liability beyond the limits of owner or operator liability would enhance this purpose by allowing government cleanup efforts to proceed without regard to cost.

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¹³⁷ Sweeney, *supra* note 78, at 199-200.

¹³⁸ Two additional arguments were presented during the Senate hearings, but they have already been answered. The first was that allocation of liability among oil companies would be impossible for any given cargo. *1969 Hearings*, pt. 4, at 1416. Under the proposal advocated herein, however, the cargo owner whose oil was discharged would be liable. The second argument was that the legislation covers all vessels, but that oil companies should not be held liable for spills from passenger vessels. *Id.* However, the liability limits provided by the Act are probably sufficient to cover spillages of fuel from vessels other than tankers. Note 72 *supra*.