

Notes on Senate “Clean Energy Jobs and Oil Company Accountability Act of 2010”

TITLE I – Removal of Limits on Liability for Offshore Facilities

Section 102

Removes the current \$75 million limit of liability for Offshore Facilities.

Strongly Oppose. The Oil Pollution Act of 1990 (OPA '90) established the Oil Spill Liability Trust Fund (OSLTF) as an “insurance policy” for payment of potential damages from oil releases from exploration, production or transportation accidents. The OSLTF is funded exclusively by a per barrel tax on the oil industry – not by taxpayers. The industry has contributed 100% of the \$1.6 billion currently in the Fund. OPA '90 requires that responsible parties pay ALL cleanup costs related to a spill from an offshore platform. Only then can responsible parties use the OSLTF to cover up to \$1 billion for consequential damages if those claims exceed the OPA’s \$75 million liability cap. Further, the liability cap for consequential damages does not apply in instances of gross negligence, willful misconduct, or violation of applicable federal regulations. Injured parties may also file claims in state courts, which are not subject to the liability limits.

In response to the Deepwater Horizon incident, BP has made it clear in writing that it will pay 100% of the environmental cleanup and all legitimate claims for economic damages without seeking reimbursement from the Fund. Nevertheless, this provision would eliminate liability limits entirely. This would threaten the viability of offshore operations and could significantly reduce US domestic oil production, cost jobs and harm U.S. energy security.

TITLE II – Federal Research and Technologies for Oil Spill Prevention and Response

TITLE III – Outer Continental Shelf Reform

The proposed changes in this Title to the OCS Lands Act (OCSLA) are far reaching and diminish existing policy emphasis on policy and research support for finding and developing deepwater resources, while placing increased emphasis on safety and environmental protection. This bill is nearly identical to portions of the bill proposed by the House Energy and Natural Resources Committee (HR 3534 – CLEAR Act of 2010). This bill reduces the significance of OCSLA’s expression of policy favoring resource development to identification of resource development as among policy options to be considered in managing the OCS. The full impacts of the proposed changes are hard to determine because of the discretion given the Secretary under the OCSLA. How the DOI goes about interpreting and implementing these new provisions will determine the full impact to OCS leasing and development activities.

Sec. 304

Amends Section 3 of OCSLA (43 U.S.C. 1332). With minor stylistic changes, this section follows the approach of Sec. 204 of the CLEAR Act, and is objectionable. “Exploration, development and production of energy resources on the OCS should be allowed only (emphasis added) when those activities can be accomplished in a manner that provides reasonable assurance of adequate protection against harm to life, health, the environment, property, or other users of the waters, seabed, or subsoil”.

Oppose. This language would increase opportunities to challenge virtually any administrative decision favoring energy development.

Sec. 306

Oppose. The section overall presents too many prescriptive new requirements for administrative decisions on exploration plans and permits. Together these will increase the cost, complexity and time required for review of operator submittals, and will likely discourage investment in the OCS. Among key examples:

- The Secretary is *directed* to disapprove an exploration plan if he determines that because of 'exceptional' geological conditions in the lease area and 'exceptional' resource values in the surrounding environment, implementation of the exploration plan would cause serious harm to the environment, and the threat would not diminish over an acceptable period of time – and the advantages to disapproving the plan outweigh the advantages of exploration. *The meaning of exceptional geological conditions is unclear, and the provision ignores the realities of oil and gas development, where challenging geologic conditions are commonly encountered and managed through application of skill, prudent practices, and technology. Operators must explore first-- geological conditions are not known until the drilling is completed.*
- This section amends the OCSLA, substantially weakening its mandate to support environmentally responsible energy development on the OCS. *The Secretary would be required to 'give equal consideration to' (in place of 'consider') the 'economic, social, and environmental values of the renewable and nonrenewable resources contained in the outer Continental Shelf'. This is another invitation to legal challenge of virtually any administrative decision favoring development, on the grounds that equal consideration was not given to the other resource values of the OCS.*
- The section eliminates the OCSLA requirement that the Secretary determine economic feasibility of 'use of the best available and safest technologies'. *Including language for economic feasibility or commercial availability of technologies is important in order to make certain that technologies have been tested and demonstrated to be effective. The absence of this requirement imposes unreasonable burdens on operators to add features or components to their operations that may not be needed or fit for purpose. Requiring the use of equipment that isn't commercially available would prevent domestic production.*
- Similar to the CLEAR Act of 2010, this bill would modify OCSLA to increase civil administrative penalties for violation of any portion of the Act as modified of \$75,000 per day for each day of violation. The civil penalty for 'knowing and willful' violations would be raised from \$100,000 to \$10,000,000. These penalty amounts are to increase each year with the CPI. *This civil penalty provision is much too broad, applying to ANY person violating ANY term or ANY regulation. This could lead to capricious regulatory enforcement, and to the imposition of substantial penalties on parties whose violations are neither intentional nor present environmental harm.*

TITLE IV – Environmental Crimes Enforcement

Sec. 402

Requires the US Sentencing Commission to consider whether the current sentencing guidelines are sufficiently stringent to deter oil spills. In addition, it adds the OPA and the Clean Water Act as statutes which all restitution as part of the criminal sentence.

This is redundant to the extensive liability system already in place under OPA.

TITLE V – Fairness in Admiralty and Maritime Law

Sec. 502

Repeals the 1851 Limitation of Liability Act, in which shipowners are entitled to limit tort liability to the value of the vessel and freight, but only if the owner of the vessel was not at fault.

Clarification is needed in this language. It is not clear whether the bill language is merely reiterating that it's not implicating OPA, or that it is in fact removing the liability cap set by OPA. If the intent is to effectively remove the liability cap: Strongly Oppose.

The Limitation of Liability Act does not actually limit liability very often, but because of certain procedural vagaries of the statute, the Act allows the owner of the vessel to control the flow of litigation by stalling litigation, moving the venue of the litigation, etc. If the intent of the language is to repeal the 1851 Act, some protections provided to vessel owners would be removed but it would not make a significant monetary impact to the marine liability regime.

Sec. 503

Overturns the 1-to-1 ratio requirement of punitive damages to compensatory damages imposed in the Supreme Court case *Exxon Shipping Co. v. Baker*, allowing for punitive damages that are not correlated to compensatory damages.

Oppose. Even in other contexts, the Supreme Court has declared that punitive damages awards in amounts that exceed a multiple of four times compensatory damages might be close to the line of constitutional impropriety. This would seem to provide for unlimited punitive damages, which would be extremely costly to the marine industry if passed. This would apply to all shipping activity and would impede global trade.

Sec. 506

This is a retroactivity clause, allowing all of the above changes to apply to all claims brought after April 19, 2010 (presumably whether resolved or not), and all outstanding claims and causes of action that remain unresolved. This clause would most strongly impact the litigation surrounding the Deepwater Horizon incident.

TITLE VI – Securing Health for Ocean Resources And Environment (SHORE)

Sec. 611

Places significant burden on NOAA to conduct ocean modeling and research related to the fate and effects of oil and dispersant use. NOAA is required to update the environmental sensitivity index at least every seven years for coastal areas leased or under consideration for leasing for energy production. *This could adversely impact the industry when used as a mechanism to stop leasing or production in areas designated for such purposes.*

NOAA would be given authority to review dispersant application protocol and technologies capable of detecting subsea hydrocarbons. *This review should occur in cooperation with industry experts.*

The subtitle establishes a National Information Center on Oil Spills within NOAA as a single source for oil spill emergency response scientific data.

NOAA is directed to compile a report on ecological baseline data every five years on areas under consideration for leasing. *This too could adversely impact industry when used as a mechanism to stop leasing in proposed areas.*

Sec. 615

Provides for long term monitoring in the Gulf of Mexico.

The independent peer reviewed research should be defined to include a cross section of research experts, including industry.

Sec. 616

Includes a broad-based approach to data collection and oil spill response research in the Arctic.

Sec. 624

Sets out a joint agency process to evaluate oil pollution containment and removal technologies. This includes NOAA, Coast Guard and DOI. A Federal Spill Response Committee is created for research, prevention and response purposes. The section calls for a clearinghouse or centralized database of equipment and technology to be housed at the Coast Guard "National Response Unit" which should be the National Strike Force Coordination Center in NC and it is not dramatically different than current practices

This approach runs the risk of bureaucratizing the process of testing and review of technologies that occurs in the marketplace and by government experts in consultation with industry and third party/academic experts, and forcing decisions (and possible required uses) of certain technologies based on agency determination as opposed to operator or industry experience or the informed consensus of the response community.

If this concept moves forward, industry should participate in the evaluation of response technologies.

Sec. 626. GULF OF MEXICO REGIONAL CITIZENS' ADVISORY COUNCIL.

Establishes a Regional Citizen's Advisory Council in the GOM.

Oppose.

- *Would be entirely duplicative of current practices of the Federal and State governments and of companies now operating in the region. This concept would not enhance the level of consultation that now occurs, and would run the risk of actually diminishing the voice and the interests of local governments in the Gulf region by setting up a new entity whose board members would not be accountable to voters or to Gulf residents in any direct way.*
- *Would, as drafted, specially favor the interests of the particular groups listed in Section 629(c) over the interests of Gulf residents as a whole, and would provide no representation at all to the tens of thousands of men and women and the thousands of businesses in the Gulf region that depend upon a healthy offshore oil and gas industry.*
- *Would provide a forum very likely to favor groups and individuals who generally oppose oil and gas development, giving them quasi-official status in public debate and media accounts, and in cases of project controversy lead to unreasonable pressure on State or county/parish government officials who seek balanced solutions and compromise.*

- *Would impose a new cost on operators in the Gulf of Mexico and add a measure of uncertainty in the permitting process that could discourage investment in the oil and natural gas resources of the Gulf or the entry of new players into the industry.*

Sec. 630

Amends OPA '90 to increase vessel liability to \$1,900, \$3,300 and \$7,000 per gross ton or \$16,000,000, \$29,100,000, \$36,900,000 and \$93,600,000, whichever is greater depending on the tanker specifications.

This disproportionately hits small vessel operators. The vessel liability limits were recently adjusted and do not need to be adjusted again.

TITLE XLIII – Hydraulic Fracturing Chemicals

Sec. 4301

Would amend Title III of the Emergency Planning and Community Right to Know Act (EPCRA) by adding provisions that require any person using hydraulic fracturing for an oil and natural gas well to disclose to the state, no later than 30 days after the completion of the well, the list of chemicals used in each fracturing process. This disclosure must include the well location and number, the chemical constituents of mixtures used at the well, the Chemical Abstract Service (CAS) registry numbers, and the material safety data (MSDS) sheets. The state must make the disclosure information available to the public, including a posting of the information on line. If the state does not have a system in place for this public disclosure by December 31, 2011, then the burden is placed on the operator to make the information available to the public on line no later than 30 days after completion of the well.

- *Section 4301 would undermine existing state regulatory authority, be inconsistent with federal environmental laws that balance disclosure issues with confidential business information, chill technology innovation and investment related to hydraulic fracturing, and restrict the development of the nation's enormous and "game-changing" reserves of shale gas.*
- *Section 4301 places unrealistic burdens on producers. Operators and service companies currently provide full chemical disclosure in accordance with all applicable federal and state authorities. In contrast to the assertions on which this section premised, these materials are well known to state regulators, and are generally available to members of the public upon a quick search of the Internet, or by request to the state.*
- *Unfortunately, this section would compel producers to disclose information that they may neither have, nor have the legal right to disclose. Additives used in the fracturing process are manufactured by companies that determine the amount of information they can post on Material Safety Data Sheets. Service companies and producers purchase these materials from manufacturers. Under the Reid provision, producers could be in a position where they cannot meet these new requirements and would either be subject to \$10,000/day fines under EPCRA, or limit their ability to fracture natural gas formations.*
- *Section 4301 is inconsistent with federal statutes. The language is inconsistent with the key congressional policies set up in EPCRA and other federal environmental laws for attempting to balance disclosure issues with confidential business information. For example, in EPCRA Congress recognized the need to strike a balance between reporting on additive use to local*

authorities and the need to protect business information. However, the language does not extend these protections for valuable information related to hydraulic fracturing.

- *Section 4301 will adversely impact energy development in the U.S. with no tangible benefits to show for it. It would provide a strong disincentive to service companies to engage in further innovation with respect to the development of new fracturing solutions. The loss of these new and innovative products would greatly reduce energy production in the U.S., and ratchet up our reliance on foreign imports. Even though state regulatory programs have effectively managed the environmental considerations associated with fracturing for decades, companies are actively working to produce new HF systems that are even more environmentally benign than they are today. The bill language would undermine this development and innovation.*
- *In the FY2010 Appropriations bill, Congress directed EPA to undertake a study focusing on the relationship between hydraulic fracturing and drinking water. In 2004, the Agency published a report finding hydraulic fracturing to be a safe and well-regulated technology. Notwithstanding those findings, EPA is honoring the Congressional request to study the technology once again and has initiated a 2 year study process. Legislative efforts such as this one should wait until the results of that study are released.*
- *States' record of enforcement/oversight proves they know how to regulate the process. States have effectively regulated hydraulic fracturing for more than a half-century. Section 4301 would undermine existing state regulatory authority, be inconsistent with federal environmental laws that balance disclosure issues against confidential business information, chill HF technology innovation and investment, and restrict the development of the nation's shale gas resources.*