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## Spillover from the *Exxon Valdez*: North Carolina's New Offshore Oil Spill Statute

Shortly after midnight on March 24, 1989, the tanker *Exxon Valdez* ran aground in the biologically rich waters of Prince William Sound, beginning the largest oil spill in United States history.<sup>1</sup> Drifting with the wind and currents, eleven million gallons of spilled oil eventually stretched along more than 1200 miles of shoreline.<sup>2</sup> The enormous spill devastated the local fishing industry and threatened several national and state parks and wildlife refuges.<sup>3</sup> Although the full environmental and economic effects of the spill are yet unknown, "[c]leanup costs alone are estimated at approximately \$2 billion."<sup>4</sup>

Within a month, the incident had spawned over thirty lawsuits,<sup>5</sup> prompting commentators to speculate whether full compensation was even possible.<sup>6</sup> The cleanup response quickly drew criticism from officials in both Congress and the Bush Administration who complained that "the oil spill contingency plan and the availability of adequate equipment were dramatically lacking."<sup>7</sup> As the cleanup effort lingered for months after the spill, the failure of existing oil spill legislation became increasingly apparent. Outrage over the Alaskan spill renewed a fourteen-year-old debate over comprehensive federal oil spill legislation in both houses of Congress.<sup>8</sup>

The *Exxon Valdez* disaster also fueled a continuing debate over exploratory

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1. Over several days, the *Exxon Valdez* spilled approximately 11 million gallons (240,000 barrels) of crude oil. Straube, *Is Full Compensation Possible for the Damages Resulting from the Exxon Valdez Oil Spill?*, 19 ENVTL. L. REP. 10338, 10338 (1989). The largest previous tanker spill in United States waters occurred in 1976 when the *Argo Merchant* ran aground off Massachusetts, spilling 7.7 million gallons (180,000 barrels). U.S. DEP'T OF INTERIOR, DRILLING AND PRODUCTION DISCHARGES AND OIL SPILLS IN THE MARINE ENVIRONMENT 15-16 (1989).

2. "Had the spill occurred on the eastern seaboard, it would have stretched from Cape Cod to North Carolina's Outer Banks." Hodgson, *Alaska's Big Spill: Can the Wilderness Heal?*, NAT'L GEOGRAPHIC, Jan. 1990, at 12.

3. Straube, *supra* note 1, at 10338. "The spill occurred in a remote and pristine area, abundant with wildlife and fisheries, at the beginning of the fish spawning, seal pupping, and bird migration seasons." *Id.*

4. Kuntz, *Oil Spill Negotiators Find Another Sticking Point*, 48 CONG. Q. 1261, 1262 (weekly ed. Apr. 28, 1990) (quoting Sen. George Mitchell, D-Me.). For a detailed examination of the *Exxon Valdez* spill, see *Exxon Valdez Oil Spill: Hearing on Topics Concerning the Exxon Valdez Oil Spill into the Prince William Sound of Alaska Before the Subcomm. on Coast Guard & Navigation of the House Comm. on Merchant Marine & Fisheries*, 101st Cong., 1st Sess. (1989).

5. Straube, *supra* note 1, at 10338 (citing *Exxon Says 31 Lawsuits Filed in Oil Spill*, Washington Post, Apr. 26, 1989, at A-12, col. 4).

6. See *id.* at 10349 (concluding that the availability of full compensation is "unclear").

7. 135 CONG. REC. S3221 (daily ed. Apr. 4, 1989) (Sen. Murkowski paraphrasing remarks of Secretary of Transportation Samuel Skinner).

8. See generally Jones, *Oil Spill Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENVTL. L. REP. 10333, 10333 (1989) (Rep. Walter Jones' account of "the perverse legislative hell that has dogged consideration of oil spill compensation bills in the United States Congress"). Only days before the *Exxon Valdez* spill, Representative Jones (D-N.C.) introduced a comprehensive oil spill bill in the House. See H.R. 1465, 101st Cong., 1st Sess., 135 CONG. REC. H708 (daily ed. Mar. 16, 1989). Senator George Mitchell (D-Me.) introduced a similar bill in the Senate less than 2 weeks after the spill. See S. 686, 101st Cong., 1st Sess., 135 CONG. REC. S3241 (daily ed. Apr. 4, 1989). For a discussion of the House and Senate bills, see *infra* notes 53-79 and accompanying text.

drilling off the North Carolina coast.<sup>9</sup> Even before the Alaskan spill, opponents of offshore drilling, including both environmentalists and commercial interests, worried that a spill off the North Carolina coast would "foul the state's beaches and blacken the reputation of its tourism and fishing industries."<sup>10</sup> News of the *Exxon Valdez* only raised concerns over North Carolina's oil spill response capacity.<sup>11</sup>

Against this backdrop, the North Carolina General Assembly recognized the inadequacy of North Carolina's oil pollution legislation. Seeking to mitigate the potentially catastrophic effects of offshore oil and gas activities on North Carolina coastal resources, the General Assembly enacted comprehensive legislation dealing specifically with oil spill liability and cleanup.<sup>12</sup> Among other things, the new legislation subjects responsible parties to strict liability for all cleanup costs and direct or indirect damages resulting from oil spills affecting North Carolina waters.<sup>13</sup> Unlike existing and proposed federal legislation, the new North Carolina law places no limit on liability for responsible parties who do not fall within a specified exception.<sup>14</sup> The new law also assigns cleanup responsibility to the Department of Natural Resources and Community Development,<sup>15</sup> and requires the State Emergency Response Commission to promulgate an oil spill contingency plan.<sup>16</sup>

This Note analyzes North Carolina's new oil spill legislation and its relationship to similar federal and state laws. Sections I and II examine federal oil pollution legislation and its preemptive effect on state oil spill laws. Section III examines oil spill statutes in other states, and Section IV analyzes the new North Carolina oil spill legislation. Section V then compares the North Carolina law to similar federal and state statutory schemes, and suggests additional measures that may strengthen North Carolina's effort to combat coastal oil pollution. The Note concludes that the new North Carolina legislation's emphasis on post-spill cleanup and compensation will help deal with the effects of oil spills, but argues that more is needed to protect North Carolina's coast.

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9. Heading a group of eight oil companies, Mobil Oil Corporation plans to drill exploratory wells about 50 miles off Cape Hatteras. Tursi, *Debate Rages Over Proposed Well*, Winston-Salem (N.C.) Journal, Feb. 26, 1989, at A1, col. 1.

10. *Id.*

11. *See State Unprepared to Cope with Oil Spill, Official Says*, Durham (N.C.) Morning Herald, May 1, 1989, at 1-C, col. 1 [hereinafter *State Unprepared*].

12. *See* Act of July 19, 1989, ch. 656, 1989 N.C. Sess. Laws 222 [hereinafter the "Offshore Oil Spill Act"]. Section 5 of the Act added a new Part to Article 21A of Chapter 143 of the General Statutes entitled "Offshore Oil and Gas Activities: Adverse Environmental Impact Protection." *Id.* § 5, 1989 N.C. Session Laws at 226. This Part originally was enacted as Part 2B of Chapter 143 by Act of July 19, 1989, ch. 656, § 5, 1989 N.C. Session Laws 222, 226 (N.C. GEN. STAT. §§ 143-215.94N to -215.94W); but was recodified as Part 2C by Act of Aug. 12, 1989, ch. 770, § 75.5, 1989 N.C. Session Laws 962, 975 (codified at N.C. GEN. STAT. §§ 143-215.94AA to -215.94JJ (Supp. 1989)).

13. N.C. GEN. STAT. § 143-215.94CC(a) (Supp. 1989).

14. *See id.* § 143-215.94CC(b)(1)-(7).

15. *Id.* § 143-215.94EE(a).

16. *Id.* § 143-215.94HH(a).

## I. FEDERAL OIL POLLUTION LEGISLATION

## A. Existing Federal Legislation

The most important federal statute dealing specifically with oil spill liability and cleanup is Section 311 of the Federal Water Pollution Control Act (FWPCA).<sup>17</sup> Announcing the policy behind the FWPCA, Section 311 broadly declares "that there should be no discharges of oil . . . into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."<sup>18</sup> When an oil spill occurs, however, the FWPCA authorizes the federal government to remove the oil unless the President "determines such removal will be done properly by the owner or operator of the vessel, on-shore facility, or offshore facility from which the discharge occurs."<sup>19</sup> The FWPCA establishes a special fund (the "311 Fund"), maintained primarily through congressional appropriations, to finance federal cleanup operations.<sup>20</sup> The FWPCA also requires promulgation of a National Contingency Plan to "provide for efficient, coordinated, and effective action to minimize damage from oil . . . discharges, including containment, dispersal, and removal."<sup>21</sup>

Although the government initially draws from the 311 Fund to subsidize its cleanup efforts,<sup>22</sup> the FWPCA makes owners and operators liable to the government for removal costs, including restoration or replacement of natural re-

17. 33 U.S.C. § 1321 (1982 & Supp. V 1987) [hereinafter "FWPCA"]. Section 311 originally was enacted as part of the Water Quality and Improvement Act of 1970. Pub. L. No. 91-224, § 11, 84 Stat. 91 (1970) (hereinafter "WQIA"). Section 11 of the WQIA was modified slightly and transferred to § 311 of the FWPCA. Pub. L. No. 92-500, § 311, 86 Stat. 862 (1972) (codified as amended at 33 U.S.C. § 1321 (1982 & Supp. V 1987)). For a detailed analysis of the FWPCA oil spill provision, see Note, *Strict Liability Under Section 311 of the Clean Water Act: Cleaning Up Respondent Superior and Negligence*, 10 COLUM. J. ENVTL. L. 149 (1985), and Note, *Oil Spills and Cleanup Bills: Federal Recovery of Oil Spill Cleanup Costs*, 93 HARV. L. REV. 1761 (1980).

18. 33 U.S.C. § 1321(b)(1) (1982). Section 311(a) broadly defines the term "discharge." See *id.* § 1321(a)(2).

19. *Id.* § 1321(c)(1). Section 311(a)(6) defines the term "owner or operator" as:

(A) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, and (B) in the case of an onshore facility, and an offshore facility, any person owning or operating such onshore facility or offshore facility, and (C) in the case of any abandoned offshore facility, the person who owned or operated such facility immediately prior to such abandonment.

*Id.* § 1321(a)(6). Section 311(a) also defines "vessel," "onshore facility," and "offshore facility." *Id.* § 1321(a)(3), (10), (11).

Interestingly, as of August, 1989, President Bush had not federalized cleanup activities in Prince William Sound despite Vice President Quayle's criticism of Exxon's response as inadequate. See Straube, *supra* note 1, at 10341 n.35.

20. See 33 U.S.C. § 1321(k)(1) (1982). The 311 Fund may contain up to \$35,000,000. *Id.* Although the fund includes costs and fines recovered from responsible parties, "[s]ince the 311(k) fund was created, the Coast Guard has spent almost \$184 million cleaning up oil spills but has been able to recover only \$144 million." H.R. REP. NO. 242, 101st Cong., 1st Sess., pt. 2, at 34 (1989) (Report to accompany H.R. 1465). "This [311] fund has never reached its authorized size . . . and as of June 1989 had a balance of \$7.3 million." Jones, *supra* note 8, at 10333-34.

21. 33 U.S.C. § 1321(c)(2) (1982). The National Oil & Hazardous Substances Pollution Contingency Plan is codified at 40 C.F.R. § 300 (1989). Section 311(j)(1) of the FWPCA requires promulgation of similar regulations. 33 U.S.C. § 1321(j)(1) (1982); see, e.g., Criteria for State, Local and Regional Oil Removal Contingency Plans, 40 C.F.R. § 109 (1989); Oil Pollution Prevention, 40 C.F.R. § 112 (1989).

22. See *supra* note 20 and accompanying text.

sources,<sup>23</sup> up to certain limits depending on the type of vessel or facility responsible for the discharge.<sup>24</sup> If, however, the government proves that the "discharge was the result of willful negligence or willful misconduct within the privity and knowledge of the owner," the liability limits do not apply.<sup>25</sup> Owners and operators can avoid liability only by proving that the spill was caused solely by an act of God, an act of war, negligence of the federal government, an act or omission of a third party, or any combination of the above.<sup>26</sup> The FWPCA creates no private remedies, but "Congress explicitly refused to prohibit state liability schemes"<sup>27</sup> when it enacted the FWPCA.

Although the FWPCA remains the primary federal oil pollution statute, "the location of an oil spill or the origin of the spilled oil"<sup>28</sup> may trigger application of other federal statutes. Special oil spill provisions govern oil produced from offshore oil leases,<sup>29</sup> oil handled at deepwater ports,<sup>30</sup> oil transported through the Trans-Alaska Pipeline System,<sup>31</sup> and oil spills affecting national marine sanctuaries.<sup>32</sup> The Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA),<sup>33</sup> for example, provide a statutory scheme governing spills resulting from oil and gas activities on the Outer Continental Shelf.<sup>34</sup> Like the FWPCA, OCSLA establishes a special fund to help finance federal cleanup ef-

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23. 33 U.S.C. § 1321(f)(4) (1982).

24. Owners and operators of "inland oil barges" are responsible for "\$125 per gross ton of such barge, or \$125,000, whichever is greater, and in the case of any other vessel, \$150 per gross ton of such vessel (or, for a vessel carrying oil or hazardous substances as cargo, \$250,000), whichever is greater." *Id.* § 1321(f)(1). In contrast, owners and operators of onshore and offshore facilities are liable up to \$50,000,000. *Id.* § 1321(f)(2), (3). Liability limits for small onshore facilities are promulgated pursuant to 33 U.S.C. § 1321(f)(2) (1982), and codified at 40 C.F.R. § 113 (1989).

Owners of certain vessels must also maintain evidence of financial responsibility in amounts equal to the corresponding liability limits. *See* 33 U.S.C. § 1321(p) (1982 & Supp. V 1987).

25. 33 U.S.C. § 1321(f)(1)-(3). The Fourth Circuit has construed the term "willful negligence" in § 311(f) to mean "reckless disregard for the probable consequences of a voluntary act or omission." *Stewart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 614 (4th Cir. 1979).

26. *See* 33 U.S.C. § 1321(f)(1)-(3) (1982). Owners and operators may recover their own cleanup costs when discharges result solely from causes other than their own acts. *See id.* § 1321(g), (i).

27. Lipeles, *State Control of Oil Pollution: Legislating in the Twilight Zone*, 1 HARV. ENVTL. L. REV. 431, 437 (1976) (citing 33 U.S.C. § 1321(o)(2)). *Cf. infra* notes 87-93 and accompanying text (discussing whether FWPCA liability limits apply to state liability schemes).

28. Straube, *supra* note 1, at 10339.

29. *See* Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. §§ 1801-1824 (1982 & Supp. V 1987) [hereinafter "OCSLA"]. For a discussion of the OCSLA oil spill provisions, *see infra* notes 33-42 and accompanying text.

30. *See* Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524 (1982 & Supp. V 1987) [hereinafter "DWPA"]. "A deepwater port is basically a set of elaborate buoys at which supertankers can dock and transfer their cargo to pipelines running underwater to shore." Lipeles, *supra* note 27, at 431 n.3; *see also* 33 U.S.C. § 1501(10) (1982) (defining deepwater ports for purposes of the DWPA). There is currently only one deepwater oil port in the United States, the Louisiana Offshore Oil Port. *See Jones, supra* note 8, at 10334.

31. *See* Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651-1655 (1982) [hereinafter "TAPAA"]. For an application of TAPAA and FWPCA to the facts of the *Exxon Valdez* spill, *see* Straube, *supra* note 1, at 10339-50.

32. *See* Marine Protection, Research, and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1434 (1982).

33. 43 U.S.C. §§ 1801-1824 (1982 & Supp. V 1987).

34. *See id.* § 1802(8).

forts.<sup>35</sup> The OCSLA Fund, however, differs from the 311 Fund in several significant respects. The OCSLA Fund not only pays federal and state removal costs,<sup>36</sup> but also reimburses public and private claimants for damages including loss of real and personal property, natural resources, profits, and tax revenues.<sup>37</sup> Moreover, in contrast to the 311 Fund's reliance on appropriated funds,<sup>38</sup> the OCSLA fund is maintained by a surcharge on oil obtained from federal offshore leases.<sup>39</sup> Additionally, OCSLA imposes strict liability on owners and operators for both public and private damages<sup>40</sup> within prescribed limits.<sup>41</sup> Notwithstanding the limitation on damages, however, OCSLA imposes unlimited liability for both federal and state cleanup costs.<sup>42</sup>

Another federal statute that may affect oil spill compensation is the Limitation of Liability Act of 1851 (LLA).<sup>43</sup> Although not specifically geared to oil spills, the LLA limits a shipowner's liability to the value of the vessel if a maritime accident occurs without the shipowner's "privity or knowledge."<sup>44</sup> Because this valuation is made after the accident,<sup>45</sup> the LLA may restrict significantly recovery of oil spill damages from vessel owners. Following the *Torrey Canyon* disaster in 1967,<sup>46</sup> for example, the shipowner filed a petition

35. See *id.* § 1812 [hereinafter "OCSLA Fund"]. Similar funds are authorized by the DWPA and TAPPA. See 33 U.S.C. § 1517(f) (1982) ("Deepwater Port Liability Fund"); 43 U.S.C. § 1651(c)(4) (1982) ("Trans-Alaska Pipeline Liability Fund").

36. See 43 U.S.C. § 1811(22) (1982) (defining "removal costs").

37. See generally *id.* § 1813 (defining permissible claims and persons entitled to assert claims).

38. See *supra* note 20 and accompanying text.

39. See 43 U.S.C. § 1812(d) (1982). The surcharge, which may not exceed three cents per barrel, is "designed to insure that the Fund is maintained at a level of not less than \$100,000,000 and not more than \$200,000,000." *Id.* § 1812(d)(2). According to a 1988 report by the Congressional Research Service, "the fund balance currently exceeds \$120 million, with [fiscal year 1989] collections projected at \$10 million." CONGRESSIONAL RESEARCH SERVICE, OIL POLLUTION LIABILITY AND COMPENSATION 5 (1988) [hereinafter OIL POLLUTION LIABILITY AND COMPENSATION]. Cf. *supra* note 20 (noting 311 Fund's June, 1989 balance of \$7.3 million).

40. See 43 U.S.C. § 1814(a) (1982) (strict, joint and several liability); *id.* § 1813(a) (describing potential damages). Owners and operators can escape liability under OCSLA by proving one of several statutory defenses similar to those in the FWPCA. See *id.* § 1814(c) ("exceptions and defenses"); cf. 33 U.S.C. § 1321(f) (1982) (describing statutory defenses under the FWPCA).

41. Vessel owners and operators are liable for damages up to \$250,000 or \$300 per gross ton, whichever is greater. 43 U.S.C. § 1814(b)(1) (1982). For offshore facilities, recoverable damages are limited to \$35,000,000. *Id.* § 1814(b)(2). Like the FWPCA, however, OCSLA imposes full liability on owners and operators in the case of willful misconduct, gross negligence or failure to obey applicable federal regulations. *Id.* § 1814(b). Cf. *supra* notes 23-27 and accompanying text (defining scope of liability under FWPCA).

42. See 43 U.S.C. § 1814(d) (1982).

43. 46 U.S.C. §§ 181-196 (Supp. V 1987).

44. See *id.* § 183(a). "Privity" refers to "some fault or neglect in which the shipowner personally participates." *In re Texaco, Inc.*, 570 F. Supp. 1272, 1278 (E.D. La. 1983). "Knowledge means personal cognizance or means of knowledge, of which the shipowner is bound to avail himself, of a contemplated loss or condition likely to cause loss, unless proper means are adopted to prevent it." *Id.*; see also *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978) (shipowner's negligence determined on basis of customary industry practice or violation of statutory duty), *cert. denied*, 440 U.S. 959 (1978).

45. See *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 120-22 (1871).

46. The *Torrey Canyon* ran aground in the English Channel, spilling its entire cargo of crude oil, and eventually sank after being bombed by the Royal Air Force. See Note, *Liability for Maritime Oil Pollution: A Comparison of the Maine Coastal Conveyance Act with Federal Liability Provisions*, 29 ME. L. REV. 47, 50 (1977). The twenty-nine million gallon spill "cost an estimated \$15

under the LLA in federal court to limit its liability to \$50, the value of a single remaining lifeboat.<sup>47</sup> Although the LLA "can be stretched out or narrowed at will" depending on the facts of the particular case and the philosophy of the judge hearing the case,<sup>48</sup> the statute has survived despite ample opportunity for congressional amendment or repeal.<sup>49</sup>

### B. Proposed Federal Legislation

Recognizing the complexity of the current federal oil spill scheme, each Congress since 1975 has considered a bill of some form designed to overhaul and consolidate domestic oil pollution legislation.<sup>50</sup> Despite optimism over such legislation in the past, a House-Senate rift over preemption of stricter state laws ultimately doomed previous oil spill bills.<sup>51</sup> In November 1989, however, the House reversed its traditional stance in favor of preemption, clearing "the way for near-certain congressional approval of such legislation for the first time since Congress began wrestling with the issue in 1975."<sup>52</sup>

Fueled by outrage over the *Exxon Valdez* spill,<sup>53</sup> both chambers of the 101st Congress recently passed similar comprehensive oil spill bills.<sup>54</sup> Although both bills would leave states free to establish their own liability and cleanup systems,<sup>55</sup> the bills would create a uniform federal liability system for oil spill

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million to clean up and spawned damage claims of \$25 million that were ultimately settled for approximately \$7 million." Jones, *supra* note 8, at 10333.

47. *In re Barracuda Tanker Corp.*, 281 F. Supp. 228, 230 (S.D.N.Y. 1968), *rev'd on other grounds*, 409 F.2d 1013 (2d Cir. 1969).

48. Mendelsohn & Fidell, *Liability for Oil Pollution—United States Law*, 10 J. MAR. L. & COM. 475, 477 (1979) (quoting G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 877 (2d ed. 1975)). Cf. *In re Hokkaido Fisheries Inc.*, 506 F. Supp. 631, 633-34 (D. Alaska 1981) (construing language in FWPCA, "notwithstanding any other provision of law," 33 U.S.C. § 1321(f)(1), to infer congressional intent that the LLA not apply to recovery of cleanup costs under the FWPCA).

49. *But see infra* text accompanying note 60 (noting bills currently before Congress that would prohibit application of LLA to removal costs and damages resulting from oil spills).

50. For a history of Congressional consideration of comprehensive oil spill liability and compensation bills since 1975, see Jones, *supra* note 8, at 10333-37; and OIL POLLUTION LIABILITY AND COMPENSATION, *supra* note 39, at 9-14.

51. See Jones, *supra* note 8, at 10333. "Generally, the House has been in favor of preempting State laws, while the Senate has not. Industry favors preempting State programs, while States desire to retain their liability standards and separate compensatory funds." OIL POLLUTION LIABILITY AND COMPENSATION, *supra* note 39, at 15. For a discussion of the preemptive effect of current federal oil pollution law, see *infra* notes 80-112 and accompanying text.

52. Hager, *Tough Oil-Spill Measure Rides Atop Environmental Wave*, 47 CONG. Q. 3043, 3043 (weekly ed. Nov. 11, 1989). The original House bill, introduced by Representative Walter Jones (D-N.C.), would have preempted state oil spill liability regimes. See H.R. REP. NO. 242, 101st Cong., 1st Sess., § 109(a) (1989). On February 8, 1989, however, the House passed, by a 279-143 vote, an amendment introduced by Representative George Miller (D-Calif.) which prevented preemption of state laws relating to oil spill liability, compensation, and cleanup. See 135 CONG. REC. D1321 (daily ed. Nov. 8, 1989).

53. "The event is driving [the] concerns of members of Congress." Hager, *supra* note 52, at 3043 (quoting Rep. George Miller, D-Calif.).

54. The Senate passed its version of the bill, S. 686, 101st Cong., 1st Sess. (1989), with a 99-0 vote on August 4, 1989. See 135 CONG. REC. D934-35 (daily ed. Aug. 4, 1989). The full House bill, H.R. 1465, 101st Cong., 1st Sess. (1989), passed by a 375-5 vote on November 9, 1989. See 135 CONG. REC. D1333 (daily ed. Nov. 9, 1989). See also Hager, *supra* note 52, at 3044 (comparing the House and Senate bills).

55. For example the House bill provides that nothing in the new Act or the LLA "shall be

cleanup and compensation<sup>56</sup> in a single statute entitled the "Oil Pollution Act of 1989."<sup>57</sup> Both versions of the new Act would raise sharply the federal oil spill liability limits,<sup>58</sup> and subject responsible parties to private and public claims for cleanup costs, economic losses, and natural resource damage.<sup>59</sup> The bills also would explicitly preclude application of the LLA to cleanup costs or damages resulting from oil spills.<sup>60</sup>

Under both the House and Senate versions, the new Act would create a one billion dollar Oil Spill Liability Trust Fund,<sup>61</sup> financed by a per-barrel tax on domestic and imported oil.<sup>62</sup> The new Fund would provide direct compensation to public and private spill victims provided that the responsible party reached its liability limit or refused to settle a claim for damages within a specified number of days.<sup>63</sup> In any event, the fund would pay the immediate cleanup costs of both federal and state governments.<sup>64</sup>

Both versions of the new Act would increase federal control over oil spill cleanup and prevention. Either bill, for example, would empower the President to direct both federal and private industry cleanup efforts.<sup>65</sup> The bills also

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construed or interpreted as preempting any State . . . from imposing any additional liability or requirements with respect to the discharge of oil or other pollution by oil within such State." H.R. 1465, 101st Cong., 1st Sess., § 1018(a)(1)(A) (1989). The Senate bill contains substantially similar language. See S. 686, 101st Cong., 1st Sess., § 106(e) (1989).

56. Both bills would amend or repeal the oil spill provisions in the FWPCA, TAPAA, DWPA, and OCSLA. See H.R. 1465, 101st Cong., 1st Sess., tit. II, §§ 2001-2005 (1989) ("Conforming Amendments"); S. 686, 101st Cong., 1st Sess., tit. III, §§ 301-05 (1989) (same).

57. See, e.g., H.R. 1465, 101st Cong., 1st Sess., § 1(a) (1989).

58. The House and Senate currently disagree on the exact limits on liability or the parties responsible for payment. Kuntz, *supra* note 4, at 1262. The House would split liability between ship and cargo owners for the greater of \$1200 per gross ton of oil or \$10,000,000 for large tankers; less for smaller vessels. *Id.* In contrast, the Senate would impose liability on shipowners only; and would limit liability to \$1000 per ton, up to \$10 million, regardless of size. *Id.* Like the FWPCA and OCSLA, however, both would impose unlimited liability in the event of gross negligence, willful misconduct, or violation of federal regulation. See H.R. 1465, 101st Cong., Sess. 1004(c); S. 686, 101st Cong., 1st Sess., 102(c)(2) (1989). Cf. *supra* notes 23-27 and accompanying text (discussing scope of liability under FWPCA); *supra* notes 40-42 and accompanying text (discussing current liability limits under OCSLA).

59. See H.R. 1465, 101st Cong., 1st Sess., § 1002 (1989); S. 686, 101st Cong., 1st Sess., § 102(a) (1989). As under the FWPCA and OCSLA, liability under the new Act could be avoided completely by proving one or a combination of the traditional defenses. See H.R. 1465, 101st Cong., 1st Sess., § 1003 (1989); S. 686, 101st Cong., 1st Sess., § 102(b) (1989).

60. See H.R. 1465, 101st Cong., 1st Sess., § 1018(c) (1989); S. 686, 101st Cong., 1st Sess., § 106(e) (1989).

61. Although the Oil Spill Liability Trust Fund originally was established by the Omnibus Budget Reconciliation Act of 1986, Pub. L. 99-509, tit. VIII, § 8033(a), 100 Stat. 1959 (1986), it has been awaiting implementing legislation ever since. See Jones, *supra* note 8, at 10336-37.

62. "The size and structure of the tax are under the jurisdiction of the House Ways and Means Committee, and details are part of negotiations over a deficit-reduction 'reconciliation' bill now in conference." Hager, *supra* note 52, at 3044. The new Act also would transfer the 311, OCSLA, DWPA, and TAPAA funds into the new fund. See H.R. 1465, 101st Cong., 1st Sess., tit. II, §§ 2001-2005 (1989) ("Conforming Amendments"); S. 686, 101st Cong., 1st Sess., tit. III, §§ 301-05 (1989) (same).

63. See H.R. 1465, 101st Cong., 1st Sess., § 1013(c)(2) (1989) (90 days); S. 686, 101st Cong., 1st Sess., § 103(c)(4)(D) (1989) (180 days).

64. See H.R. 1465, 101st Cong., 1st Sess., § 1012(a) (1989); S. 686, 101st Cong., 1st Sess., § 103(a) (1989).

65. See H.R. 1465, 101st Cong., 1st Sess., § 4201(a) (1989); S. 686, 101st Cong., 1st Sess., § 201 (1989).



would establish regional oil spill strike force teams,<sup>66</sup> and require increased oil spill contingency planning.<sup>67</sup> Both bills would create research programs to study the environmental effects and cleanup methods involved in oil spills.<sup>68</sup> Additionally, in the hope of preventing future spills, the House bill would establish a series of mariner licensing requirements, vessel manning requirements, vessel operating procedures, and other safety measures.<sup>69</sup>

Although the House bill explicitly disclaims any intent to preempt state laws,<sup>70</sup> the preemption issue has resurfaced with a dispute over United States' participation in an international oil spill agreement. Provisions in the House bill would implement, subject to Senate ratification, a forty-three nation agreement which sets liability limits for tanker spills and establishes an international oil spill liability fund.<sup>71</sup> Fearing that the liability limits would effectively preempt stiffer state liability laws, Senate conferees remain adamantly opposed to the international accord.<sup>72</sup>

Besides the protocol-preemption debate, few major differences remain in the House and Senate bills.<sup>73</sup> The most significant controversy concerns a provision in the House bill<sup>74</sup> that would require double hulls on tankers.<sup>75</sup> In August 1989, the Senate voted 51-48 to reject the double-hull mandate, choosing instead to allow the Secretary of Transportation "to require double hulls only if a study found they provided significant benefits."<sup>76</sup> Although a compromise over double hulls appears promising,<sup>77</sup> resolution of the protocol-implementation is-

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66. See H.R. 1465, 101st Cong., 1st Sess., § 4203 (1989); S. 686, 101st Cong., 1st Sess., § 203 (1989).

67. See H.R. 1465, 101st Cong., 1st Sess., § 4202 (1989); S. 686, 101st Cong., 1st Sess., § 204 (1989).

68. See H.R. 1465, 101st Cong., 1st Sess., § 7001 (1989); S. 686, 101st Cong., 1st Sess., § 205 (1989).

69. See generally H.R. 1465, 101st Cong., 1st Sess., tit. IV, subtit. A, §§ 4101-4119 (1989) ("Prevention"). The Senate bill would require a study to consider oil spill prevention measures. See S. 686, 101st Cong., 1st Sess., § 207(a) (1989).

70. See *supra* note 55 and accompanying text.

71. See H.R. 1465, 101st Cong., 1st Sess. §§ 3001-3009 (1989). The agreement actually encompasses two international accords, signed in 1969 and 1971, and amendments drafted in 1984 in the form of protocols. Kuntz, *supra* note 4, at 1261. For an analysis of these international accords, see Note, *Oil Spill Liability and Compensation: Time to Clean Up the Law*, 19 GEO. WASH. J. INT'L L. & ECON. 787.

72. Kuntz, *supra* note 4, at 1261. Additionally, many Senators oppose the House-approved implementing provisions on constitutional grounds, claiming invasion of the Senate's constitutional power over treaties. *Id.*

73. See generally Hager, *supra* note 52, at 3044 (discussing the House-Senate differences).

74. See H.R. 1465, 101st Cong., 1st Sess., § 4118 (1989).

75. Hager, *supra* note 52, at 3044. In addition to the double-hull dispute, the House and Senate currently disagree on whether to impose liability on cargo owners, as well as shipowners. See *supra* note 58. Concerned about its effect on small independent companies, the Senate has refused to accept cargo-owner liability. Kuntz, *supra* note 4, at 1262. However, a "possible compromise would make cargo owners liable only if the spill involved crude oil, thereby exempting independents who deal in gasoline and heating oil." *Id.*

76. Hager, *supra* note 52, at 3044. See S. 686, 101st Cong., 1st Sess., § 207(a) (1989) (requiring study to consider, *inter alia*, "modifications in tanker construction and operation standards").

77. As of April 28, 1990, the "[l]atest Senate offer would phase out existing vessels over 15 to 20 years, with the largest and oldest removed first. It calls for double hulls, but allows for an alternative if the National Academy of Sciences certifies a safer way." Kuntz, *supra* note 4, at 1262. A report of June 2, 1990 noted that House negotiators also had made concessions, "offering more

sue remains a significant obstacle to final passage of the Oil Pollution Act of 1989.<sup>78</sup> Until a compromise can be reached, federal oil pollution law will consist of a confusing "patchwork of liability limits, legal defenses, and compensation fund programs."<sup>79</sup>

## II. FEDERAL PREEMPTION OF STATE OIL SPILL LAWS

The United States Constitution expressly grants to the federal courts exclusive jurisdiction over admiralty and maritime claims.<sup>80</sup> Although "state law must yield to the needs of a uniform federal maritime law . . . this limitation still leaves the States a wide scope."<sup>81</sup> In *Askew v. American Waterways Operators, Inc.*,<sup>82</sup> the United States Supreme Court included state oil spill liability laws within this "wide scope" when it upheld the Florida Oil Spill Prevention and Control Act.<sup>83</sup>

Seeking to avoid a proliferation of similar state laws, the shipping industry and other affected interests claimed the Florida Act invaded a regulatory area preempted by the predecessor to the FWPCA.<sup>84</sup> Finding no collision between the federal and state laws, however, the Court stressed that "[w]hile the Federal Act is concerned only with actual cleanup costs by the Federal Government, the State of Florida is concerned with its own cleanup costs."<sup>85</sup> Accordingly, the Court concluded that "since Congress dealt only with 'cleanup' costs, it left the States free to impose 'liability' in damages for losses suffered both by the States and by private interests."<sup>86</sup> Because the Florida Act did not "in terms provide

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lenient schedules that would allow tankers with single hulls to operate well into the next century." Cushman, *With Oil Tanker Ablaze in Gulf, Oil Cleanup Plans Languish*, N.Y. Times, June 2, 1990, at A1, col. 1 (citing source from the National Resources Defense Council).

78. According to a report on the implementing provisions debate, the "Senate appears unified in opposition, and some House members are against the provisions, too. But many House members, backed by the Bush administration, support it." Kuntz, *supra* note 4, at 1262. See also Cushman, *supra* note 77, at A12, col. 1 ("On the biggest sticking point, the international agreement [on] oil liability, there is no sign of compromise.")

Although the Oil Pollution Act of 1989 had not been enacted at the time this Note went to print, House and Senate negotiators were scheduled to grapple over the remaining issues during the summer of 1990. See *id.*

79. Mendelsohn & Fidell, *supra* note 48, at 498. For a discussion of the current federal scheme, see *supra* notes 17-49, and accompanying text.

80. In relevant part, the Admiralty Clause states: "The judicial power shall extend to . . . all Cases of admiralty and maritime jurisdiction." U.S. CONST. art. III, § 2, cl. 1.

81. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959).

82. 411 U.S. 325 (1973).

83. *Id.* at 332. The legislation at issue is codified at FLA. STAT. ANN. §§ 376.011 to 376.21 (West 1987) [hereinafter "Florida Act"]. At the time of the *Askew* decision, the Florida legislation imposed strict liability without limit on vessels and terminal facilities for oil spill cleanup costs and both public and private damages. *Askew*, 411 U.S. at 327. The Florida statute has since been amended to limit liability absent gross negligence or willful misconduct. See FLA. STAT. ANN. § 376.12(1) (West 1987); see also Barrett & Warren, *History of Florida Oil Spill Legislation*, 5 FLA. ST. U.L. REV. 309, 327-37 (1977) (discussing industry pressure and other reasons for liability limitation amendments).

84. At issue was the preemptive effect of the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, § 11, 84 Stat. 91 (1970). *Askew*, 411 U.S. at 328. For a discussion of the transfer of the WQIA to the FWPCA, see *supra* note 17.

85. *Askew*, 411 U.S. at 335-36.

86. *Id.* at 336. Although *Askew* determined the preemptive effect of the FWPCA, as yet no

for unlimited liability,"<sup>87</sup> however, the Court expressly reserved the question whether the federal liability limitations apply to state liability statutes.<sup>88</sup>

Although the Supreme Court has never answered this question, the Fourth Circuit, in *Steuart Transportation Co. v. Allied Towing Corp.*,<sup>89</sup> held that the FWPCA's liability ceilings could not prevent the state of Virginia from recovering oil spill cleanup costs exceeding FWPCA limits<sup>90</sup> under a state statute affording no limitation on liability.<sup>91</sup> To buttress its conclusion, the Fourth Circuit stressed that "Congress expressly disclaimed any intention to preempt the states 'from imposing any requirement or liability with respect to the discharge of oil.'"<sup>92</sup> Because the negligent shipowner was denied relief under the LLA, however, the *Steuart* court never decided whether the LLA applies to state strict liability statutes.<sup>93</sup>

Although few cases have addressed the issue, at least two federal district courts have applied the LLA to claims against shipowners brought under state oil spill liability statutes.<sup>94</sup> Neither case, however, considered the potential effect of the ambiguous language in Section 311(f)(1) of the FWPCA, which establishes liability limits on shipowners "notwithstanding any other provision of law."<sup>95</sup> Because the FWPCA is the exclusive federal remedy in the oil pollution context, some commentators have suggested that the language in Section 311(f)(1) "supercedes the Limitation of Liability Act by creating new limits on liability."<sup>96</sup> Nevertheless, if enacted, the Oil Pollution Act of 1989<sup>97</sup> would end

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courts have examined OCSLA's effect on state oil spill laws. Nevertheless, OCSLA provides that it "shall not be interpreted to preempt the field of liability or to preclude any State from imposing additional requirements or liability for any discharge of oil resulting in damages or removal costs within the jurisdiction of such State." 43 U.S.C. § 1820(c) (1982). OCSLA does, however, prohibit double recovery for the same damage or cleanup claims, and preempts state laws that require proof of financial responsibility beyond the requirements of OCSLA. See *id.* § 1820(a), (b). "Other than these restrictions, states are virtually unlimited in their right to create additional oil spill liability without preemption under [OCSLA]." Bederman, *High Stakes in the High Arctic: Jurisdiction and Compensation for Oil Pollution from Offshore Operations in the Beaufort Sea*, 4 ALASKA L. REV. 37, 53 (1987).

87. *Askew*, 411 U.S. at 331.

88. "Whether the amount of costs [Florida] could recover from a wrongdoer is limited to those specified in the [WQIA] and whether in turn [the WQIA] removes the pre-existing limitations of liability in the Limited Liability Act are questions we need not reach here." *Id.* at 332.

89. 596 F.2d 609 (4th Cir. 1979).

90. *Id.* at 620-21. The case arose after *Steuart's* oil barge sank in Chesapeake Bay. *Id.* at 612. "At Coast Guard direction, *Steuart* spent about \$40,000 in preliminary containment operations. Spillage later appeared in areas away from the immediate scene of the accident, and the Coast Guard directed an extensive removal operation which cost the United States about \$480,000 and the Commonwealth of Virginia about \$41,000." *Id.*

91. *Id.* at 620 (construing former VA. CODE § 62.1-44.34.2). Although the Virginia statute imposed unlimited liability at the time of the oil spill at issue, the statute now limits shipowner liability to \$5,000,000 for oil spills that do not involve negligence. See VA. CODE ANN. § 62.1-44.34:2B (1987).

92. *Steuart*, 596 F.2d at 620 (quoting 33 U.S.C. § 1321(o)(2)).

93. See *id.* at 620 n.22.

94. See *In re Oswego Barge Corp.*, 439 F. Supp. 312 (N.D.N.Y. 1977) (applying the LLA to New York statute imposing strict liability for oil spills); *In re Harbor Towing Corp.*, 335 F. Supp. 1150 (D. Md. 1971) (subjecting Maryland's oil spill liability statute to the LLA).

95. 33 U.S.C. § 1321(f)(1) (1982).

96. Note, *Federal Water Pollution Control Act Does Not Preempt State Statutes Imposing Unlimited Strict Liability: Steuart Transportation Co. v. Allied Towing Corp.*, 9 BALTIMORE L. REV.

the preemption debate by expressly precluding application of the LLA, or any other federal liability statute, to state oil spill statutes.<sup>98</sup>

In the landmark case of *Portland Pipe Line Corp. v. Environmental Improvement Commission*,<sup>99</sup> the Supreme Judicial Court of Maine recognized the ability of states to establish comprehensive oil spill regulatory schemes without violating the Commerce Clause.<sup>100</sup> The court upheld the Maine Coastal Conveyance Act<sup>101</sup> against claims that the Act's levy of a one-half cent per barrel fee on oil<sup>102</sup> and imposition of vicarious liability on terminal facilities<sup>103</sup> constituted an impermissible burden on foreign and interstate commerce.<sup>104</sup> Upholding the oil tax as part of a valid police power regulation, the court stressed that it was not a general revenue measure, but a fee designed to offset the risks involved in over-water oil transport.<sup>105</sup> The court also noted that the Maine Act's regulatory and liability scheme did not discriminate against interstate commerce in favor of intrastate commerce.<sup>106</sup>

Although the United States Supreme Court denied certiorari for want of a substantial federal question in *Portland Pipe*,<sup>107</sup> the Maine opinion, like *Askew*,<sup>108</sup> remains one of the "key court decisions on the question of state authority in the oil spill area."<sup>109</sup> Read together with *Steuart Transportation Co. v. Allied Towing Corp.*,<sup>110</sup> the two cases leave states virtually free to establish their own oil spill liability and cleanup regimes without fear of preemption by existing federal law.<sup>111</sup> If enacted, the Oil Pollution Act of 1989 will continue to recog-

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113, 118 (1979) (citing G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 10-4(b) (2d ed. 1975), and 3 E. BENEDICT, *ADMIRALTY* § 112 (7th ed. 1975)). But see SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 17-1 (1987) ("Authority is sparse, but the Limitation Act . . . should be applicable [to state laws] so that limitation can be claimed regarding state cleanup costs.").

97. See *supra* note 57 and accompanying text.

98. See *supra* text accompanying note 60; see also *supra* note 55 (citing relevant provisions of the House and Senate bills).

99. 307 A.2d 1 (Me. 1973).

100. *Id.* at 36-40. In relevant part, the Commerce Clause states that "Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several states." U.S. CONST. art I, § 8, cl. 3.

101. ME. REV. STAT. ANN. tit. 38, §§ 541-560 (1989 & Supp. 1989) [hereinafter the "Maine Act"].

102. The tax is used to finance the Maine Coastal and Inland Surface Oil Clean-up Fund. See *id.* § 551.

103. See *id.* § 552.

104. *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 301 A.2d 1, 36-40 (Me. 1973).

105. *Id.* at 36-39.

106. *Id.* at 40.

107. 414 U.S. 1035 (1973).

108. See *supra* notes 82-88 and accompanying text (discussing the Supreme Court's decision in *Askew*).

109. Lipeles, *supra* note 27, at 444.

110. 596 F.2d 609 (4th Cir. 1979). See *supra* notes 89-93 and accompanying text (discussing the Fourth Circuit's opinion in *Steuart*).

111. But see *infra* note 156 (discussing the authority of states to regulate pollution originating outside their territorial waters). It should be noted, however, that federal law currently preempts conflicting state regulation of tanker design and operation. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163 (1978), the United States Supreme Court held that the Ports and Waterways Safety Act of 1972, Pub. L. 92-340, 86 Stat. 424 (1972), "intended uniform national standards for design

nize the power of states to enact special oil spill statutes.<sup>112</sup>

### III. STATE OIL SPILL LEGISLATION

With the Supreme Court's authorization in *Askew v. American Waterways Operators, Inc.*,<sup>113</sup> many coastal states have enacted statutes designed to protect their coastal resources and dependent industries from oil discharges.<sup>114</sup> Consequently, a myriad of state oil spill statutes is superimposed on the already complex federal statutory scheme.<sup>115</sup> Although the state statutes vary considerably, all regulate oil pollution in some manner. Some states have "general water pollution control statutes which encompass pollution of waters by oil as well as other hazardous substances."<sup>116</sup> Other states employ specialized statutes dealing specifically with oil spill liability and cleanup.<sup>117</sup>

The most controversial provisions of state oil pollution laws typically involve liability limits, compensation funds, and financial responsibility require-

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and construction of tankers that would foreclose the imposition of different or more stringent state requirements." Accordingly, the Court struck down a Washington law requiring "standard safety features," including double bottoms, on certain tankers. *Id.* at 160-68 (construing WASH. REV. CODE § 88.16.190(2)). The *Ray* Court also held invalid another provision requiring "enrolled" (engaged in domestic or coastwise trade) oil tankers to take on state-licensed pilots. *Id.* at 158-59 (construing WASH. REV. CODE § 88.16.180). The Court, however, noted that states are free to impose pilotage requirements on registered vessels entering and leaving their ports. *Id.* at 159-60. The Court also recognized that state tug-escort requirements, like local pilotage requirements, were not the type of regulations demanding a uniform national rule, and did not, therefore, violate the Commerce Clause. *Id.* at 179-80.

112. See *supra* text accompanying note 60; see also *supra* note 55 (citing provisions of the House and Senate bills that disclaim intent to preempt state oil spill liability and cleanup statutes).

113. 411 U.S. 325 (1973). For a discussion of the Court's holding in *Askew*, see *supra* notes 82-88 and accompanying text.

114. For examples of the various state statutes, see *infra* notes 116-17 and accompanying text.

115. For a detailed, but somewhat dated, analysis of state oil pollution legislation, including individual summaries of the key provisions in each of the 24 states examined, see *Oil Pollution Liability: Hearing on H.R. 1232 Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 99th Cong., 1st Sess., 173-282 (1985) (Report prepared by the Oceanic Society for the U.S. Coast Guard, entitled, "Oil Spill Liability and Compensation Legislative Preemption Considerations") [hereinafter "COAST GUARD REPORT"].

116. COAST GUARD REPORT, *supra* note 115, at 178. See, e.g., ALA. CODE §§ 22-22-1 to -22-14 (1984 & Supp. 1989); FLA. STAT. ANN. §§ 376.011 to 376.17, 376.19 to 376.21 (West 1987); GA. CODE ANN. §§ 17-501 to -522 (1988); HAW. REV. STAT. §§ 342D-50 to -60 (Supp. 1989); ILL. REV. STAT. ch. 85, paras. 1701-1706 (Supp. 1987); LA. REV. STAT. ANN. §§ 30:2071-2078 (West 1989 & Supp. 1989); MISS. CODE ANN. §§ 49-17-1 to -17-433 (Supp. 1988); 35 PA. CONS. STAT. § 691.1 to 691.760.2 (1977 & Supp. 1989); R.I. GEN. LAWS §§ 46-12-1 to -12-433 (1972 & Supp. 1987); S.C. CODE ANN. §§ 48-43-510 to -43-620 (Law Co-op. 1987); TEX. WATER CODE §§ 26.261 to 26.268 (Vernon 1988 & Supp. 1990).

117. See, e.g., ALASKA STAT. §§ 46.03, 46.04, and 46.08 (1987); CAL. HARB. & NAV. CODE §§ 151-152, 293-294 (1978 & Supp. 1990); CONN. GEN. STAT. §§ 22a-448 to -453 (1985 & Supp. 1989); DEL. CODE ANN. tit. 7, §§ 6201-6216 (1983 & Supp. 1986); ME. REV. STAT. ANN. tit. 38, §§ 541-560 (1989 & Supp. 1989); MD. ENV'T CODE §§ 4-401 to 4-418 (1987); MASS. ANN. LAWS ch. 21E, §§ 1-18 (Law Co-op. 1988); N.H. REV. STAT. §§ 146A:1-15, 146D:1-9 (Supp. 1989); N.J. REV. STAT. §§ 58:10-23.11, 58:10A (1982 & Supp. 1989); N.Y. NAV. LAW §§ 170-197 (1989 & Supp. 1990); N.C. GEN. STAT. §§ 143-215.75 to -215.94, 143-215.94A to -215.94J (1987 & Supp. 1989); OR. REV. STAT. §§ 468.780 to 468.815 (1989); VA. CODE ANN. §§ 62.1-44.34:1 to .34:7 (1987); WASH. REV. CODE ANN. §§ 90.48.315 to 90.48.390 (Supp. 1989). Georgia also has special oil spill provisions which relate only to notification of oil spills. See GA. CODE ANN. §§ 12-14-1 to -14-4 (1988).

ments.<sup>118</sup> Virtually all states employ an absolute liability or strict liability standard against oil dischargers.<sup>119</sup> A majority of states impose unlimited liability on responsible parties,<sup>120</sup> while others limit liability in varying degrees.<sup>121</sup> Virtually all the states with liability caps, however, follow the FWPCA's approach and impose full liability when an oil spill involves gross negligence.<sup>122</sup>

Many states have special oil spill funds from which the state or other claimants may draw to cover cleanup costs and related damages.<sup>123</sup> The methods of funding, however, vary from state to state. Typical financing sources include legislative appropriations,<sup>124</sup> reimbursements from responsible parties,<sup>125</sup> penalties,<sup>126</sup> and licensing fees.<sup>127</sup> Some states also levy an excise tax on oil to help finance their funds.<sup>128</sup> Typically, these surcharges cease once a fund reaches a certain limit.<sup>129</sup>

The Alaska legislature's response to the *Exxon Valdez* spill illustrates the importance of funding. In 1986, the legislature established a special fund to finance Alaska's oil spill cleanup and containment efforts.<sup>130</sup> As originally enacted, the Alaska fund had no statutory limit or minimum.<sup>131</sup> Moreover, the fund relied on legislative appropriations, and reimbursements, fines, or penalties

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118. For a helpful, but slightly dated, table comparing key provisions of state oil spill schemes, see COAST GUARD REPORT, *supra* note 115, at 233.

119. COAST GUARD REPORT, *supra* note 115, at 180. The sole exception is Alabama, which uses a tort standard of liability. *Id.* at 181.

120. *Id.* at 182.

121. See, e.g., DEL. CODE ANN. tit. 7, § 6208(b) (1983); FLA. STAT. ANN. § 376.12(1) (West 1987); N.J. REV. STAT. § 58:10-23.11(g)(b) (1982); N.Y. NAV. LAW § 181(3) (1989); VA. CODE ANN. § 62.1-44.34:2B (1987).

122. See, e.g., DEL. CODE ANN. tit. 7, § 6208(b) (1983); FLA. STAT. ANN. § 376.12(1) (West 1987); N.J. REV. STAT. § 58:10-23.11(g)(b) (1982); N.Y. NAV. LAW § 181(3) (1989). The sole exception is Virginia, which imposes unlimited liability when the claimant proves negligence alone. See VA. CODE ANN. § 62.1-44.34:2B (1987).

123. See COAST GUARD REPORT, *supra* note 115, at 191.

124. See, e.g., N.C. GEN. STAT. § 143-215.87 (Supp. 1989); TEX. WATER CODE ANN. § 26.265(b) (Vernon 1988); VA. CODE ANN. § 62.1-44.34:7 (1987).

125. See, e.g., FLA. STAT. ANN. § 376.11(2) (West 1987); MD. NAT. RES. CODE ANN. § 8-1411(2) (1987); N.H. REV. STAT. § 146-A:11-a (Supp. 1989); N.Y. NAV. LAW § 179(a) (1989); N.C. GEN. STAT. § 143-215.87 (Supp. 1989); TEX. WATER CODE ANN. § 26.265(b) (Vernon 1988); VA. CODE ANN. § 62.1-44.34:7 (1987); WASH. REV. CODE ANN. § 90.48.390 (Supp. 1989).

126. "With the exception of Connecticut and New Hampshire, all state statutes explicitly refer to penalties and fines collected thereunder as a basis for financing their funds." COAST GUARD REPORT, *supra* note 115, at 192.

127. "Except for Connecticut, New Jersey, Texas, and Virginia, all states finance their oil spill funds through collection of license fees." *Id.*

128. See, e.g., Act of July 1, 1989, ch. 112, § 2, 1989 Alaska Sess. Laws 473 (to be codified at ALASKA STAT. §§ 43.55.200 to 43.55.290); FLA. STAT. ANN. § 376.11(2) (West 1987); ME. REV. STAT. ANN. tit. 38, § 551(4)(A) (Supp. 1989); N.H. REV. STAT. § 146D:3 (Supp. 1989); N.Y. NAV. LAW § 174 (1989). "The most common approach is to levy a per-barrel fee on oil passing into or out of the state through a terminal facility, such as a port, pipeline, or refinery." Lipeles, *supra* note 27, at 441.

129. See, e.g., Act of July 1, 1989, ch. 112, § 2, 1989 Alaska Sess. Laws 474 (to be codified at ALASKA STAT. § 43.55.230(c)) (\$50,000,000); FLA. STAT. ANN. § 376.11(3)(b) (West 1987) (\$30,000,000); ME. REV. STAT. ANN. tit. 38, § 551 (Supp. 1989) (\$6,000,000); N.H. REV. STAT. § 146D:3 (Supp. 1989) (\$10,000,000); N.Y. NAV. LAW § 174(4)(a) (1989) (\$25,000,000).

130. See Act of June 1, 1986, ch. 59, § 1, 1986 Alaska Sess. Laws — (codified at ALASKA STAT. §§ 46.08.005 to 46.08.900 (1987)).

131. *Id.*

recovered from responsible parties for its financing.<sup>132</sup> After the *Exxon Valdez* disaster, however, the Alaska legislature recognized the inadequacy of the existing fund, and the need for a readily available source of financing for future containment and cleanup efforts.<sup>133</sup> Accordingly, the legislature established a five cents per barrel surcharge on oil produced in the state to maintain the oil spill fund at fifty million dollars.<sup>134</sup>

Although several states allow only state agencies to receive disbursements from their oil spill funds, at least three states specifically authorize third party claims against their funds.<sup>135</sup> In Maine, for example, a party injured as a result of an oil spill files a claim with the Board of Environmental Protection against the state's oil spill fund.<sup>136</sup> If the Board, the claimant, and the oil spiller agree on the amount of damages, the Board certifies the claim to the State Treasurer, who pays the claim directly from the oil spill fund.<sup>137</sup> If, however, the parties cannot agree, the Board of Environmental Protection must submit the claim to the Board of Arbitration to determine the amount of damages.<sup>138</sup> After the

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132. See *id.* (codified at ALASKA STAT. § 46.08.020 (1987)).

133. Specifically, the legislature found "that the March 24, 1989, oil spill disaster in Prince William Sound demonstrate[d] a need for the state to have an independent spill containment and cleanup capability in the event of future discharges of oil or a hazardous substance." Act of July 1, 1989, ch. 112, § 1(a), 1989 Alaska Sess. Laws 473.

134. *Id.* § 2 (to be codified at ALASKA STAT. §§ 43.55.200 to 43.55.290). Cf. *supra* notes 61-62 and accompanying text (discussing federal bills that would establish a \$1 billion Oil Spill Liability Trust Fund financed by a per-barrel tax on domestic and imported oil). In addition to the per-barrel tax, the Alaskan legislature expanded the purposes of the fund to include maintenance of a new oil and hazardous substance response office and corps. See Act of June 16, 1989, ch. 113, § 2, 1989 Alaska Sess. Laws 478 (to be codified at ALASKA STAT. § 46.08.100 and .08.110). The legislature established new detailed guidelines for increased state oil spill contingency planning. Act of June 3, 1989, ch. 90, § 1, 1989 Alaska Sess. Laws 353 (to be codified at ALASKA STAT. § 46.04.200). The legislature also established a new commission of state residents and national experts to study the *Exxon Valdez* disaster and to recommend "changes needed to minimize the possibility and effects of similar oil spills." Act of May 1, 1989, ch. 42, § 1, 1989 Alaska Sess. Laws 121.

135. COAST GUARD REPORT, *supra* note 115, at 194. The three states allowing private claims are Maine, New Jersey, and New York. See ME. REV. STAT. ANN. tit. 38, § 551(2) (1989); N.J. REV. STAT. § 58:10-23.11(g) (1982); N.Y. NAV. LAW § 182 (1989). Similarly, if enacted, the Oil Pollution Act of 1989 would authorize private claims against a new one billion dollar trust fund in certain circumstances. See *supra* notes 61-63 and accompanying text (discussing the proposed compensation system).

136. ME. REV. STAT. ANN. tit. 38, § 551(2) (1989). A claim must specifically allege damages to real estate or personal property or loss of income resulting from an oil discharge, and must be filed within six months of the spill. *Id.* Claimants waive any right to pursue damages "omitted from any claim at the time the award is made." *Id.* § 551(2)(C).

137. *Id.* § 551(2)(A). The fund is financed primarily by license fees on certain facilities, but also includes reimbursements from polluters. *Id.* § 551(4), (6) (1989 & Supp. 1989). The fund is limited to a total balance of \$6,000,000. *Id.* § 551 (Supp. 1989). Although this statutory limit implicitly sets a liability limit at \$6,000,000, the Act grants emergency powers to the governor that may entitle the state to additional state and federal funds. See Note, *supra* note 71, at 799 n.87 (citing ME. REV. STAT. ANN. tit. 38, § 547).

138. ME. REV. STAT. ANN. tit. 38, § 551(2)(B) (1989). "The Board of Arbitration shall consist of 3 persons, one to be chosen by the person determined . . . by the board [of Environmental Protection] to have caused the discharge, one to be chosen by the board to represent the public interest and one person chosen by the first 2 appointed members to serve as a neutral arbitrator." *Id.* § 551(3). If a neutral arbitrator cannot be agreed upon within 10 days, "the board shall request the American Arbitration Association to utilize its procedures for the selection of the neutral arbitrator." *Id.*

Determinations of the Board of Arbitration are subject to judicial review, "but only as to matters relating to abuse of discretion by the Board of Arbitration." *Id.* § 551(3)(E). If an arbitration award is appealed, payment of damages is withheld until final judgment. *Id.* § 551(3)(G). In Brown

claimant is paid from the fund, the state seeks reimbursement from the responsible party.<sup>139</sup> By providing an available source of compensation for property losses and a relatively simple method of recovery, the Maine oil spill fund "eliminates the need for [injured] parties to file tort claims to recover damages."<sup>140</sup>

Some states also have recognized the necessity of financial responsibility requirements to ensure that oil dischargers will have sufficient funds to cover cleanup costs and damages.<sup>141</sup> "The kinds of proof necessary to demonstrate financial responsibility vary from state to state."<sup>142</sup> Maryland and Massachusetts, for example, require posting of bonds, but "Maryland waives the bond requirement if financial responsibility has been demonstrated under Federal law."<sup>143</sup> Other states "accept a wider variety of proof . . . including insurance, surety bonds, qualifications of self insurance and other proof acceptable to the responsible state authority."<sup>144</sup> Dollar amounts required to be proven range "from a low of \$25,000 for vessels in Massachusetts to as much as \$50 million for terminal facilities in Alaska."<sup>145</sup> Some states enforce their financial responsibility requirements with fines for noncompliance.<sup>146</sup>

#### IV. NORTH CAROLINA'S OIL SPILL LEGISLATION

The North Carolina General Assembly made its first foray into oil spill regulation with the North Carolina Oil and Hazardous Substances Control Act of 1978 (the "1978 Act").<sup>147</sup> Under the 1978 Act, "any person"<sup>148</sup> found re-

v. Department of Environmental Protection, 495 A.2d 1138 (Me. 1988), the Supreme Judicial Court of Maine held that responsible parties have standing to appeal arbitration awards under the Maine oil spill statute. In *Brown*, the court reversed a contrary holding by a lower court despite the lower court's finding "that an appeal from the arbitration proceedings would be inconsistent with the statutory objective of prompt payment for third party claims." *Id.* at 1140 n.5.

139. See ME. REV. STAT. ANN. tit. 38, § 551(6) (1989). Under a strict liability provision, the state need not plead negligence to recover damages, but need only present evidence of the identity of the oil spiller. See *id.* § 552(2). The state may also recover its cleanup costs. *Id.*

140. Note, *supra* note 71, at 799. "The statute, in effect, transfers from private claimants to the state the right to bring actions against polluters." *Id.* at 799 n.89. The Supreme Judicial Court of Maine upheld the arbitration provisions of the Maine Act against a procedural due process challenge in *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 Me. 1, 14-16 (1973), *appeal dismissed*, 414 U.S. 1035 (1973).

141. Some states require proof of financial responsibility from both vessels and facilities. See, e.g., ALASKA STAT. § 46.04.040 (1987); DEL. CODE ANN. tit. 7, § 6209 (1983); FLA. STAT. ANN. § 376.14 (West 1987). Other states require proof from vessels only. See MD. ENV'T CODE § 4-407 (1987); MASS. ANN. LAWS ch. 21, § 50B (Law Co-op. 1988). At one time, Connecticut also required proof of financial responsibility from vessels, but abolished the requirement in 1987. See Act Repealing Vessel Bonding Requirements, ch. 125, § 2, 1987 Conn. Acts 159, 163 (Reg. Sess.) (repealing CONN. GEN. STAT. § 22a-455). The FWPCA also requires proof of financial responsibility from certain vessels. See 33 U.S.C. § 1321(p) (1982 & Supp. V 1987).

142. COAST GUARD REPORT, *supra* note 115, at 189.

143. *Id.* See MD. ENV'T CODE § 4-407 (1987); MASS. ANN. LAWS ch. 21, § 50B (Law Co-op. 1988).

144. COAST GUARD REPORT, *supra* note 115, at 189-90.

145. *Id.* at 190. See ALASKA STAT. § 46.04.040 (1987); MASS. ANN. LAWS ch. 21, § 50B (Law Co-op. 1988).

146. COAST GUARD REPORT, *supra* note 115, at 190. See DEL. CODE ANN. tit. 7, § 6209(d) (1983) ("not less than \$5,000 nor more than \$15,000"); MD. ENV'T CODE § 4-407 (1987) ("not exceeding \$5,000 for each offense"); MASS. ANN. LAWS ch. 21, § 50B (Law. Co-op. 1988) (\$5,000).

147. N.C. GEN. STAT. §§ 143-215.75 to -215.94 (1987 & Supp. 1989). The Act originally was enacted in 1973 as the Oil Pollution Control Act of 1973, ch. 534, 1973 N.C. Sess. Laws 816. In



sponsible for an oil spill in North Carolina waters is strictly liable "for damages to persons or property, public or private."<sup>149</sup> The 1978 Act authorizes the State to recover damages including costs of investigating violations of the Act and costs of replenishing natural resources.<sup>150</sup> Liability to the State under the 1978 Act, however, is subject to federal limitations.<sup>151</sup> The 1978 Act also authorizes civil penalties for intentional or negligent discharges of oil, and criminal sanctions for intentional or knowing discharges.<sup>152</sup> To secure liability for cleanup costs and penalties, the 1978 Act also imposes liens on vessels responsible for oil spills.<sup>153</sup> Like similar legislation in other states,<sup>154</sup> the 1978 Act establishes a special fund, financed primarily through legislative appropriations, to pay for state cleanup and recovery efforts.<sup>155</sup>

With resource protection as its primary goal,<sup>156</sup> the new Offshore Oil Spill Act slightly modified the 1978 Act,<sup>157</sup> and added a new comprehensive section designed to minimize the adverse environmental impact of oil and gas activities off the North Carolina coast.<sup>158</sup> The new legislation extends coverage of the 1978 Act to oil spills outside the territorial jurisdiction of the State that affect

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1978, the General Assembly amended the Act to include hazardous substances, and renamed it the Oil Pollution and Hazardous Substances Act of 1978, ch. 535, 1979 N.C. Sess. Laws 551.

148. See N.C. GEN. STAT. § 143-215.77(13) (1987) (defining "Person" for purposes of the Act).

149. *Id.* § 143-215.93. Liability under the 1978 Act is joint and several. *Id.* § 143-215.94. Like the federal statutes, the North Carolina statute provides the traditional defenses to liability, including acts of God, acts of war, and negligence of a third party. See *id.* § 143-215.83(b).

150. See *id.* § 143-215.90(a).

151. See *id.* § 143-215.89.

152. See *id.* § 143-215.91. Civil penalties must not exceed \$5000. *Id.* § 143-215.91(a). The North Carolina Environmental Management Commission determines the exact amount of civil penalties after considering certain specified factors. *Id.* With regard to criminal penalties the Act provides:

Any person who intentionally or knowingly or willfully discharges or causes or permits the discharge of oil . . . shall be guilty of a misdemeanor punishable by imprisonment not to exceed six months or by fine to be not more than ten thousand dollars (\$10,000), or by both, in the discretion of the court.

*Id.* § 143-215.91(b).

153. See *id.* § 143-215.92. "[S]aid lien shall not attach if a surety bond is posted . . . or a cash deposit is made with the [North Carolina Environmental Management] Commission in an amount acceptable to the Commission. Provided further, that such lien shall not have priority over any existing perfected lien or security interest." *Id.*

154. See *supra* notes 123-34 and accompanying text (discussing oil spill funds in other states).

155. See N.C. GEN. STAT. § 143-215.87 (Supp. 1989) (establishing an "Oil or Other Hazardous Substances Pollution Protection Fund"). The fund also includes "fees, charges, penalties or other moneys" recovered from responsible parties. *Id.* "The moneys shall be used to defray the expenses of any project or program for the containment, collection, dispersal or removal of oil . . . discharged to the land or waters of this State . . . or for restoration necessitated by the discharge." *Id.*

156. Although there is no documented legislative history of the new Act, Mr. Tim Nifong of the Ocean Unit of the North Carolina Attorney General's Office, who helped draft the bill for Representative Basnight, stated in a telephone conversation that the new legislation was designed primarily to protect North Carolina coastal resources. Telephone interview with Tim Nifong, Ocean Unit, North Carolina Attorney General's Office (Jan. 23, 1990). Mr. Nifong also noted that the drafters drew from legislation in other states, but did not model it after any particular state. *Id.* See also N.C. GEN. STAT. § 143-215.94AA(2) (Supp. 1989) (legislative finding that preservation of the traditional uses of the seacoast "is a matter of the highest urgency and priority").

157. See Act of July 19, 1989, ch. 656, §§ 1-4, 1989 N.C. Sess. Laws 222-26.

158. See *id.* § 5 (adding new Part to Article 21A of Chapter 143 entitled "Offshore Oil and Gas Activities: Adverse Environmental Impact Protection") (codified at N.C. GEN. STAT. §§ 143-215.94AA to -215.94JJ (Supp. 1989)).

North Carolina waters.<sup>159</sup> More importantly, however, the new legislation creates a system for recovery of both public and private oil spill cleanup costs and damages in state court,<sup>160</sup> and attempts to organize the State's oil spill response efforts.<sup>161</sup>

In what may be the most significant provision of the new Offshore Oil Spill Act, Section 143-215.94FF(b) allows injured private parties to file civil actions for damages<sup>162</sup> against responsible persons<sup>163</sup> in North Carolina state courts.<sup>164</sup> This improves upon the 1978 Act which made responsible parties liable for both public and private damages, but provided no means of asserting such claims.<sup>165</sup> In addition, the new Act expands the definition of damages to include injury to real or personal property,<sup>166</sup> business loss,<sup>167</sup> interest on loans obtained to ame-

159. The new Act expands the definition of "discharge" to include spills into "waters of the State or into waters outside the territorial limits of the State which affect lands, waters or uses related thereto within the territorial limits of the State." *Id.* § 1 (amending N.C. GEN. STAT. § 143-215.77(4)).

Although the ability of states to regulate oil pollution originating in their own waters was upheld in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), "[t]here remains some question as to whether states can impose liability on activities located beyond their territorial limits that cause oil pollution within their jurisdiction." Lipeles, *supra* note 27, at 435-36 (citation omitted). "A recent United States Supreme Court decision confirms the tenuousness of a state's imposition of liabilities in conflict with the FWPCA for damage caused by discharge outside of state waters." Bederman, *supra* note 86, at 51. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), Vermont residents filed a common-law nuisance action under Vermont law against a New York paper mill that had discharged pollutants into Lake Champlain, which forms part of the border between Vermont and New York. Upholding summary judgment for the mill, the United States Supreme Court held that the FWPCA preempts the common law of an affected state to the extent it attempts to impose liability on a point source in another state. *Id.* at 497. Specifically, the Court found that application of Vermont law against the New York mill "would allow respondents to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the [FWPCA]." *Id.* at 494. Although the effect of *Ouellette* on state oil spill liability laws remains unclear, one might argue that "since the FWPCA itself does not afford a private right to compensation, a state scheme which does would not necessarily be incompatible with the FWPCA's purpose." Bederman, *supra* note 86, at 52. Nevertheless, as one commentator warns, "where the discharge does not occur within [a state's] territorial waters, state law could be preempted by the FWPCA." *Id.*

160. See *infra* notes 162-64 and accompanying text.

161. See *infra* notes 170-74 and accompanying text.

162. See *infra* notes 166-68 and accompanying text (discussing recoverable damages under the Act).

163. "Responsible person" means any of the following:

- a. The owner or transporter of natural gas, oil or drilling waste which causes an injury covered by this Part.
- b. The owner, operator, lessee of, or person who charters by demise, any offshore well, undersea site, facility, oil rig, oil platform, vessel, or pipeline which is the source of natural gas, oil, drilling waste, or is the source or location of exploration which causes an injury covered by this Part. "Responsible party" does not include the United States, the State, any county, municipality or public governmental agency; however, this exception . . . shall not be read to exempt utilities from the provisions of this Part.

N.C. GEN. STAT. § 143-215.94BB(6) (Supp. 1989).

164. Such actions "shall be brought in the superior court of the county in which the alleged injury occurred or in which the alleged damaged property is located." *Id.* § 143-215.94FF(b). The new Act also authorizes the Attorney General to bring class actions for damages and injunctive relief in the Wake County Superior Court. *Id.* § 143-215.94FF(a).

165. See *id.* § 143-215.93.

166. Injury or harm to property

includes the cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge . . . , any income lost from the time such property is

liorate oil spill effects, cleanup costs, and costs of restoring natural resources.<sup>168</sup> Moreover, Section 143-215.94CC(a) makes responsible persons strictly liable for all cleanup costs and damages, notwithstanding the limitations established by the 1978 Act.<sup>169</sup>

In addition to providing a statutory scheme for oil spill liability and compensation, the new Offshore Oil Spill Act also increases the State's role in planning for and responding to oil spills. Section 143-215.94HH requires the State Emergency Response Commission to promulgate a State oil spill contingency plan,<sup>170</sup> and directs the Secretary of Crime Control and Public Safety to establish an emergency oil spill control network to provide immediate access to available equipment.<sup>171</sup> The new legislation also requires any person responsible for an oil spill to notify the State immediately,<sup>172</sup> and authorizes the Department of Environmental Health and Natural Resources to respond with cleanup efforts.<sup>173</sup> Section 143-215.94II(a) directs the Governor to declare a state of emergency "[w]hensoever any emergency exists or appears imminent," arising out of an oil spill.<sup>174</sup>

## V. ROOM FOR IMPROVEMENT

Although offshore drilling is still in the planning stages in North Caro-

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damaged to the time such property is restored, repaired, or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto.

*Id.* § 143-215.94BB(1)(a).

167. "Business loss" includes "loss of income or impairment of earning capacity due to damage to real or personal property or to damage or destruction of natural resources upon which such income or earning capacity is reasonably dependent." *Id.* § 143-215.94BB(1)(b).

168. *Id.* § 143-215.94BB(1)(c)-(e). The new Act also allows the State to recover additional damages for injury to natural resources. *Id.* § 143-215.94BB(1)(f)(1). Liability under the new legislation, however, does not include damages for personal injury. *Id.* § 143-215.94DD(c).

169. *Id.* § 143-215.94CC(a). As under the 1978 Act, liability under the new legislation is joint and several. *See id.* § 143-215.94DD(a). Responsible persons may avoid liability to injured parties by proving that damages were caused solely by an act of war, act of God, negligence of the injured party or of a third party, and other limited situations. *See id.* § 143-215.94CC(b).

170. *See id.* § 143-215.94HH(a). For the text of § 143-215.94HH(a), see *infra* note 179. As of February 1990, the North Carolina contingency plan was still in the planning stages. According to a newsletter published by the North Carolina Outer Continental Shelf Office, "[u]nder the direction of Joe Myers, emergency management director, a planning group has been formed and initial meetings held to identify state and federal agency responsibilities for spill response." Outer Continental Shelf Office, N.C. Dep't of Admin., *State Working on Oil Spill Plan*, 2 OCS UPDATE (Feb. 1990).

171. *See* N.C. GEN. STAT. § 143-215.94HH(b) (Supp. 1989). "Such network shall be employed to provide an immediate response to an oil discharge into the offshore marine environment which is reasonably likely to affect the State's coastal waters." *Id.*

172. *See id.* § 143-215.94GG(a). Notification must be made "pursuant to rules established by the Secretary of Crime Control and Public Safety, . . . but in no case later than two hours after the discharge." *Id.* Failure to immediately report a discharge subjects the violator to civil penalties up to \$250,000, depending on the quantity of oil spilled. *Id.* § 143-215.94GG(b).

173. *See id.* § 143-215.94EE(a). The 1978 Act requires responsible persons to "immediately undertake to collect and remove" spilled oil. *Id.* § 143-215.84(a).

174. N.C. GEN. STAT. § 143-215.94II(a) (Supp. 1989). The new legislation also contains a savings clause expressly disclaiming any intent to "conflict with limitations on State authority established by federal law." *Id.* § 143-215.94JJ; *see supra* notes 80-112 and accompanying text (discussing potential preemptive effect of federal law).

lina,<sup>175</sup> as Donna Moffitt, director of the North Carolina Outer Continental Shelf Office, once warned: "a tanker spill can happen even without offshore development."<sup>176</sup> Oil tankers traveling the North Carolina coast and unloading at the State's ports already pose a threat to coastal resources.<sup>177</sup> The risk of oil spills will increase if indeed oil is found off the North Carolina coast. The new Offshore Oil Spill Act represents an effort to cope with the inevitable effects of oil pollution;<sup>178</sup> but the resulting legislation incorporates many of the pitfalls of similar state and federal statutes.

The North Carolina law, for example, does little to ensure that the State will respond effectively to oil spills. Although the new legislation requires the State to prepare an oil spill contingency plan, the General Assembly gave no guidelines as to what the plan is to cover or how it is to be implemented.<sup>179</sup> Similarly, the new law provides for an emergency oil spill network comprised of available equipment from state and local governments.<sup>180</sup> The General Assembly, however, provided no readily available source of funding for additional cleanup capability should the available equipment prove inadequate.<sup>181</sup> Because the nearest Coast Guard oil spill response team currently is stationed in Ala-

175. See *supra* note 9 (discussing Mobil Oil Corp.'s plans to drill off the North Carolina coast).

176. *State Unprepared*, *supra* note 11, at 1-C, col. 1. "Most offshore spills are the result of tanker and barge accidents, but pipeline and platform accidents (i.e. well blowouts, explosions, and fires) occasionally contribute to the total." U.S. DEP'T OF INTERIOR, *supra* note 1, at 15. In fact, based on 1985 estimates, less than two percent of oil pollution in the marine environment results from oil and gas production. *Id.*

177. "During the past five years, about 500 tankers carrying about 180,000 tons of petroleum products docked at Wilmington and Morehead City." *State Unprepared*, *supra* note 11, at 1-C, col. 1 (citing Coast Guard records). "During that time, the Coast Guard reported five spills, most of them a few gallons." *Id.*

Although North Carolina has not experienced a major oil spill, the State's good fortune does not belie the need for an ability to respond to even relatively small spills. A 1969 spill of approximately 4,100 gallons of No. 2 fuel oil off West Falmouth, Massachusetts illustrates the destructive potential of small spills. According to a recent U.S. Department of Interior report:

Even though this spill was relatively small . . . , the prevailing south to southwesterly winds in this region created an oil-in-water emulsion which spread over more than 1,000 acres of Wild Harbor River, causing immediate large-scale mortality of marine animals in the intertidal and subtidal zones of the river. This is an example of the unpredictability of the potential impact of a spill.

U.S. DEP'T OF INTERIOR, *supra* note 1, at 15 (citing H. Sanders, J. Grassle, G. Hampton, L. Morse, S. Garner-Price, and C. Jones, *Anatomy of an Oil Spill: Long Term Effects from the Barge Florida Off West Falmouth, Massachusetts*, 38 J. MARINE RES. 265-380 (1980)).

178. See N.C. GEN. STAT. § 143-215.94AA (Supp. 1989) (declaration of public policy accompanying North Carolina's new oil spill legislation).

179. In relevant part, § 143-215.94HH(a) provides:

The State Emergency Response Commission . . . shall develop a State oil spill contingency plan relating solely to the undersea exploration, extraction, production and transport of oil . . . in the marine environment off the North Carolina coast, including any such development on the Outer Continental Shelf seaward of the State's jurisdiction over its territorial waters.

*Id.* § 143-215.94HH(a).

180. See *id.* § 143-215.94HH(b).

181. The legislation merely provides that the "oil spill contingency plan and oil spill response network . . . shall be reviewed and evaluated for adequacy and continued feasibility every three years, or more often if deemed appropriate by the Secretary of Crime Control and Public Safety." *Id.* § 143-215.94HH(b)(4).

bama,<sup>182</sup> the importance of locally available manpower and cleanup equipment must not be overlooked.<sup>183</sup>

Moreover, if the Alaskan experience is any indication,<sup>184</sup> the North Carolina Oil Pollution Protection Fund's reliance on legislative appropriations will leave it inadequately financed in the event of a major oil spill.<sup>185</sup> As one commentator observed, "[t]his method somewhat hampers the damage compensation objective as compared to automatic funding because the appropriations process does not always provide monies at the necessary time or in the necessary amount."<sup>186</sup> In addition to, or instead of, legislative appropriations, a per-barrel fee on oil would provide a reliable source of funds.<sup>187</sup> A per-barrel fee could also provide an incentive for industry prevention, as consumers "might exert some pressure on producers to keep prices down by preventing spills."<sup>188</sup>

Other omissions in the North Carolina law further reduce the incentive for industry efforts to prevent oil spills. Although imposition of strict unlimited liability on oil spillers will theoretically force them to internalize the costs of oil pollution, economists have demonstrated that the threat of liability alone will

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182. See *State Unprepared*, *supra* note 11, at 1-C, col. 1.

183. For example, "the cleanup of a spill of 500,000-plus gallons of fuel oil into the Savannah River at Savannah, Ga., in December 1986 was delayed because it took the Coast Guard four days to find the source." *Id.* As one environmentalist warned, "[t]he situation that existed in Savannah exists now in North Carolina." *Id.* (quoting Hans Neuhauser, Coastal Resources Director for the Georgia Conservancy).

184. See *supra* notes 130-34 and accompanying text (discussing the Alaskan legislature's post-*Exxon Valdez* enactment of a per-barrel tax on oil to help finance the state's \$50,000,000 cleanup fund).

185. Indeed, the fund currently may be underfunded. In a 1985 report comparing state oil spill funds, the Coast Guard indicated that the North Carolina fund was "not well endowed." COAST GUARD REPORT, *supra* note 115, at 271.

186. Lipeles, *supra* note 27, at 442. North Carolina's reliance on legislative appropriations may be particularly ineffective, given the State's current budgetary crisis. See generally Riley, *State Budget Outlook Grows Gloomier*, *The News and Observer* (Raleigh, N.C.), June 5, 1990, at 1B, col. 2 (discussing North Carolina's \$550 million revenue shortage for budget year ending June 30, 1990).

187. For example, funding for Florida's "oil spill program has been derived from the past collection of a \$0.02 per barrel excise tax on pollutants transferred across State waters at their initial point of transfer." *Oil Pollution Liability: Hearing on H.R. 1632 Before the Subcomm. on Coast Guard & Navigation of the House Comm. on Merchant Marine & Fisheries*, 100th Cong., 1st Sess. 4 (1987) (statement of Bob Martinez, Governor of the State of Florida). According to Governor Bob Martinez, the Florida fund "reached its statutory cap of \$35 million in 1980; since that time, the cap has been lowered to \$25 million, and there has not been a need to reactivate the collection of the excise tax." *Id.* Governor Martinez added that, since its enactment in 1970, the Florida system "has provided Florida with the capacity for well-coordinated responses to over 300 spills that are annually investigated by the State of Florida." *Id.* The Florida oil spill program is codified at FLA. STAT. ANN. §§ 376.011 to 376.17, 376.19 to 376.21 (1987).

188. Lipeles, *supra* note 27, at 442. As one commentator noted:

[The per-barrel fee] seems equitable in that it relates the costs a facility must bear to the amount of oil it might spill. However, it tends to relax the prevention incentive in two ways. First, it places no burden on vessels, the largest category of polluters. . . . Second, the per-barrel fee does not distinguish between facilities with good and poor spill records.

*Id.* at 441. To alleviate the second disincentive, Ms. Lipeles suggests a system requiring "terminal facilities and vessels to pay annual risk charges, based on oil handling capacity, cleanup capability, previous 'risk experience,' and, in the case of vessels, the presence or absence of specified design characteristics." *Id.* (citing ALASKA STAT. § 30.25.250(a) (Supp. 1976)). Although Alaska at one time required risk charges from facilities and vessels, the Alaskan legislature repealed the risk charge provision in 1980. Act of July 1, 1980, ch. 116, § 11, 1980 Alaska Sess. Laws 15 (repealing ALASKA STAT. § 30.25).

not prevent oil spills.<sup>189</sup> Without some sort of financial responsibility requirement<sup>190</sup> or risk charge system,<sup>191</sup> even North Carolina's imposition of unlimited liability will not appreciably increase "the burdens on industry beyond federal requirements"<sup>192</sup> until a spill actually occurs.

Although the Offshore Oil Spill Act establishes a liability and compensation regime that will help facilitate recovery of oil spill cleanup costs and damages,<sup>193</sup> the Act's reliance on litigation may prove burdensome to private claimants seeking recovery of property and income losses. Under the current legislation, state courts in coastal counties would be inundated with private damage claims in the event of a major oil spill.<sup>194</sup> Although the strict liability standard<sup>195</sup> might help claimants obtain prompt recovery of oil spill damages, the nature of litigation provides responsible parties with ample opportunity to delay damage awards. In contrast, an administrative compensation system, similar to the one employed by Maine,<sup>196</sup> would offer expedited recovery to private claimants who would "need only present a claim to the state board along with proof of damage to obtain immediate financial compensation for . . . oil pollution damage."<sup>197</sup> Before such a system could be implemented, however, the General Assembly would have to identify a reliable source of funding, such as license fees or an excise tax on oil.<sup>198</sup>

## VI. CONCLUSION

Although the current North Carolina oil pollution law may prove to have

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189. See generally, Hartje, *Oil Pollution Caused by Tanker Accidents: Liability Versus Regulation*, 24 NAT. RES. J. 41, 60 (1984) (economic analysis concluding that "[c]hanges in liability law have improved the legal positions of the victims, but remain insufficient as an incentive for accident prevention"); Bradley, *Marine Oil Spills: A Problem in Environmental Management*, 14 NAT. RES. J. 337-59 (1974) (economic approach proposing a fine system to address detection and enforcement problems for oil spillage control).

190. See *supra* notes 141-46 and accompanying text (discussing state financial responsibility requirements). The North Carolina legislation currently requires no proof of financial responsibility from either vessels or facilities.

191. See *supra* note 188 (discussing risk charges).

192. Lipeles, *supra* note 27, at 441. "The only time an unlimited liability provision met strong resistance was when Florida refused to honor the federal certificate [showing financial responsibility]; the state later revised its law to limit shippers' liability and to accept the FWPCA certificate." *Id.* at 440-41. Cf. *supra* note 141 (noting Connecticut's 1987 repeal of vessel bonding requirements).

193. See Act of July 19, 1989, ch. 656, § 5, 1989 N.C. Sess. Laws 222 (codified at N.C. GEN. STAT. §§ 143-215.94AA to -215.94JJ (Supp. 1989)).

194. See N.C. GEN. STAT. § 143-215.94FF(b) (Supp. 1989) (requiring private damage claims to be "brought in the superior court of the county in which the alleged injury occurred or in which the alleged damaged property is located, or in the county in which the injured party resided"). See also *supra* note 5 and accompanying text (noting rush of lawsuits following the *Exxon Valdez* disaster).

195. See N.C. GEN. STAT. § 143-215.94CC(a) (Supp. 1989) (imposing strict liability on responsible persons).

196. See *supra* notes 136-40 and accompanying text (discussing Maine's oil spill compensation scheme).

197. Note, *supra* note 71, at 817. But see *supra* note 138 (discussing standing for appeal of arbitration awards under the Maine oil spill compensation scheme).

198. See Bederman, *supra* note 86, at 64 (noting that use of Alaska's oil spill fund to compensate private claimants "would require expansion of financing . . . and specific procedural provisions authorizing successful private claimants to draw upon it up to a specified limit").

little effect on efforts to *prevent* oil spills,<sup>199</sup> the new legislation provides a liability and compensation scheme that should help deal with oil spills when they *do* occur.<sup>200</sup> Moreover, although North Carolina law provides little guidance in planning for oil spill response,<sup>201</sup> it does provide a basic framework within which State officials can work to organize their cleanup efforts.<sup>202</sup> In light of the deficiencies and advantages of the new oil spill legislation, the North Carolina General Assembly apparently has learned some, but not all, of the lessons taught by the *Exxon Valdez* spill.<sup>203</sup> Only time will tell, however, whether the new law will meet its lofty goal of protecting North Carolina's coastal resources from the potentially devastating effects of oil spills.

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199. See *supra* notes 189-92 and accompanying text.

200. See *supra* notes 162-69 and accompanying text.

201. See *supra* note 179 and accompanying text.

202. See *supra* notes 170-74 and accompanying text.

203. See *supra* notes 1-8, and accompanying text (discussing the *Exxon Valdez* spill); *supra* notes 130-34 and accompanying text (discussing the Alaska legislature's response to the spill).