

Consumer Price Index Adjustments of the Oil Pollution Act of 1990 Limit of Liability for Offshore Facilities

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SUMMARY: The Oil Pollution Act of 1990 (OPA) establishes a comprehensive regime for addressing the consequences of oil spills, ranging from spill response to compensation for damages to injured parties. Other than deepwater ports subject to the Deepwater Port Act of 1974, the Bureau of Ocean Energy Management (BOEM) is authorized to adjust the limit of liability in OPA for offshore facilities, including pipelines. This rule amends BOEM's regulations to add to the regulations on Oil Spill Financial Responsibility (OSFR) for offshore facilities in order to increase the limit of liability for damages caused by the responsible party for an offshore facility from which oil is discharged, or which poses the substantial threat of an oil discharge, as described in OPA. This rule adjusts the limit of liability to reflect the significant increase in the Consumer Price Index (CPI) that has taken place since 1990. It also establishes a methodology for BOEM to use to periodically adjust the OPA offshore facility limit of liability for inflation. BOEM is hereby increasing the limit of liability for damages under OPA from \$75 million to \$133.65 million.

EFFECTIVE DATE: This final rule is effective January 12, 2015.

FOR FURTHER INFORMATION CONTACT: Peter Meffert, Office of Policy, Regulations and Analysis (OPRA), Bureau of Ocean Energy Management, Department of the Interior, at 381 Elden Street, MS-4050 Herndon, Virginia 20170-4817 at (703) 787-1610, or email at peter.meffert@boem.gov. Questions related to the limit of liability or the adjustment process should be directed to Dr. Marshall Rose, Chief, Economics Division, Office of Strategic Resources, Bureau of Ocean Energy Management, at 381 Elden Street, MS-4050 Herndon, Virginia 20170-4817 at (703) 787-1538, or email at marshall.rose@boem.gov.

SUPPLEMENTARY INFORMATION:

Introduction

OPA requires inflation adjustments to the offshore facility limit of liability not less than every three years to reflect significant increases in the CPI. 33 U.S.C. 2704(d)(4). This requirement is to preserve the deterrent effect and "polluter pays" principle embodied in the OPA Title I liability and compensation provisions.

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On February 24, 2014, BOEM published a proposed rule to increase the OPA offshore facility limit of liability to \$133.65 million and establish the methodology for future inflation adjustments (79 FR 10056). The rulemaking comment period initially closed on March 26, 2014. Various groups requested additional time to review and analyze the implications of this proposed rule and BOEM extended the comment period by an additional 30 days (79 FR 15275) which closed on April 25, 2014.

Of the public comments received, all were generally supportive of the proposed rule. Also, one offered an alternative CPI adjustment. BOEM has posted all comments received in the docket [BOEM-2012-0076] for this rulemaking at www.regulations.gov.

Background

In general, under Title I of OPA, the responsible parties for any vessel or facility, including any offshore facility that discharges or poses a substantial threat of discharge of oil into or upon navigable waters, adjoining shorelines, or the exclusive economic zone, are liable for the OPA removal costs and damages that result from such incident (as specified in 33 U.S.C. 2702(a) and (b)). Under 33 U.S.C. 2704(a), however, the total liability of the responsible parties is limited (with certain exceptions specified in 33 U.S.C. 2704(c)). In instances when the OPA liability limit applies, the Oil Spill Liability Trust Fund (OSLTF) is available to compensate claimants for damages in excess of the liability limit and to reimburse responsible parties for damages that they pay for that are in excess of the liability limit, as provided in 33 U.S.C. 2708, 2712(a)(4), and 2713. The OPA at 33 U.S.C. 2704(a)(3) provides that responsible parties for an offshore facility incident are liable for "the total of all removal costs plus \$75,000,000." The \$75 million limit of liability only applies to damages covered by OPA.

To prevent the real value of the amount of liability authorized by OPA from declining over time as a result of inflation, and shifting the financial risk of oil spill incidents to the OSLTF, OPA (33 U.S.C. 2704(d)(4)), requires that the President adjust the limit of liability "not less than every three years," by regulation, to reflect significant increases in the CPI. This mandate has been in place since 1990.

Executive Order 12777, as amended, delegates the implementation of the President's OPA limit of liability inflation adjustment authority, dividing the responsibility among several Federal agencies. Among those delegations, section 4 of Executive Order 12777 vests the Secretary of the Interior (DOI) with authority to adjust the limit of liability for "offshore facilities, including associated pipelines, other than deepwater ports subject to the [Deepwater Port Act of 1974]" for inflation. Under Secretarial Order 3299, BOEM exercises this authority on behalf of DOI. In addition, section 4 of Executive Order 12777, as amended and in relevant part, vests in the Secretary of the Department in which the Coast Guard is operating the President's authority to adjust for inflation the OPA limits of liability for vessels and deepwater ports (including associated pipelines), and the statutory limit of liability for onshore facilities. This authority has been redelegated by the Secretary of Homeland Security to the Coast Guard.



Regulatory History

On July 1, 2009, following substantial coordination with DOI, the Environmental Protection Agency and the Department of Transportation to achieve consistent approaches to the inflation adjustment mandate, the Coast Guard published an Interim Final Rule With Request For Comments (IFR) (74 FR 31357), implementing the first set of regulatory inflation adjustments to the limits of liability for vessels and deepwater ports, and establishing the methodology the Coast Guard will use for future inflation adjustments to the limits of liability for its delegated source categories. (See 33 CFR 138.240. See also, Notice of Final Rulemaking, 73 FR 54997 (September 24, 2008), and Final Rule, 75 FR 750 (January 6, 2010)).

As described in the preamble to the Coast Guard's IFR, DOI and other agencies with delegated authority for adjusting the OPA liability limits agreed to follow the Coast Guard's inflation adjustment methodology. BOEM has coordinated with the Coast Guard on the inflation adjustments to the OPA liability limit in this rulemaking.

BOEM published its proposed rule to increase the OPA offshore facility limit of liability on February 24, 2014 (79 FR 10056). The comment period closed on April 25, 2014. This final rule increases the offshore facility limit of liability for OPA damages to \$133.65 million and establishes the methodology for future inflation adjustments, which generally follows the Coast Guard's approach.

Offshore Facility Limit of Liability

This rule implements the first mandated adjustment, under 33 U.S.C. 2704(d)(4), to the OPA limit of liability for damages for offshore facilities to reflect significant increases in the CPI. This rule also establishes a methodology for making inflation adjustments to the OPA limit of liability for offshore facilities. To ensure maximum consistency in promulgating rules for CPI adjustments to the OPA limit of liability, the approach used by BOEM follows, in most respects, the inflation adjustment approach used by the Coast Guard in its 2009 CPI rulemaking that adjusted the limits of liability for vessels and deepwater ports. That approach, found at 33 CFR part 138, subpart B, went through a full notice and comment rulemaking and received no adverse comments.

Offshore facilities are unique among the vessels and facilities covered under OPA. The OPA, at 33 U.S.C. 2704(a), assigns unlimited liability to the responsible parties for removal costs resulting from an offshore facility oil spill incident, and only limits their liability for the damages that result from such a spill and that are covered by OPA. This rulemaking adjusts the offshore facility limit of liability for OPA damages to \$133.65 million. Under OPA, the responsible parties' liability for removal costs resulting from an offshore facility oil spill incident remains unlimited.

Oil Spill Financial Responsibility Requirements Are Not Affected by This Rulemaking

This rulemaking does not affect the level of oil spill financial responsibility (OSFR) coverage (found in 33 U.S.C. 2716(c), and 30 CFR 553.13) that responsible parties must demonstrate for covered offshore facilities (COFs) under subparts B through E in the regulations at 30 CFR part 553.

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The OPA offshore facility limit of liability applies to more facilities than are covered by the OSFR requirement. The limit of liability for offshore facilities applies to all offshore facilities (other than deepwater ports), while OSFR coverage is required only for offshore facilities (other than deepwater ports) located seaward of the coastline, or in any portion of a bay connected to the sea generally, with a worst case oil discharge potential of more than 1,000 barrels and meeting other specific criteria in the definition of COF found in 30 CFR 553.3.

The OSFR coverage levels are specified at 33 U.S.C. 2716 and are not tied to the offshore facility limit of liability and, therefore, are not affected by the inflation adjustments required under OPA at 33 U.S.C. 2704(d)(4). The OSFR coverage provisions of OPA establish minimum and maximum coverage amounts for any activity involving a COF. The OSFR coverage amounts are found in OPA at 33 U.S.C. 2716(c) and in the regulations at 30 CFR 553.13.

Unlike the evidence of financial responsibility requirements applicable to vessels and deepwater ports, which are administered by the Coast Guard and are directly tied to the applicable CPI-adjusted limits of liability, OSFR coverage requirements are not directly tied to, and their levels do not automatically increase with changes in, the offshore facility limit of liability. OPA does not authorize an OSFR increase based solely on an increase in the limit of liability for offshore facilities occasioned by CPI adjustments. Rather, as stated in 33 U.S.C. 2716(c)(1)(C), any adjustment to the required OSFR coverage amount must be separately "justified based on the relative operational, environmental, human health, and other risks posed by the quantity or quality of oil that is explored for, drilled for, produced, or transported by the responsible party"

BOEM specifically requested comments on any potential OSFR insurance underwriter premium increases. We received no comments related to OSFR insurance premiums during the proposed rule comment period.

Additional Regulatory Changes in 30 CFR Part 553

Section 553.1 of this rule, consistent with the proposed rule, expands the purpose section to include adjusting the limit of liability. In section 553.3, the final rule also adds, consistent with the proposed rule, the following three new definitions to facilitate the implementation of the inflation adjustment process: Annual CPI-U, Current Period, and Previous Period. It also adds a new definition for Responsible Party, in the context of Subpart G.

Discussion of This Rule

I. Explanation of the CPI Adjustment to the Offshore Facility Limit of Liability for Damages

This rule implements the first adjustment, mandated by 33 U.S.C. 2704(d)(4), to the OPA limit of liability for damages caused by the responsible party for a facility from which oil is discharged, or which poses the substantial threat of a discharge from offshore facilities other than deepwater ports to reflect significant increases in the CPI. This rule also establishes the methodology that BOEM will use to make periodic CPI adjustments to the OPA offshore facility limit of liability for damages. These provisions are encompassed in a new 30 CFR part 553 subpart G.

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1. How will BOEM calculate CPI adjustments to the limit of liability for offshore facilities?

BOEM will calculate the new limit of liability for the offshore facility source category using the following formula: New limit of liability = Previous limit of liability + (Previous limit of liability multiplied by the decimal equivalent of the percent change in the CPI from the year the previous limit of liability was established, or last adjusted by statute or regulation, whichever is later, to the present year), then rounded to the closest \$100.

2. Which CPI will BOEM use?

The Bureau of Labor Statistics (BLS) publishes a variety of inflation indices, including the "Consumer Price Index--All Urban Consumers, Not Seasonally Adjusted, U.S. City Average, All Items, 1982-84 = 100," also known as "CPI-U," for both monthly and annual periods. Consistent with the Coast Guard regulations at 33 CFR 138.240, BOEM will use CPI-U values, which may be viewed on the BLS Web site at: <http://www.bls.gov/cpi/cpifiles/cpai.txt>. For consistency with the Coast Guard's limits of liability CPI adjustment rule, BOEM will use the annual period CPI-U (hereinafter the "Annual CPI-U"), rather than the monthly period CPI-U.

3. How will BOEM calculate the percent change in the Annual CPI-U?

Consistent with the Coast Guard's inflation adjustment methodology, BOEM will calculate the percent change in the Annual CPI-U using the BLS escalation formula described in Fact Sheet 00-1, U.S. Department of Labor Program Highlights, "How to Use the Consumer Price Index for Escalation," September 2000. This formula provides that: Percent change in the Annual CPI-U = [(Annual CPI-U for Current Period--Annual CPI-U for Previous Period) / Annual CPI-U for Previous Period] x 100. Fact Sheet 00-1 is available from the BLS online at <http://www.bls.gov/cpi/cpi1998d.pdf>.

4. Which Annual CPI-U "Previous Period" and "Current Period" will BOEM use for its first inflation adjustment to the offshore facility limit of liability?

To maintain the real value of the amount of liability authorized by OPA for damages, as contemplated in the original OPA mandate that directed the limit of liability be adjusted for the CPI, BOEM will use a "Previous Period" of 1990, the year OPA was enacted. For the "Current Period," BOEM will use the most recently published Annual CPI-U (see 30 CFR 553.703(a)). The latter is consistent with the Coast Guard's OPA limits of liability rule at 33 CFR 138.240 for vessels and deep water ports.

For the calculations in this rule, BOEM has used the 2013 Annual CPI-U, published on January 16, 2014. Future updates will proceed on a 3-year schedule, as provided in 30 CFR 553.703.

5. How has BOEM calculated the adjustment to the limit of liability and what is the new limit?

The following illustrates how BOEM will apply the BLS escalation formula to calculate the decimal equivalent of the percent change in the Annual CPI-U to adjust the limit of liability for offshore facilities. The Annual CPI-U (index base period (1982-84 = 100)) for Current Period (2013): 232.957 - Annual CPI-U for Previous Period (1990): 130.7 = an index point change: 102.257 / Annual CPI-U for Previous Period: 130.7 = 0.782; result multiplied by 100: 0.782 x 100 = percent change in the Annual CPI-U of 78.2 percent. Note that the cumulative percent change value is rounded to one decimal place as provided in SEC 553.703.

The "Current Period" value for this methodology is the Annual CPI-U for the previous calendar year, due to the BLS Annual CPI-U publication schedule.

Applying these values, this final rule adjusts the statutory offshore facility limit of liability for OPA damages of \$75 million by the 78.2 percent increase in the Consumer Price Index Annual (CPI-U) that has taken place since 1990, to \$133,650,000.

6. How will BOEM calculate the percent change for subsequent inflation adjustments to the OPA limit of liability for offshore facilities?

This rule establishes the adjustment methodology BOEM will use for subsequent CPI adjustments to the OPA limit of liability for offshore facilities. Key features for the future inflation adjustments to the limit of liability include:

* BOEM plans to publish, through a final rule in the Federal Register, the inflation adjustments to the limit of liability for offshore facilities every three years, counting from 2014 with this rulemaking, provided that the threshold for a significant increase in the Annual CPI-U is met. A three percent or more change constitutes the significant increase threshold. The current adjustment uses the 2013 Annual CPI-U for the "Current Period."

* BOEM has discretion to adjust the offshore facility limit of liability more frequently than every three years, by regulation, to reflect significant increases in the CPI.

* If Congress amends the limit of liability for offshore facilities, BOEM will calculate the Annual CPI-U change with the "Previous Period" beginning with the year in which Congress amends the limit of liability. Otherwise we will calculate the percent change in the CPI-U for the next CPI adjustment to the offshore facility limit using the 2013 Annual CPI-U (the "Current Period" for today's adjustment to the limit of liability) as the "Previous Period" value.

* BOEM will evaluate whether the cumulative percent change in the Annual CPI-U since the last adjustment has exceeded three percent no later than 2017 (using the 2016 Annual CPI-U as the "Current Period"). If the change is three percent or greater, BOEM will publish a final rule in the Federal Register with the new inflation-adjusted offshore facility limit of liability. If, by the end of the three-year period, the cumulative percent change in the Annual CPI-U is less than three percent, BOEM will publish a notice in the Federal Register of no inflation adjustment to the limit of liability.

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* Following a notice of no inflation adjustment, BOEM will evaluate the cumulative percent change in the Annual CPI-U annually and adjust the limit based on the cumulative percent change in the Annual CPI-U, once the three-percent threshold is reached. After this adjustment is made, BOEM will resume its process of conducting a review every three years.

7. How will BOEM provide public notice for the offshore facility limit of liability adjustments?

BOEM will publish subsequent CPI or statutory adjustments to the offshore facility limit of liability for damages in a final rule in the Federal Register . A final rule will provide for timely notice of the CPI adjustments and will keep the offshore facility limit of liability amount current in BOEM regulations.

II. Additional Changes to 30 CFR Part 553

1. Update to Section 553.1 (What is the purpose of this part?)

Consistent with the proposed rule, BOEM is making the following changes to 30 CFR part 553, setting forth the limit of liability for offshore facilities under OPA.

2. Definition Changes for Terms Found at 30 CFR 553.3 ("How are the terms used in this regulation defined?")

BOEM is adding the following definitions to 30 CFR 553.3: Annual CPI-U, current period, previous period and Responsible party for purposes of Subpart G.

Changes Made Between the Proposed Rule and This Final Rule

The proposed rule would have revised the definition of "responsible party" in the existing regulation at 30 CFR 553.3, which addresses the party's responsibilities for COFs under the OSFR program. While the existing definition of "responsible party" adequately addresses the needs of the OSFR program, it does not contemplate the broader range of facilities that are covered by the limit of liability for offshore facilities under OPA at 33 U.S.C. 2704. In the context of OPA liability, a responsible party's liability is not limited to damages or removal costs associated with a COF. In this final rule, the new definition of "responsible party" for the limit of liability for offshore facilities in subpart G now makes clear that it also applies to all offshore facilities, whether the facilities are COFs (subject to the financial responsibility requirements of subparts A through F), or not, while the existing definition of "responsible party" for OSFR remains unchanged.

Further, BOEM has removed the following sentence from the definition of "responsible party" that appeared in the notice of proposed rulemaking: "The owner of operating rights in a lease is a responsible party with respect to facilities that serve or served an area and depth in which it holds operating rights, but not with respect to any facility that only serves parts of the lease to which it does not hold operating rights." A lessee of the area in which the facility is located is a responsible party under OPA at sec. 2701(32)(C). The definition of "responsible party" in both the proposed rule and in this final rule includes lessees as responsible parties. BOEM's definition of "lessee" in its existing regulation at 30 CFR 553.3 (which is not changed by this final rule) includes a holder of operating rights (working interest owner). Therefore, when read together, the definition of "responsible party" without the described sentence and the definition of "lessee" hold operating rights owners responsible, making this sentence unnecessary. To reinforce this connection between the definitions, BOEM has added a phrase in the second sentence of the definition of "responsible party for purposes of Subpart G" to expressly state that a responsible party includes lessees "as defined in this subpart."