

U.S. Department  
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DEPARTMENT OF TRANSPORTATION

U. S. COAST GUARD

STATEMENT OF REAR ADMIRAL RICHARD A. APPELBAUM

ON VESSEL FINANCIAL RESPONSIBILITY FOR WATER POLLUTION

BEFORE THE

SUBCOMMITTEE ON COAST GUARD AND NAVIGATION

COMMITTEE ON MERCHANT MARINE AND FISHERIES

HOUSE OF REPRESENTATIVES

NOVEMBER 6, 1991



REAR ADMIRAL RICHARD A. APPELBAUM  
COMMANDER, NATIONAL POLLUTION FUNDS CENTER  
UNITED STATES COAST GUARD



Rear Admiral Richard A. Appelbaum assumed duties as Commander, National Pollution Funds Center, located in Ballston, Virginia, in February 1991. He is the first officer to hold that position. He is responsible for managing the billion dollar Oil Spill Liability Trust Fund established by the Oil Pollution Act of 1990. The Fund provides money for pollution response and damage compensation. The Funds Center also certifies the financial responsibility of vessels operating in U.S. waters.



Prior to this assignment, Rear Admiral Appelbaum served as Chief, Office of Navigation Safety and Waterway Services, at Coast Guard Headquarters, Washington, D.C. In this capacity, he was director of several programs, including: search and rescue; recreational boating safety; aids to navigation; radio navigation; vessel traffic services; bridge administration; and domestic and polar icebreaking. Rear Admiral Appelbaum's other flag assignment was as Commander, Ninth Coast Guard District, and Commander, Maritime Defense Zone Sector Nine, headquartered in Cleveland, Ohio. He was responsible for Coast Guard activities on the Great Lakes.

Rear Admiral Appelbaum received a Bachelor of Science degree, in 1961, from the Coast Guard Academy in New London, CT, and a law degree, in 1970, from George Washington University.

Rear Admiral Appelbaum, as a Coast Guard law specialist, has served as: Legal Officer of the Seventh District (Miami, FL) and the Eleventh District (Long Beach, CA); the Service's General Court-Martial Military Judge; and the Head of the Law Faculty at the Coast Guard Academy.

Other shore assignments included command of the Long Range Navigation (LORAN) Station at Hokkaido, Japan, and Chief of Intelligence and Law Enforcement and Chief of Operations at the Seventh District.

Rear Admiral Appelbaum's seagoing assignments included command of the cutters CAPE YORK (Pascagoula, MS), CAPE FLORIDA (Anacortes, WA), and VIGOROUS (New London, CT). He also served on the cutter SALVIA (Mobile, AL) and as Executive Officer of the cutters PAPA W (Charleston, SC), EAGLE (the Academy's training barque), and WESTWIND (Milwaukee, WI).

Rear Admiral Appelbaum has received the Legion of Merit, the Meritorious Service Medal and four Coast Guard Commendation Medals.

A native of Chicago, Illinois, Rear Admiral Appelbaum has called Miami, Florida, his home since 1950. He is married to the former Maureen Eddy Carr of Nashville, Tennessee. The Appelbaum's have three sons: Kevin, Paul and David.

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GOOD MORNING, MR. CHAIRMAN. I AM HONORED TO APPEAR BEFORE THIS DISTINGUISHED SUBCOMMITTEE TODAY TO DISCUSS THE STATUS OF THE COAST GUARD'S ACTIONS TO IMPLEMENT THE VESSEL FINANCIAL RESPONSIBILITY PROVISIONS IN THE OIL POLLUTION ACT OF 1990 (OPA 90) AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA). IT IS ONE OF THE RESPONSIBILITIES OF MY COMMAND, THE NATIONAL POLLUTION FUNDS CENTER, TO CARRY OUT THE VESSEL FINANCIAL RESPONSIBILITY PROVISIONS OF THESE ACTS.

THE COAST GUARD PUBLISHED A NOTICE OF PROPOSED RULEMAKING IN THE FEDERAL REGISTER ON SEPTEMBER 26, 1991 (CGD 91-005). THIS NOTICE ALLOWS A 60-DAY PERIOD FOR THE PUBLIC TO SUBMIT COMMENTS. AFTER THE COMMENT PERIOD CLOSES, WE PLAN TO PUBLISH A FINAL RULE WHICH WILL INCORPORATE ANY CHANGES MADE. WE LOOK FORWARD TO RECEIVING THE PUBLIC'S INPUT TO HELP US CRAFT A COMPREHENSIVE AND WORKABLE FINAL RULE IN CONFORMITY WITH OPA 90.

THE COAST GUARD IS IN THE PROCESS OF PREPARING A REGULATORY IMPACT ANALYSIS. THIS ANALYSIS WILL ASSESS THE POTENTIAL EFFECTS ARISING FROM DIFFICULTIES OCEANGOING OPERATORS MAY ENCOUNTER IN OBTAINING THE USUAL GUARANTIES OF INSURANCE FROM THEIR INSURANCE ENTITIES ONCE THE RULE GOES INTO EFFECT. TO ASSIST IN PREPARING THIS ANALYSIS, THE NOTICE OF PROPOSED RULEMAKING CONTAINS A LIST

OF QUESTIONS SOLICITING SPECIFIC INFORMATION REGARDING SOME OF THE SUBJECTS THAT MAY BE ADDRESSED IN THE ANALYSIS. UPON CONSIDERATION OF THE COMMENTS AND OTHER INFORMATION RECEIVED, THE ANALYSIS WILL BE COMPLETED AND NOTICE OF ITS AVAILABILITY PLACED IN THE FEDERAL REGISTER. BASED ON THE COMMENTS RECEIVED IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING, IF ADDITIONAL OPPORTUNITY FOR PUBLIC COMMENT ON THE ANALYSIS IS INDICATED, THE COAST GUARD WILL PROVIDE AN OPPORTUNITY FOR SUCH COMMENT BEFORE PUBLISHING A FINAL RULE.

CURRENTLY, PENDING PROMULGATION OF A FINAL RULE, FOR PURPOSES OF CERTIFICATION (AS CONTRASTED WITH LIABILITY), WE ARE USING VESSEL FINANCIAL RESPONSIBILITY NUMBERS THAT ARE PROVIDED IN PRE-OPA 90 LAWS, SUCH AS THE CLEAN WATER ACT. TODAY, TO OBTAIN A CERTIFICATE AND OPERATE IN THE U.S., A VESSEL OPERATOR NEED ONLY PROVIDE EVIDENCE OF FINANCIAL RESPONSIBILITY WHICH IS A FRACTION OF THAT PRESCRIBED IN OPA 90. THAT OWNER OR OPERATOR MAY BECOME LIABLE UNDER OPA 90 FOR MUCH HIGHER AMOUNTS, BUT, ABSENT UPDATED RULES, THERE IS NO REQUIREMENT TO PRODUCE EVIDENCE OF FINANCIAL RESPONSIBILITY COMMENSURATE WITH SUCH HIGHER AMOUNTS. THE PROPOSED RULE SEEKS TO BLEND THE SPECIFIC REQUIREMENTS OF THE ACT, INCLUDING ITS INCREASED LIMITS OF LIABILITY, WITH BASIC PROCEDURAL STEPS THAT HAVE BEEN IN EFFECT FOR MANY YEARS.

THE REQUIREMENTS FOR VESSEL FINANCIAL RESPONSIBILITY HAVE BEEN IN EFFECT IN THE U.S. SINCE 1971. OPA 90 HAS NOT CHANGED THE MECHANICS OF THIS SYSTEM. ALTHOUGH THE STATUTORY LIMITS AND SCOPE OF LIABILITY HAVE INCREASED THROUGHOUT THE YEARS, THE

SYSTEM FOR ESTABLISHING FINANCIAL RESPONSIBILITY HAS REMAINED THE SAME. HISTORICALLY, FOUR WORKABLE METHODS FOR ESTABLISHING FINANCIAL RESPONSIBILITY HAVE BEEN IDENTIFIED BY INDUSTRY AND GOVERNMENT: 1) INSURANCE GUARANTIES, 2) SURETY BOND GUARANTIES, 3) SELF-INSURANCE, AND 4) FINANCIAL GUARANTIES, WHICH ARE SIMILAR TO SELF-INSURANCE. OF THESE METHODS, INSURANCE GUARANTIES ARE, BY FAR, THE MOST FREQUENTLY USED, PARTICULARLY IN THE INTERNATIONAL VESSEL OPERATING COMMUNITY.

THE COAST GUARD CERTIFICATION PROCESS IS SIMPLE: ONCE THE OWNER/OPERATOR AND THE VESSELS ARE IDENTIFIED ON AN APPLICATION FORM, AND THE GUARANTOR OR SELF-INSURER HAS PROVIDED THE COAST GUARD WITH SUFFICIENT EVIDENCE OF FINANCIAL RESPONSIBILITY, THE AFFECTED VESSELS ARE ISSUED CERTIFICATES OF FINANCIAL RESPONSIBILITY (COFR'S). APPLICATION AND CERTIFICATION FEES MUST BE PAID. IN GENERAL TERMS, VESSELS LACKING VALID COFR'S ARE PROHIBITED BY THE COAST GUARD, AS WELL AS THE U.S. CUSTOMS SERVICE, FROM OPERATING IN U.S. WATERS, AND ENTERING OR LEAVING U.S. PORTS. OPA 90 AND CERCLA CONTINUE TO MANDATE SUCH ENFORCEMENT.

OVER THE PAST SEVERAL MONTHS, THE NATIONAL POLLUTION FUNDS CENTER HAS BEEN NOTIFIED OF SEVERAL CONCERNS OF THE MARITIME COMMUNITY. I WILL IDENTIFY THE PRINCIPAL ISSUES RAISED THUS FAR.

ONE CONCERNS THE LIMITS OF LIABILITY. UNDER OPA 90, THE LIMITS OF LIABILITY FOR TANK VESSELS GENERALLY ARE SEVERAL TIMES HIGHER THAN UNDER THE PREVIOUS STATUTES. BUT, EVEN WITH THIS INCREASE, THE LIMITS OF LIABILITY ARE WELL BELOW THE COVERAGE THAT WE UNDERSTAND IS ROUTINELY PROVIDED BY THE INTERNATIONAL

SHIPPING COMMUNITY'S INSURANCE ENTITIES, CALLED PROTECTION AND INDEMNITY (P&I) CLUBS. ALSO, THE LIMITS OF LIABILITY ARE SPECIFIED IN THE STATUTE AND THERE ARE NO NEW PROCEDURAL CONCEPTS IN THE PROPOSED RULE. VIRTUALLY ALL OCEANGOING OPERATORS WHO USE U.S. WATERS ALREADY WOULD HAVE MORE THAN THE NECESSARY INSURANCE COVERAGE FOR FEDERAL PURPOSES FROM THEIR P&I CLUBS. ALL THAT IS REQUIRED BY OPA 90 AND CERCLA, AND THEREFORE BY THE PROPOSED RULE, IS THAT THE COVERAGE BE SUBMITTED IN A FORM ACCEPTABLE TO ESTABLISH EVIDENCE OF FINANCIAL RESPONSIBILITY, BUT ONLY UP TO THE LIMITS OF OPA 90 AND CERCLA. I SHOULD ADD HERE THAT FOR THE GREAT MAJORITY OF OCEANGOING VESSELS, THE P&I CLUBS HAVE ALWAYS BEEN THE GUARANTORS FOR U.S. FINANCIAL RESPONSIBILITY PURPOSES. THE CLUBS ALSO PROVIDE FINANCIAL SECURITY FOR THE OIL POLLUTION DAMAGE LIABILITY OF SHIPOWNERS WHO TRADE IN, OR FLY THE FLAGS OF, SIXTY-NINE OTHER COUNTRIES PARTY TO THE 1969 CONVENTION ON CIVIL LIABILITY FOR OIL POLLUTION DAMAGE. WE UNDERSTAND THAT INSURANCE GUARANTIES FOR THE NON-OCEANGOING OR "BROWN WATER" VESSEL OPERATORS ARE READILY AVAILABLE FROM THE COMMERCIAL MARINE INSURANCE INDUSTRY IN THE UNITED STATES. I AM TOLD THAT THEY WILL REMAIN AVAILABLE.

A SECOND ISSUE RAISED IS THAT OF DIRECT ACTION AGAINST A GUARANTOR BY PRIVATE CLAIMANTS. OPA 90 REQUIRES THAT CLAIMANTS, INCLUDING PRIVATE CLAIMANTS, BE ABLE TO PRESENT A CLAIM FOR REMOVAL COSTS OR DAMAGES DIRECTLY AGAINST AN INSURER OR OTHER GUARANTOR SHOULD A VESSEL BE INVOLVED IN A POLLUTION INCIDENT. DIRECT ACTION BY PRIVATE CLAIMANTS IS NOT A NEW CONCEPT. ALTHOUGH ONLY THE FEDERAL GOVERNMENT COULD TAKE DIRECT ACTION

AGAINST THE GUARANTOR UNDER THE CLEAN WATER ACT, DIRECT ACTION BY PRIVATE CLAIMANTS WAS A FEATURE OF THE FINANCIAL RESPONSIBILITY REQUIREMENTS UNDER THE TRANS-ALASKA PIPELINE AUTHORIZATION ACT OF 1973 AND THE OUTER CONTINENTAL SHELF LANDS ACT AMENDMENTS OF 1978. DIRECT ACTION BY PRIVATE CLAIMANTS AGAINST AN INSURER OR OTHER PERSON PROVIDING FINANCIAL SECURITY IS ALSO AN UNDERPINNING OF THE SCHEME UNDER THE 1969 CIVIL LIABILITY CONVENTION. WHILE NEITHER THE 1969 CONVENTION NOR THE 1984 PROTOCOLS TO THAT CONVENTION HAVE BEEN RATIFIED BY THE UNITED STATES, THE 1969 CONVENTION HAS BEEN IN EFFECT SINCE AS EARLY AS 1975 IN THE NATIONS PARTY TO THE CONVENTION (CURRENTLY SIXTY-NINE IN NUMBER). THEREFORE, COVERAGE OF UNITED STATES RISK UNDER BOTH OPA 90 AND THE CURRENT PRIMARY INTERNATIONAL REGIME REQUIRES DIRECT ACTION AGAINST INSURERS BY PRIVATE CLAIMANTS.

A THIRD ISSUE CONCERNS THE MATTER OF FEDERAL PREEMPTION. OPA 90 DOES NOT PREEMPT STATES FROM IMPOSING ADDITIONAL LIABILITY OR OTHER REQUIREMENTS WITH REGARD TO OIL POLLUTION. WE UNDERSTAND THAT SOME OPERATORS HAVE EXPRESSED CONCERN THAT, IN THE AFTERMATH OF THE EXXON VALDEZ INCIDENT, SOME STATES MAY LEGISLATE PROHIBITIVELY IN THIS AREA. STATE LIABILITY REQUIREMENTS DO NOT AFFECT OPA 90 FINANCIAL RESPONSIBILITY REQUIREMENTS. STATE AND FEDERAL REGULATIONS ON THE SUBJECT OF FINANCIAL RESPONSIBILITY ARE SEPARATE AND DISTINCT.

A FOURTH ISSUE RAISED BY THE MARITIME INDUSTRY IS THAT OF POTENTIAL UNLIMITED LIABILITY. OPA 90 EXPRESSLY PROVIDES FEDERAL LIABILITY LIMITS FOR RESPONSIBLE PARTIES INVOLVED IN AN OIL POLLUTION INCIDENT. THE PROPOSED RULE REFLECTS THOSE LIMITS.

HOWEVER, IF AN INCIDENT WAS CAUSED BY GROSS NEGLIGENCE, WILLFUL MISCONDUCT, OR A VIOLATION OF CERTAIN FEDERAL REGULATIONS, THE LIMITS OF LIABILITY WOULD NOT APPLY. IN A CASE WHERE A RESPONSIBLE PARTY'S LIMIT OF LIABILITY IS BROKEN, THE GUARANTOR WOULD STILL ONLY BE LIABLE, UNDER DIRECT ACTION, UP TO THE LIMITS OF ITS GUARANTEE. IN THE EVENT OF THE RESPONSIBLE PARTY'S WILLFUL MISCONDUCT, UNDER OPA 90 THE GUARANTOR IS NOT LIABLE AT ALL. IT IS THE RESPONSIBLE PARTY -- NAMELY THE OWNER AND OPERATOR OF THE VESSEL -- WHO WOULD BE LIABLE.

A FIFTH ISSUE CONCERNS POLICY DEFENSES. INSURANCE GUARANTIES, TO HAVE ANY PRACTICAL MEANING, CANNOT CONTAIN POLICY DEFENSES, WHICH ARE A HOST OF EXCLUSIONS IN THE UNDERLYING INSURANCE CONTRACT, AS WELL AS IN CASE LAW, BETWEEN THE INSURER AND INSURED. THESE DEFENSES OR EXCLUSIONS VOID THE UNDERLYING INSURANCE FOR A VARIETY OF REASONS. WHILE OPA 90 ALLOWS THE SECRETARY TO SPECIFY NECESSARY POLICY DEFENSES IN PROMULGATING FINANCIAL RESPONSIBILITY REQUIREMENTS, WE HAVE FOUND NONE, OTHER THAN THOSE PERMITTED BY STATUTE, THAT WOULD "EFFECTUATE THE PURPOSES OF THIS ACT." IT APPEARS TO US THAT CONGRESS INTENDED DIRECT ACTION TO BE A PRINCIPAL FEATURE OF THE LAW, AND POLICY DEFENSES APPEAR TO RUN COUNTER TO THE CONCEPT OF DIRECT ACTION.

THE FINAL ISSUE CONCERNS SELF-INSURANCE. SELF-INSURANCE IS ONE OF THE STATUTORILY-PERMITTED METHODS OF ESTABLISHING FINANCIAL RESPONSIBILITY. THE PROPOSED RULE WOULD MAKE NO CHANGES FROM CURRENT REGULATIONS ON ESTABLISHING SELF-INSURANCE. TO SUMMARIZE THEIR REQUIREMENTS: A SELF-INSURER MUST HAVE ASSETS IN THE U.S. THAT CAN BE ATTACHED BY CLAIMANTS (INCLUDING THE OIL

SPILL LIABILITY TRUST FUND), IF NECESSARY TO SATISFY A JUDGMENT. IN ADDITION, U.S. ASSETS MUST BE BALANCED AGAINST INTERNATIONAL LIABILITIES. THAT IS, A SELF-INSURER'S WORLDWIDE LIABILITIES MUST BE LESS THAN ITS U.S. ASSETS. THIS IS INTENDED TO ENSURE THAT THE U.S. ASSETS REMAIN AVAILABLE TO U.S. CLAIMANTS AND ARE NOT DEPLETED IN MEETING FOREIGN LIABILITIES. WE ARE SOLICITING COMMENTS IN OUR NOTICE OF PROPOSED RULEMAKING ON THE VIABILITY OF SELF-INSURANCE UNDER OPA 90.

I HAVE RECENTLY HEARD OF A PROPOSAL TO ALLOW THE USE OF P&I CLUB MEMBERSHIP OR INSURANCE AS AN "ASSET" FOR SELF-INSURANCE PURPOSES. THERE ARE SEVERAL POINTS I WOULD LIKE TO MAKE CONCERNING THIS PROPOSAL. FIRST, AS BETWEEN THE INSURED AND THE INSURER, INSURANCE IS SUBJECT TO POLICY DEFENSES, SOME OF WHICH MAY NOT BE EXPLICIT IN INSURANCE CONTRACTS. FOR A HOST OF REASONS, AN INSURED MAY END UP WITHOUT THE COVERAGE NECESSARY TO SATISFY HIS LIABILITIES. SECOND, TYPICALLY, P&I CLUB INSURANCE SPECIFICALLY PROHIBITS ATTACHMENT OR DIRECT ACTION BY CLAIMANTS. THIRD, WE UNDERSTAND THAT P&I INSURANCE NORMALLY CAN BE CANCELLED WITHOUT THE CONSENT OF THE SHIPOWNER AND WITHOUT THE KNOWLEDGE OF THE COAST GUARD. FOURTH, P&I INSURANCE IS TYPICALLY CHARACTERIZED AS INDEMNITY INSURANCE. THAT MEANS THAT IF A VESSEL COVERED BY A P&I CLUB HAS AN OIL SPILL, THE INSURED MUST FIRST PAY FOR THE REMOVAL COST AND DAMAGES OUT OF ITS OWN POCKET. THEN, AND ONLY THEN, WOULD THE SHIPOWNER HAVE LEGAL STANDING TO DEMAND THAT THE P&I CLUB PAY-UP; PROVIDED, OF COURSE, THAT THE CLUB DID NOT HAVE THE RIGHT TO ASSERT A POLICY DEFENSE. AS AN EXAMPLE, THE SUBCOMMITTEE RECENTLY WROTE THE COMMANDANT

CONCERNING A CASE INVOLVING THE CIBRO SAVANNAH SPILL IN WHICH A POLICY DEFENSE WAS EMPLOYED AGAINST THE INSURED. WHILE THIS DID NOT AFFECT THE GUARANTEE OF FINANCIAL RESPONSIBILITY TO THE COAST GUARD, IT DEMONSTRATES ONE OF THE SHORTCOMINGS OF USING INSURANCE AS AN ASSET.

FINALLY, MR. CHAIRMAN, OPA 90 DEFINES ANY PERSON, OTHER THAN THE RESPONSIBLE PARTY, WHO PROVIDES EVIDENCE OF FINANCIAL RESPONSIBILITY AS A "GUARANTOR." IT FURTHER PROVIDES FOR DIRECT ACTION AGAINST ANY "GUARANTOR." IF WE WERE TO ISSUE REGULATIONS PERMITTING AN INSURANCE POLICY TO BE COUNTED AS AN ASSET, THE INSURER COULD AVOID DIRECT ACTION, THEREBY THWARTING THE REQUIREMENTS OF OPA 90. WE LOOK FORWARD TO RECEIVING COMMENTS ANALYZING THE ISSUES ASSOCIATED WITH GUARANTEEING FINANCIAL RESPONSIBILITY THROUGH USE OF P&I MEMBERSHIP OR INSURANCE AS AN ASSET FOR SELF-INSURANCE PURPOSES.

MR. CHAIRMAN, I WILL BE GLAD TO RESPOND TO ANY QUESTIONS YOU OR THE OTHER MEMBERS OF THE SUBCOMMITTEE MAY HAVE.