DEPARTMENT OF EDUCATION

[CFDA No.: 84.271]

Faculty Development Fellowship Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 1994

Purpose of Program

The Faculty Development Fellowship Program provides grants to institutions of higher education, consortia of institutions, and consortia of institutions and nonprofit organizations to fund fellowships for individuals from underrepresented minority groups to enter or continue in the higher education professorate.

On March 31, 1994, the President signed into law the Goals 2000: Educate America Act (Pub. L. 103–227). The Act enunciates eight National Education Goals for the year 2000. This program addresses the National Education Goals, that the Nation's teaching force will have access to programs for the continued improvement of their professional skills and the opportunity to acquire the knowledge and skills needed to instruct and prepare all American students for the next century. This program furthers the Goals by providing grant funds to allow prospective faculty members and experienced faculty members to engage in doctoral study or participate in professional development programs that will enhance their skills and careers.

Eligible Applicants

Institutions of higher education, consortia of institutions, and consortia of institutions and nonprofit organizations that have a demonstrated record of enhancing the access to graduate education of individuals from underrepresented minority groups.

No fellowship shall be awarded under this program for study at a school or department of divinity.

Deadline For Transmittal of Applications: August 15, 1994.

Deadline for Intergovernmental Review: September 28, 1994.

Applications Available: July 1, 1994.

Available Funds: $3.5 million.

Estimated Range of Awards: $200,000–$400,000.

Estimated Average Size of Awards: $350,000.

Estimated Number of Awards: 8–12.

Note: The Department is not bound by any estimates in this notice.

Project Period

Up to 60 months for the Experienced Faculty Development Fellowships. Up to 36 months for the Faculty Professional Development Fellowships.

Applicable Regulations

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 82, 85, and 86; and (b). The regulations in 34 CFR part 641 as published elsewhere in this issue of the **Federal Register**.

SUPPLEMENTARY INFORMATION: This program provides three types of fellowships—(1) *Prospective Faculty Development Fellowships* for talented baccalaureate degree recipients from underrepresented minority groups who have financial need and who wish to obtain a doctoral degree and enter the higher education professorate; (2) *Experienced Faculty Development Fellowships* for talented faculty from underrepresented minority groups who wish to continue in the higher education professorate and obtain a doctoral degree; and (3) *Faculty Professional Development Fellowships* for talented faculty from underrepresented minority groups who wish to participate in short-term professional development programs, including seminars, conferences, and workshops, specifically designed to enhance their skills and careers. The purpose of the program is to increase the number of doctoral degrees received by members of underrepresented minority groups in the higher education professorate and to provide professional development activities to underrepresented minority faculty. Grant funds for prospective and experienced faculty development fellowships may be used to pay stipends to the fellows. Grant funds for faculty professional development fellowships may be used to cover allowable costs specified in the program regulations.

Stripend Level

The Secretary has determined that the maximum fellowship stipend for experienced faculty development fellows for academic year 1994–1995 is $14,400, which is equal to the level of support that the National Science Foundation is providing for its graduate fellowships.

Priority

Under 34 CFR 75.105(c)(3) and 34 CFR 641.24(a) the Secretary gives an absolute preference to applications that meet one of the following priorities. The Secretary funds under this competition only applications that meet one of these absolute priorities:

1. Experienced faculty development fellowships; or

2. Faculty professional development fellowships.

For Applications or Information Contact: Karen W. Johnson, U.S. Department of Education, 400 Maryland Avenue, SW., Portals Building, Courtyard Level C–80, Washington, DC 20202–5329. Telephone: (202) 260–3209. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

Information about the Department's funding opportunities, including copies of application notices for discretionary grant competitions, can be viewed on the Department's electronic bulletin board (ED BOARD), telephone (202) 260–9950; or the Internet Gopher Server at GOPHER.ED.GOV (under Announcements, Bulletins, and Press Releases). However, the official application notice for a discretionary grant competition is the notice published in the **Federal Register**.

Authority: 20 U.S.C. 1134r.

Dated: June 24, 1994.

David A. Longanecker,

Assistant Secretary for Postsecondary Education.

[FR Doc. 94–15961 Filed 6–30–94; 8:45 am]

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Friday
July 1, 1994

Part VII

Department of Transportation

Coast Guard

33 CFR Parts 4, 130, et al.
Financial Responsibility for Water Pollution (Vessels); Final Rule

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Parts 4, 130, 131, 132, 137, and 138

[CGD 91–005]

RIN 2115–AD76

Financial Responsibility for Water Pollution (Vessels)

AGENCY: Coast Guard, DOT.

ACTION: Interim rule with request for comments.

SUMMARY: The Coast Guard is promulgating interim regulations to implement the provisions concerning financial responsibility for vessels under the Oil Pollution Act of 1990 and the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (Acts). These provisions require owners and operators of vessels (with certain exceptions) to establish and maintain evidence of insurance or other evidence of financial responsibility sufficient to meet their potential liability under the Acts for discharges or threatened discharges of oil or hazardous substances. The regulations are administrative in nature and concern procedures for evidencing financial responsibility.

DATES: Effective Date. This rule is effective on July 1, 1994.

Comment Closing Date. Comments must be received on or before September 29, 1994.

Implementation Date. The Coast Guard will issue new Certificates of Financial Responsibility under this rule beginning December 28, 1994, following the implementation schedule described in this preamble.

ADDRESSES: Comments may be mailed to the Executive Secretary, Marine Safety Council (G–LRA/3406) (CGD 91–005), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001, or may be delivered to room 3406 at the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

The Executive Secretary maintains the public docket for this rulemaking. Comments will become part of this docket and will be available for inspection or copying at room 3406, U.S. Coast Guard Headquarters, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Unless otherwise indicated, documents referred to in this preamble also are available in this docket.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Skall, (703) 235–4704, or Mr. Robert S. Horowitz, (703) 235–4792, National Pollution Funds Center. Procedural questions may be directed to Mr. Richard Castellano at (703) 235–4810.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written comments on the implementation schedule as well as other changes to the NPRM. Commenters are requested not to resubmit or restate comments already filed to the docket, as those comments have been considered in promulgating this rule. Persons submitting comments should include their names and addresses, identify this rulemaking (CGD 91–005) and the specific section of this rule to which each comment applies, and give the reason for each comment. Please submit two copies of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose stamped, self-addressed postcards or envelopes.

The Coast Guard will consider all comments received during the comment period. It may change this rule in view of the comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Marine Safety Council at the address under **ADDRESSES**. The request should include the reasons why a hearing would be beneficial. If it determines that the opportunity for oral presentations will aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register**.

Drafting Information

The principal persons involved in drafting this document are Mr. Robert M. Skall, Project Manager, and Mr. Robert S. Horowitz, Project Counsel, National Pollution Funds Center.

Regulatory Information

This interim rule is being made effective on the date of publication for the reasons given in the "Implementation Schedule" section of this preamble. Therefore, the Coast Guard for good cause finds, under 5 U.S.C. 553(d)(3), that this rule should be made effective in less than 30 days after publication. An interim, rather than a final, rule is being issued to enable the public to comment on the changes that have been made to the notice of proposed rulemaking (NPRM).

Regulatory History

On September 26, 1991, the Coast Guard published an NPRM titled "Financial Responsibility for Water Pollution (Vessels)" in the **Federal Register** (56 FR 49006). The Coast Guard received over 300 letters commenting on this proposal. On July 21, 1993, the Coast Guard published a notice of availability of a Preliminary Regulatory Impact Analysis (PRIA) in the **Federal Register** (58 FR 38994). The Coast Guard received over 60 letters commenting on this PRIA.

Several of the commenters requested a public hearing. Extensive comments were provided to the public docket, both concerning the NPRM and the PRIA, during this extended comment period. In addition, on November 9, 1991, the House Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries held a Congressional hearing concerning the substance of the NPRM. Certificates of Financial Responsibility Under the Oil Pollution Act: Hearing Before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries, 102d Cong., 1st Sess. (1991). Witnesses' oral and written statements at this hearing are very similar to comments supplied to this rulemaking docket. The Coast Guard determined that a public hearing would not further illuminate the detailed comments provided to the docket or otherwise facilitate development of the rule. Accordingly, a public hearing was not held by the Coast Guard.

The Coast Guard also received about eight letters concerning this rulemaking in response to a request for comments to the regulatory review docket associated with former President Bush's regulations moratorium and review (Coast Guard Docket No. CGD 92–005 and DOT Docket No. 92–1). These comments sound the same themes as the comments to this docket (CGD 91–005). This preamble, the PRIA and the final RIA that accompanies this rule address the issues raised by these comments.

Background and Purpose

On August 18, 1990, the President signed into law the Oil Pollution Act of 1990 (Pub. L. 101–380; 33 U.S.C. 2701 *et seq.*) (OPA 90). Under Federal law before that date, several statutes dealt with the issue of oil spill liability and compensation. Each was different and narrow in scope.

To remedy this situation, OPA 90 repealed or superseded certain oil spill liability provisions under the Federal Water Pollution Control Act (33 U.S.C.

1321) (FWPCA), title III of the Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1814) (OCSLAA), the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1653) (TAPAA), and the Deepwater Port Act of 1974 (33 U.S.C. 1517) (DPA). The financial responsibility provisions of those acts (i.e., the provisions requiring vessel owners and operators to maintain evidence of financial responsibility sufficient to meet their potential liability under each of those Acts) were replaced by a single financial responsibility regime under section 1016 of OPA 90 (33 U.S.C. 2716). This new financial responsibility regime is keyed to the broader and higher limits of liability under OPA 90.

In addition to OPA 90, which is limited to all types of oil, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9601 *et seq.*) (CERCLA or Superfund) also concerns pollution liability and compensation. CERCLA establishes a financial responsibility regime for hazardous substances other than oil. The Conference Report on OPA 90 (H. Rep. No. 653, 101st Cong., 2d Sess. 120 (1990) (Conference Report) states:

> To avoid undue administrative burdens, the regulations for financial responsibility for vessels should be consolidated, wherever possible, with those under other Federal statutes. In this manner, only one certificate would be required for vessels to meet the requirements for financial responsibility for the statutes consolidated by this Act, and other pollution laws such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

This rulemaking, therefore, consolidates financial responsibility requirements for vessels under both OPA 90 and CERCLA. It allows the issuance of a single, unified Certificate of Financial Responsibility (COFR or Certificate) for vessels, replacing the separate certificates and financial responsibility regimes under the FWPCA, OCSLAA, TAPAA, and DPA. This new, unified COFR and financial responsibility regime (under new part 138) also make it unnecessary for a separate Certificate and regime under CERCLA. In effect, this rule alleviates the need for five separate sets of regulations and certificates, as well as the accompanying paperwork burden on government and industry.

Discussion of Comments and Changes

General Issues

This rulemaking proceeding has been contentious due to a number of factors, most of which are not directly germane to the specifics of the rule itself. Many in the maritime industry opposed title I of OPA 90 as enacted, preferring instead the international liability and compensation scheme for oil, namely the International Convention on Civil Liability for Oil Pollution Damage of 1969 (1969 CLC) and its companion International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention). (These Conventions may be replaced by 1992 Protocols, which incorporate amendments made in 1984 Protocols.) Under the 1969 CLC, insurers such as the Protection and Indemnity Clubs (P&I Clubs) provide financial responsibility guaranties on behalf of their shipowner members. These guaranties subject the Clubs to direct action by all claimants and do not allow the use of policy defenses. The lower shipowner limits of liability under the 1969 CLC are practically unbreachable compared to OPA 90. Although this is not an issue directly related to this rulemaking, it has, nevertheless, been the reason why this rulemaking has been drawn out and contentious. In short, this rulemaking has become the victim of the non-rulemaking-related opposition to OPA 90.

The U.S. Congress, after the EXXON VALDEZ catastrophe, essentially adopted the 1969 CLC's financial responsibility scheme, but rejected its unbreachable limit of liability scheme, and instead enacted OPA 90. Thus, although OPA 90's financial responsibility concept and mechanism is very similar to that of the 1969 CLC, OPA 90 potentially exposes owners and operators to far greater liabilities for removal costs and damages from oil spills. OPA 90's philosophy is that, in general, the spiller—not U.S. consumers and taxpayers—should bear the lion's share of costs and damages.

In addition, under OPA 90, owners and operators remain subject to potential unlimited liabilities under State laws as well. Adoption of the 1969 CLC would have required preemption of State laws. These issues are not matters within the Coast Guard's discretion to affect. Nevertheless, these issues have impeded drastically the course of this rulemaking.

Oceangoing shipowners and their wholly owned insurers, the P&I Clubs that are members of the International Group of P&I Clubs, objected to OPA 90's liability and compensation scheme before enactment, after enactment, and in several comments to this rulemaking docket. These commenters have emerged OPA 90's liability provisions with financial responsibility issues, complicating this rulemaking proceeding. The most serious commingling of the issues is the unsubstantiated allegation by the P&I Clubs and their principal reinsurer, Lloyd's of London, that, somehow, despite OPA 90's clear statement to the contrary, the American court system would make insurers serving as OPA 90 guarantors subject to unlimited liability. Although it is true that no insurer can survive a legal system that imposes unlimited liability on insurers, it is equally true that Congress always has been well aware of that fact and paid sufficient attention to that matter when it drafted OPA 90's provisions. No one disputes the fact that vessel owners and operators are subject to potential unlimited liability under OPA 90 (for example, when there is gross negligence), but that fact should not be confused with the alleged potential for guarantors to be liable without limit because of this rule. There simply is no support in OPA 90 or in law for the insurers' assertions.

The P&I Clubs, in particular, by stating early on that under no circumstances would they open themselves up to unlimited liability by continuing to provide 1969 CLC-type insurance guaranties to the Coast Guard, placed an understandable fear in many segments of the maritime industry. This fear was that, because the P&I Clubs have a virtual monopoly on relatively inexpensive marine pollution liability insurance, no vessel could demonstrate acceptable evidence of financial responsibility without the P&I Clubs. The obvious consequence was said to be that, if the Coast Guard adopted the NPRM, neither oil nor other commodities would move in United States trade, thereby severely disrupting the United States and global economies. In later comments to the docket, the P&I Clubs confirmed that their shipowner boards of directors would not permit the P&I Clubs to soften their stand. Thus, the main focus of the debate has been whether the P&I Clubs would, in fact, not provide these guaranties, and on the assumption that they would not, whether there are other options (obtainable commercial insurance or bonds) available to avoid this alleged economic disruption. In fact, no commenters objected to the time-tested mechanics of the proposed rule, which mechanics have been in place and worked well for 23 years in the United States, and since 1975 in the rest of the world under the 1969 CLC.

In order to explore all possible options, the Coast Guard has examined all comments carefully, and looked at the suggested alternatives to the NPRM. The PRIA, made available on July 21,

1993, and open for public comment, refined the issues and elicited several amplifying comments.

All issues now have been aired, and the Coast Guard has decided to adopt the essence of the NPRM, subject to technical changes adopting many of the commenters' suggestions and, hopefully, alleviating the comments that P&I Clubs and other guarantors could somehow become subject to unlimited liability. These changes are identified in the discussion that follows. The Coast Guard has decided on this course of action because it believes that the central objections of the commenters to the rule are objections to OPA 90 itself (for example, potential unlimited liability of vessel owners and operators), and, if necessary, should be dealt with by the Congress and not the Coast Guard. The central issue germane to this rulemaking is whether owners and operators will be able to obtain financial responsibility guaranties if the P&I Clubs, as they have declared, do not provide guaranties of insurance. From the letters submitted to the regulatory docket, the Coast Guard concludes that even if the P&I Clubs do not provide these guaranties, alternative financial responsibility sources will be available. These include commercial insurance entities and surety bond companies, as well as the potential greater use of self-insurance and financial guaranties. These alternatives are described more fully in the final regulatory impact analysis (RIA) that accompanies this rule, a summary of which appears under the heading "Regulatory Impact Analysis" in this preamble. The Coast Guard has determined that the approach in the NPRM best fulfills the intent of Congress to assure prompt and certain compensation by the polluter to victims of oil spills and hazardous substance releases. Other suggested alternatives do not satisfy that intent. Among these alternatives are: treating P&I Club membership as an asset for self-insurance purposes; treating P&I Club membership, with a provision making the Oil Spill Liability Trust Fund a "loss-payee," as a form of self-insurance; and adoption through legislation of a "Mandatory Excess Insurance Facility." These alternatives are discussed in detail in the final RIA accompanying this rule. The alternatives have not been adopted. That was the main issue in this proceeding. The other issues primarily concern specific technical aspects of each section of the rules.

Part and Section Numbers

The NPRM proposed that preexisting part 130 be replaced by a completely new part 130, that parts 131 and 132 be removed, and that subpart D of part 137 be removed and reserved. In order to phase in the new rules with the least disruption and cost to the maritime industry, an orderly compliance schedule is being adopted. This schedule allows existing Certificates for non-tank vessels to be used until their regularly scheduled expiration dates, as described in the section of this preamble labeled, "Implementation Schedule." Because of this phased approach, preexisting parts 130, 131, and 132, and subpart D of part 137, must temporarily remain effective after the effective date of this rule. Accordingly, a new part 138 has been designated for the rule that will replace preexisting parts 130, 131, and 132, and subpart D of part 137. Conforming amendments have been made to 33 CFR parts 130, 131, and 132, and subpart D of part 137. The following table shows the location in the new part 138 of the corresponding sections of the NPRM:

NPRM Part 130	Part 138
130.1(b)	138.10.
130.1(a); 130.2(b) ("vessel").	138.12.
	138.15 [new].
130.2	138.20.
130.3	138.30.
130.4	138.40.
130.5	138.50.
130.6	138.60.
130.1(c)	138.65.
130.7	138.70.
130.8	138.80.
130.9	138.90.
130.10	138.100.
130.11	138.110.
130.12	138.120.
130.13	138.130.
130.14	138.140.
130.15	138.150.
Appendix A	Appendix A.
Appendix B	Appendix B.
Appendix C	Appendix C.
Appendix D	Appendix D.
Appendix E	Appendix E.
Appendix F	Appendix F.
Appendix G	138.80(f).

Implementation Schedule

Section 1016(h) of OPA 90 (33 U.S.C. 2716(h)) states that financial responsibility regulations under acts repealed or superseded by OPA 90 remain in effect until superseded by new regulations issued under OPA 90. Therefore, the financial responsibility requirements in 33 CFR part 130 (FWPCA), 33 CFR part 131 (TAPAA), 33 CFR part 132 (OCSLAA), and 33 CFR part 137, subpart D (DPA) will remain in effect with respect to individual vessels in the manner prescribed by section 138.15 of this rule. The intent of the implementation schedule (which could also be termed a compliance schedule) is to allow for an orderly transition to part 138 by allowing, as some commenters recommended, COFRs issued under the preexisting regulations to remain valid until their expiration dates. The Coast Guard is adopting that comment, but only with respect to non-tank vessels. (As explained below, tank vessels will be required to demonstrate financial responsibility under the new part 138 on a more expedited schedule.) This phased-in transition will also enable the Coast Guard to issue new Certificates in an orderly manner utilizing existing resources. Rather than attempting to issue approximately 23,000 new COFRs by a single, mandatory date, the Coast Guard expects the future Certificate renewal cycle, applicable to Certificates issued under this rule, to result in the renewal of about one-third that number each year. No new Coast Guard resources would be required for that routine renewal cycle.

The existing operators of non-tank vessels which presently are subject to the regulations issued under one or more of the preexisting CFR parts may continue to comply with those preexisting regulations for, in some cases, three and one half years after publication of this rule in the **Federal Register**, depending upon the expiration dates of their preexisting COFRs. These operators also have the option of choosing to comply with this rule soon after its initial implementation date, which is 180 days after the publication date, i.e., "effective date".

On the other hand, self-propelled tank vessels, followed by non-self-propelled tank vessels, will be required to comply with this rule sooner than non-tank vessels because of the generally greater danger of large and possibly catastrophic spills from tank vessels. Self-propelled tank vessels will be required to submit, not later than 180 days after publication of this rule in the **Federal Register**, at least the evidence of financial responsibility required by this rule (new application forms will be required later). Non-self-propelled tank vessels (i.e., tank barges) will be required to submit, not later than one year after publication of this rule in the **Federal Register**, application forms as well as evidence of financial responsibility required by this rule.

Although this phased transition to the new rule may appear complicated it is designed to impose the least burdensome requirements on the regulated community while balancing the need of potential claimants to be assured that the vessels posing the

greatest pollution threat, tank vessels, are in compliance within a reasonable time. It also accounts for the administrative needs of the Coast Guard. A reading of the actual regulation (§ 138.15) is encouraged to ensure a full understanding of the compliance deadlines.

There are three dates germane to this implementation schedule. The first is the "effective date". The other two can be termed the "initial implementation date" and the "final implementation date". The effective date, as already discussed, is the date of publication in the **Federal Register**. The initial implementation date is the date 180 days after the effective date. The final implementation date is the date three years plus 180 days after the effective date. The final implementation date is the date by which every vessel subject to OPA 90/CERCLA financial responsibility provisions is required to have an OPA 90/CERCLA COFR issued under this new part 138.

Effective Date: The effective date of this rule is the date of its publication in the **Federal Register** (see **DATES** at the beginning of this preamble), for the following reasons:

(1) The phased implementation schedule imposes both a benefit and a condition on current Certificate holders. The benefit is the ability to use, temporarily, an existing Certificate. The condition is that the Coast Guard will not accept the surrender (for the purpose of obtaining a new Certificate with an extended expiration date) of a Certificate during the 179 day period beginning on the effective date (publication date) of this rule. Otherwise, Certificate holders simply could surrender their existing Certificates and request the Coast Guard to issue new Certificates with new three-year expiration dates. Were the Coast Guard to allow this, the Coast Guard would be encouraging vessel owners and operators to unreasonably delay compliance with the law and this new rule. The likely result would be that thousands of COFRs would be surrendered with requests for reissuance with new three-year expiration dates, as would otherwise be permitted by the preexisting rules. This would be an intolerable situation—one not contemplated by Congress, and wholly inconsistent with the intent of the orderly implementation schedule now being adopted.

(2) A second reason for the immediate effective date is to enable vessel owners and operators that either are required, or wish, to carry new Certificates under the new rule on or soon after the initial implementation date, to file their applications as soon as possible. For example, operators who already purchase OPA 90/CERCA liability insurance and whose insurers' agree to issue the insurance guaranty appended to this rule, may wish to apply for OPA 90/CERCLA COFRs on or shortly after the effective date of this rule. The same applies to operators who can obtain OPA 90/CERCLA surety bond or financial guaranties, or who can self-insure.

(3) Although this rule is being made effective immediately, no vessel is required to possess a new OPA 90/CERCLA COFR (part 138 COFR) until at least the initial implementation date (180 days after the effective date). Therefore, there is no burden placed upon any vessel owner or operator by making the effective date immediate. For these reasons, the Coast Guard has determined under 5 U.S.C. 553(d)(3) that good cause exists for making the rule effective in less than 30 days after publication in the **Federal Register**.

Initial and Final Implementation Dates: New § 138.15 (and the conforming new §§ 130.0, 131.0, 132.0, and 137.300 in the preexisting regulations) sets forth the effects of these dates on all vessels, including vessels having existing COFRs issued under the preexisting regulations, i.e., issued before the initial implementation date of this new rule. The discussion in this preamble under § 138.15 explains these requirements.

Upon the final implementation date, 33 CFR parts 130, 131, and 132 and subpart D of part 137 (which concern vessel financial responsibility under the FWPCA, TAPAA, OCSLAA, and DPA for water pollution) will be removed. Title 33 CFR part 138 will then be the sole rule governing vessel financial responsibility for oil spill incidents and hazardous substance releases. "Incidents" and "releases" are statutory terms with legal significance under OPA 90 and CERCLA, respectively.

Mobile Offshore Drilling Units (MODUs)

Requirements for OPA 90 COFRs for offshore facilities per se do not fall under the jurisdiction of the U.S. Coast Guard and, therefore, are not included in this rule. However, COFRs issued to vessels which are MODUs under this rule will cover not only the general (i.e., non-tank vessel) liability of MODUs (section 1004(a)(2) of OPA 90) but their tank vessel liability as well (section 1004(b)(1) of OPA 90). Specifically, MODUs, when being used as offshore facilities, are deemed by OPA 90 to be tank vessels with respect to discharges of oil on or above the surface of the water. This rule, therefore, concerns only vessel financial responsibility, not offshore facility financial responsibility. Financial responsibility requirements for offshore facilities under OPA 90 are administered by the Department of Interior's Minerals Management Service.

Some commenters observed that the delineation of responsibility between a MODU operator and an offshore leaseholder should be clarified by these rules. The Coast Guard believes there are two distinct issues here: (1) Demonstration of financial responsibility, and (2) liability in the event of an oil discharge or substantial threat of a discharge. (Clarification of what constitutes a MODU is accomplished in § 138.12(b) and in the definition of "self-elevating lift vessel". See discussion associated with §§ 138.12 and 138.20.) As to financial responsibility, since a MODU, when operating as an offshore facility, has the potential for liability as a "tank vessel", a MODU must demonstrate financial responsibility that would apply to both non-tank vessel and tank vessel situations. All of the guaranty forms provide for such all-purpose coverage.

It could be argued that questions of allocating liability lie outside the scope of this rulemaking respecting financial responsibility. However, the Coast Guard is aware of the importance to responsible parties and guarantors of assessing liability exposure in making decisions relating to the provision of coverage, and hence financial responsibility, for that exposure. Consequently, while recognizing that the courts will determine matters of liability under the provisions of OPA 90, the Coast Guard believes the following legislative history is pertinent to the determination of Congressional intent as to the scope of liability respecting MODUs operating as offshore facilities.

The enactment of title I of OPA 90 represented the culmination of the work of many Congresses on comprehensive oil pollution liability and compensation at the federal level. The text of subsection (b) of section 1004 of OPA 90, 33 U.S.C. 2704(b), which concerns the delineation of MODU owner and operator and lessee or permittee liability, derived from related provisions in bills considered by prior Congresses.

The first bills concerning comprehensive oil spill liability and compensation in which this delineation was made were H.R. 2222 and 2368, introduced and considered by the 98th Congress. Chairman Studds of the House Coast Guard and Navigation Subcommittee of the House Merchant Marine and Fisheries Committee, at a

hearing of that Subcommittee relating to those bills and H.R. 2115 held on April 20, 1983, called attention to the addition of text relating to that delineation:

> Mr. Biaggi has introduced H.R. 2115, which is identical to the bill approved by our committee in the last Congress.
>
> I have introduced H.R. 2222, which incorporates the main themes of past legislation with three significant variations. First, it incorporates the proposed change in allocating liability between oil contractors and lessees which was included in H.R. 5906 last year; * * *. Oil Pollution Liability: Hearing on H.R. 2222 (H.R. 2115, H.R. 2368), before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries, 98th Cong., 1st Sess. 1 (1983).

The bill referred to by Mr. Studds, H.R. 5906 (97th Cong.), as being the one in which the related change originated, passed the House of Representatives on December 13, 1982. 128 Cong. Rec. 30336 (1982). That bill would have amended title III of the Outer Continental Shelf Lands Act Amendments of 1978, the extant federal statute concerning oil pollution liability and compensation relative to vessels and facilities engaged in Outer Continental Shelf Lands Act activities. Mr. Studds, speaking on behalf of H.R. 5906, informed the House that one of the goals of that bill was:

> To reapportion the liability among the parties operating on the OCS to reflect more closely the industry practice that prevailed prior to enactment of the OCSLAA.
>
> * * * * *
>
> Finally, the reapportionment of liability mandated by H.R. 5906 will allocate the risks associated with OCS development more equitably among the participants in that development. While title III presently imposes liability solely upon the owners and operators of offshore facilities and vessels, H.R. 5906, as amended, will apportion it among the holders of leases, permits, and easements issued under the OCSLAA, as well as the owners and operators of vessels, mobile offshore drilling units and pipelines. Id. at 30334.

In the ensuing remarks during the House's consideration of H.R. 5906, those of Mr. Breaux were of special pertinence to the particular scope of the intended liability of the MODU owner or operator:

> The current statute has resulted in Coast Guard interpretations holding the drilling contractors solely responsible for all oil spills and the major oil company lessees free from liability.
>
> * * * * *
>
> Essentially, the amendment enacts into statute the preferred industry practice for the apportionment of liability. The general rule, therefore, is the imposition of liability on oil company lessee for any oil spill emanating from their lease and the oil reservoir contained therein. * * * *The Committee intends that the point of origin of an uncontrolled flow of oil determines where an oil pollution incident originates, and not where the oil and water first come into contact with one another.* For example, the Pemex Bay of Campeche oil spill originated below the surface of the water.
>
> Within this general rule, the amendment would impose liability on the drilling contractor operating on a lease for those oil spills originating on or above the surface of the water. *Our intent in dividing liability in this manner is to hold the contractor responsible only for the required petroleum and other oil that is present on the rig in order for it to conduct its operations and which are clearly under the control of the rig owner.* (Emphasis added) Id. at 30335.

A careful examination of the legislative history of the succeeding bills relating to comprehensive oil spill liability and compensation has failed to disclose any expressed alteration in Congressional intent respecting the allocation of liability for MODUs engaged in drilling operations.

This apparent Congressional intent comports with the position advocated by some commenters. Moreover, if the words "on or above the surface" were applied literally, a result certainly unintended by Congress could easily occur. That result would be to invite liability considerations to take precedence over safety and environmental protection decisions. Clearly, in this comprehensive environmental legislation, it would be unreasonable to interpret the statute in a way that could easily degrade safety and the environment. By recognizing that when the source of a discharge is below the seabed, the spill is not an above the surface spill, emergency response actions will be predicated on the best and safest means to abate the blowout, rather than on the means (e.g., shutting in the blowout preventer and risking a pressure buildup that could result in a catastrophic sub-seabed well blowout) which would shift liability without regard to safety or the environment. If the parties involved (the leaseholder and the MODU owner or operator) so choose, they can enter into indemnification agreements to allocate among themselves an apportionment of liability. The indemnification agreements cannot be used, however, to avoid completely liability to a claimant under OPA 90.

Paperless COFRs

One commenter recommended that the Fleet Certificate concept (which concerns non-tank barges) be expanded to cover tank barges as well, and that no COFR or copy be required aboard any barge on inland waters. In view of its evolving computer technology for COFR enforcement purposes, the Coast Guard may be able to adopt that recommendation in the future. However, the Coast Guard's computer network has not yet evolved to a level where this suggestion can be implemented. When it becomes possible for the Coast Guard to adopt such a system, a notice proposing this change will be published in the **Federal Register**.

Applicable Amounts of Financial Responsibility

Appendices B through F are guaranty form for evidencing financial responsibility. Each contains an "Applicable Amount Table". Appendix G of the NPRM, which also contained the Applicable Amount Table, has been moved to a new paragraph (f) of § 138.80. Section 138.80(f) and the Applicable Amount Table in each form set out the means by which applicants and guarantors calculate the amounts of financial responsibility required to be established and maintained under this rule.

The amount of financial responsibility which must be established and maintained with respect to each vessel to be covered under section 1016(a) of OPA 90 (33 U.S.C. 2716(a)) (i.e., the amount applicable to the vessel under OPA 90) is calculated by applying the appropriate formula specified in § 138.80(f)(1) (Part I of the Applicable Amount Table in the forms) in accordance with the type of vessel and its size in gross tons. The formulae set out in § 138.80(f)(1) and Part I are based upon the provisions of paragraphs (a)(1) and (a)(2) of section 1004 of OPA 90 (33 U.S.C. 2704), as mandated by section 1016(a) of OPA 90.

With respect to CERCLA, the NPRM proposed that all vessels demonstrate financial responsibility at the minimum amount of $5 million, by applying the formula specified under Part II of the Table, as proposed. The formula was derived from the provisions of section 108(a)(1) of CERCLA. In deriving the formula for Part II as proposed, the Coast Guard took cognizance of practical considerations of which Congress must be deemed to have been aware when drafting CERCLA. The term "hazardous substances" as defined for the purposes of CERCLA (42 U.S.C. 9601(14)) includes an almost limitless number of materials. In addition, there are numerous methods by which any one of those materials, especially in small amounts, may be carried as cargo aboard vessels. At the time a CORF application for a particular vessel is

processed, and even after a COFR is issued, there is no known way for the Coast Guard to determine that a hazardous substance is not being carried, or will not be carried (especially in small amounts), aboard that vessel as cargo.

Consequently, in order to assure that the statutorily required amount of financial responsibility had been calculated and established and would be maintained for every subject vessel, it was considered necessary to assume that all vessels subject to the provisions of section 108(a)(1) of CERCLA carry, or might carry, hazardous substances as cargo. For this reason, the formula in part II of the Table as proposed prescribed a minimum of $5,000,000 for all vessels. Comments were encouraged regarding possible means by which a determination could be made at the time of certification that, in fact, a particular vessel is not carrying and will not carry hazardous substances as cargo.

Some commenters, however, object to having to demonstrate financial responsibility at this minimum $5 million level. They assert that this is inconsistent with CERCLA in that CERCLA recognizes that for vessels not carrying hazardous substances as cargo, the liability limit is a minimum of "(500,000 (section 108(a)(1) of CERCLA requires financial responsibility to cover the liability prescribed under section 107(a)(1), and that section in paragraph (B) establishes a minimum liability limit of $500,000 for vessels not carrying hazardous substances as cargo). One commenter states that if the Coast Guard can rely upon a declaration of a vessel owner that the vessel is a non-tank vessel, a similar declaration should be allowed for carriage of hazardous substances as cargo. Another commenter alleges that vessels carrying hazardous substances as cargo can only do so in accordance with Coast Guard safety regulations, and that it is inappropriate to assume that vessels will operate in violation of those regulations.

In adjusting this rule, the Coast Guard has adopted revisions that balance two of CERCLA's apparently contrary mandates: (1) That the Coast Guard certify that the required minimum amount of financial responsibility ($5 million) is maintained by a responsible party in the event of a release or threatened release of a hazardous substance carried as cargo; and (2) the provision in CERCLA that vessels that do not carry hazardous substances as cargo need demonstrate financial responsibility only at the greater of $500,000 or $300 per gross ton. The Coast Guard concludes that the fairest way to accommodate these two opposing interests is by allowing the vessel operator and the provider of financial responsibility to decide the matter between themselves. For example, if an insurer or surety company is satisfied that its insured or principal in fact does not and will not carry hazardous substances as cargo, then the cost of the insurance or surety bond guaranty with respect to CERCLA may be priced at the $500,000/$300 per gross ton premium. The proposed and now adopted wording of the insurance and the financial guaranty forms, as well as the new wording of the surety bond guaranty, is such that, should a release occur and the facts show that a vessel was carrying a hazardous substance as cargo, the limit of the guaranty will automatically be raised to the higher amount, i.e., the greater of $300 per gross ton or $5 million. (The guaranty forms have also been amended to achieve a parallel result with respect to OPA 90 financial responsibility if the vessel is in fact a tank vessel.) This will not affect the qualifications of self-insurers or financial guarantors who, as proposed, still must demonstrate working capital and net worth according to the $300 per gross ton/$5 million formula. Only by methods such as these may the Coast Guard certify that financial responsibility requirements have been met, whether or not hazardous substances are carried as cargo. The Coast Guard has determined that this protection is necessary given the peculiar nature of hazardous substance carriage, and the inability to be assured ahead of time that no hazardous substances are being or will be carried as cargo. Section 138.80(f)(2) (Part II of the Applicable Amount Table in the forms) has been adjusted to reflect this decision.

The Coast Guard also notes that, with respect to carriage of hazardous substances, this decision only affects vessels under 16,666 gross tons. Above 16,666 gross tons, at $300 per gross ton a vessel would have to meet the $5 million minimum threshold. However, those operators of smaller vessels who can assure their financial responsibility providers that hazardous substances are not and will not be carried as cargo, may obtain a cost savings by being able to purchase guaranties of financial responsibility at the $500,000/$300 per gross ton premium level.

Section 138.80(f)(3) (Part III of the Table in the forms) is simply the addition of the amounts of financial responsibility required by paragraphs (f)(1) and (f)(2) of § 138.80 (Parts I and II of the Table in the forms). This sum is termed the "total applicable amount". The formula is derived from the provisions of section 1004 of OPA 90 and section 107(a) of CERCLA (as noted above) and reflects the fact that liability stemming from one event may arise under both Acts. In such a circumstance, and only in such a circumstance, it is necessary that two separate and distinct amounts of financial responsibility be available to meet equally separate and distinct amounts of liability under the Acts. The "total applicable amount" is not an aggregate amount applicable to a guarantor's liability under just one of the Acts.

One company commented that some of its barges are unable to carry both oil and hazardous substances at the same time, and therefore, that it should not have to establish an amount of financial responsibility reflecting both OPA and CERCLA with respect to such single-commodity barges. The Coast Guard concluded, however, that it is not in a position to issue a special tank barge COFR just for OPA 90 and a separate tank barge COFR just for CERCLA. In the first place, the Coast Guard could never be certain that a particular tank barge, which had been issued only a CERCLA COFR, was not carrying oil, or vice versa. In order to become certain that a barge's COFR matched its permissible cargo, it would be necessary to physically detain the barge, test its cargo and determine whether it was either an OPA 90-regulated oil or a CERCLA-regulated hazardous substance derivative of oil, and then match such cargo against the type of COFR being carried that particular day. The tremendous cost, delay and burden such an enforcement system would entail, both for the barge industry and the Coast Guard, would not justify separate certification and enforcement procedures.

Section-by-Section Discussion

A number of drafting changes have been made to improve readability and to specify the persons upon whom obligations are placed. These changes are considered non-substantive and are not further explained. Also, new sections have been added to add further clarity to the rule. These are: § 138.12 (applicability); § 138.15 (implementation schedule); and § 138.65 (issuance and carriage of Certificates). Only § 138.15 contains entirely new text, reflecting the compliance schedule adopted by this rule.

Section 138.10 Scope

This section addresses the general purpose of these regulations, namely that they establish the procedures for

establishing and maintaining evidence of financial responsibility under OPA 90 and CERCLA. This section is derived from proposed § 130.1(b). (Proposed § 130.1(a) is new § 138.12(a), and proposed § 130.1(b) is new § 138.65.) Section 138.10 clarifies the proposed text by adding the term "demise charterer" to the class of persons who must be covered by the evidence of financial responsibility required under this part. This clarification is being made because both OPA 90 and CERCLA define an "owner or operator" of a vessel as including any demise charterer of the vessel. Thus, if any vessel subject to this part simultaneously has an owner, a demise charterer and an "operator" (as defined in this part), all three of those entities automatically will be covered by the guaranty of insurance or other evidence of financial responsibility submitted under this part. Demise charterer, as used in this part, is synonymous with the common parlance term "bareboat charterer".

Section 130.1(d) of the NPRM, which concerned "public vessels", has been deleted. New § 138.12(d) provides that 33 CFR part 138 does not apply to any public vessel. Thus, it will not be necessary for public vessels to apply for COFRs. However, all public vessels which are not readily identifiable as such (i.e., vessels which are not naval war ships, Coast Guard cutters, etc.) and which are crewed by nongovernmental personnel, are strongly encouraged to carry appropriate government documentation indicating that the vessels are, in fact, public vessels, i.e., vessels owned or bareboat chartered by a government and not engaged in commerce. Such documentation, including a copy of any bareboat charter party, will serve to avoid misunderstandings with enforcement personnel who are not readily able to determine whether a particular vessel, especially a vessel owned and operated by private interests, and engaged in business which could be construed as commercial in nature (e.g., dredging), is or is not a public vessel.

Section 138.12 Applicability

New § 138.12 has been created to state clearly the applicability of part 138. This section is comprised of parts of proposed § 130.1(a), and of the definition of "vessel" from proposed § 130.2(b).

Paragraph (a)(1): In response to comments, this paragraph, which is derived from proposed § 130.1(a)(1), has been amended to make it clear that "vessels of any size using the waters of the exclusive economic zone to transship or lighter oil" means both delivering and receiving vessels. The term "vessel of any size" does not include the towing/pushing vessel (tug) that has custody of a barge transshipping or lightering oil within the exclusive economic zone. That is, a tug of 300 gross tons or less would not be made a tank barge (i.e., would not be made subject to the financial responsibility requirements of this rule) just because it had custody of a transshipping or lightering vessel.

Paragraph (a)(2): This paragraph is derived from proposed § 130.1(a)(2). The FWPCA excluded from the requirement to establish and maintain evidence of financial responsibility, a non-self-propelled "barge" that does not carry oil as cargo or fuel. Section 1016(a)(1) of OPA 90 excludes from that requirement a non-self-propelled "vessel" that does not carry oil as cargo or fuel. In this rule, the Coast Guard considers OPA 90's use of the term "non-self-propelled vessels" to mean non-self-propelled barges. This construction is consistent with a similar exception in CERCLA. Therefore, in § 138.12(a)(2)(ii) of this rule, the exception refers to "barges" rather than "vessels".

Paragraph (b): This paragraph concerns MODU liability and is derived from the proposed definition of the term, "vessel". Some commenters asserted that a mobile offshore drilling unit (MODU) should not be treated as a tank vessel when drilling. The Coast Guard cannot adopt this suggestion as the liability ascribed to a MODU when drilling has been fixed by Congress. Therefore, paragraph (b) of § 138.12 has been amended to make it clear that under OPA 90, when there is an "on or above the surface of the water" discharge or substantial threat of a discharge of oil from a MODU, the MODU is treated as tank vessel (for purposes of determining the limits of liability and the identity of the responsible party) (33 U.S.C. 2704(b)). Since a MODU has potential liability as a tank vessel, the MODU operator must demonstrate financial responsibility at tank vessel limits to cover the time that the MODU is operating as an offshore facility and has a spill "on or above the surface of the water."

Paragraph (c): This paragraph has been added to make it clear that CERCLA's financial responsibility provisions and this rule apply to self-propelled vessels which exceed 300 gross tons, even if they do not carry hazardous substances. Congress mandated that owners, demise charterers, and operators of all self-propelled vessels over 300 gross tons comply with CERCLA's financial responsibility provisions, without regard to whether or not the vessels actually carry hazardous substances. In this connection, the following points may be indicative of Congressional thinking: Most, if not all, self-propelled vessels over 300 gross tons carry hazardous substances in one form or another (e.g., ships' stores); and insurance coverage for liabilities concerning releases of hazardous substances from brown water vessels has never been unavailable or subject to high premiums in the United States (viz: coverage provided by the Water Quality Insurance Syndicate, New York, NY). Further, with respect to blue water (oceangoing) vessels, the International Group of P&I Clubs traditionally has provided unlimited liability coverage for releases of hazardous substances, and still does; and P&I Club premiums for this coverage (while not broken out from the total calls and premiums for P&I cover) are understood to be relatively low. Accordingly, prudent vessel operators would choose to take advantage of the available, relatively inexpensive insurance and carry such coverage as a matter of course. Whatever the reason for the Congressional mandate may have been, the Coast Guard has no rulemaking flexibility where the law is clear on its face.

Paragraph (d): This paragraph recites that 33 CFR part 138 does not apply to public vessels.

Section 138.15 Implementation Schedule

This new section sets forth the implementation schedule for vessels requiring COFRs under OPA 90 and CERCLA by specifying mandatory compliance dates for categories of vessels. As discussed earlier under "Implementation Schedule," this section establishes a phased compliance schedule, based on two categories of vessels—tank vessels (which are broken into two groups, self-propelled and non-self-propelled), and non-tank vessels. As to the latter category, this section, for the most part, allows vessels to operate with their prexisting COFRs until they expire. This section also prevents vessel owners and operators from surrendering prexisting COFRs solely for the purpose of obtaining, under the preexisting rules, new COFRs with extended expiration dates.

Paragraph (a): This paragraph governs the compliance schedule for tank vessels. Paragraph (a)(1) provides that a self-propelled tank vessel may continue to carry its preexisting COFR (or obtain one and carry it) until December 28, 1995, so long as acceptable evidence of

financial responsibility has been submitted under the new part 138 by December 28, 1994. A non-self-propelled tank vessel may continue to carry its preexisting COFR (or obtain one and carry it) until July 1, 1995.

Paragraph (a)(2) concerns self-propelled tank vessels and requires that they submit evidence of financial responsibility under the new part 138 by December 28, 1994. An application form for a new COFR may be submitted at a later date. For administrative convenience, preexisting Certificates issued under 33 CFR parts 130, 131, or 132 may continue to be carried on these self-propelled tank vessels so long as the new part 138 evidence of financial responsibility has been submitted. If this new evidence of financial responsibility is not submitted by December 28, 1994, the preexisting Certificates for that vessel will be revoked on that date. By December 28, 1995, a self-propelled tank vessel must have applied for, and be carrying, a new part 138 Certificate, regardless of the expiration date on any preexisting Certificates.

Paragraph (a)(3) concerns the requirements for a self-propelled tank vessel that does not possess a preexisting COFR issued under 33 CFR part 130 before December 28, 1994. This vessel may not operate on or after that date unless it carries a new part 138 COFR. Accordingly, this vessel must apply for a new part 138 COFR following the procedures specified in §§ 138.50 and 138.60.

Paragraph (a)(4) requires a non-self-propelled tank vessel to submit evidence of financial responsibility and a new application form under this new rule at least 21 days before July 1, 1995. (The 21 days refers to a time constraint imposed by § 138.50.) By July 1, 1995, a non-self-propelled tank vessel must carry a new OPA 90/CERCLA (part 138) COFR. On that date, preexisting COFRs for non-self-propelled tank vessels will be revoked.

Paragraph (b): This paragraph governs the compliance schedule for non-tank vessels. Paragraph (b)(1) provides that a non-tank vessel must carry a part 138 Certificate no later than December 28, 1997, provided that before that date, the vessel carries a non-expired, part 130 Certificate. A part 132 Certificate, if applicable to that vessel, must also be carried. A non-tank vessel subject to part 138 may apply for a part 138 Certificate any time on or after July 1, 1994.

Paragraph (b)(2) provides that on and after December 28, 1994, and before December 28, 1997, a Certificate issued to replace an existing 33 CFR part 130 or 132 Certificate for non-tank vessels will bear the same expiration date as the Certificate being replaced. The circumstances where this might occur are when a Certificate has been lost, or there is a vessel name change or operator name change. A change in legal identity is not a mere name change. This paragraph also provides that during this interval, the expiration date on a renewal Certificate issued under 33 CFR part 132 will be the same as the expiration date on the 33 CFR part 130 Certificate for that vessel.

Paragraph (b)(3) provides that a non-tank vessel holding a 33 CFR part 130 Certificate issued before December 28, 1994, may continue to operate with that Certificate until it expires.

Paragraphs (b)(4) and (b)(5) provide that new Certificates issued under 33 CFR parts 130 and 132 on or after July 1, 1994, and before December 28, 1994, will bear an expiration date three years after the date of issuance, except that a Certificate surrendered during that interval with a request for the issuance of a new Certificate for that same vessel will bear an expiration date the same as the expiration date appearing on the surrendered Certificate.

Paragraph (c): This paragraph provides that after the effective date of this rule, a vessel that is 300 gross tons or less and, therefore, does not carry a Certificate under 33 CFR part 130, need no longer carry a Certificate issued under 33 CFR part 131 (relating to TAPAA) or part 132 (relating to OCSLAA), so long as that vessel is not required by OPA 90 to obtain a Certificate because the vessel is engaged in lightering in the Exclusive Economic Zone. A vessel of this size engaged in lightering is required to maintain its part 131 or 132 Certificate until the vessel obtains a certificate under paragraph (a) or (b) of this section, as may be applicable.

Section 138.20 Definitions

Cargo: At the suggestion of one commenter, the definition of cargo has been amended to make it clear that neither hazardous substances nor oil, when carried solely for use aboard vessels (oil to power or lube onboard machinery; paints; cleaners; degreasers; etc.), are included in the definition of cargo.

Demise Charterer: A definition has been added to make it clear that this term is synonymous with the common term "bareboat charterer".

Fish tender vessel and *fishing vessel:* A definition was added for these terms in order to indicate that the terms have the same meaning as set forth in 46 U.S.C. 2101. This will aid in determining the meaning of the term "tank vessel". Section 5209 of Pub. L. 102–587 provided that each of these types of vessel is not a tank vessel. This law was enacted after the NPRM was published.

Guarantor: For the sake of convenience to persons who must comply with this rule, a definition of "guarantor", based on the definition in OPA 90 and CERCLA, was added to the rule.

Hazardous material: Some commenters observed that this term is different from "hazardous substances" as used in CERCLA, and were concerned that tank vessel liability not be ascribed to vessels carrying non-liquid hazardous substances. A definition of this term has been added to make clear that a vessel carrying *liquid* hazardous materials is a tank vessel. In the Conference Report, at page 102, Congress stated, "The term 'tank vessel' has the same meaning as that term has under section 2101 of title 46, United States Code." This 46 U.S.C. 2101 definition of tank vessel uses the term "hazardous material," which is defined in 46 U.S.C. 2101(14), and that definition of hazardous material controls.

Insurer: This definition has been amended to clarify the meaning of "insurer" or "insurers" as used in this rule (see, for example, § 138.80(b)(1) concerning insurance guaranties). The words "is a type of guarantor" have been added to make it clear that, insofar as insurers are concerned, this rule applies only to that class of insurers who choose to be guarantors.

Offshore supply vessel: A definition of this term was added to indicate that it has the same meaning as set forth in 46 U.S.C. 2101, and will assist in the determination of the term "tank vessel". Section 5209 Public Law 102–587, enacted after the NPRM was published, provided that an offshore supply vessel is not a tank vessel.

Operator: Some commenters felt this definition was confusing and some recommended that the term "responsible party" be used instead. Accordingly, the definition of operator was amended first, to narrow its scope by deleting the words "including but not limited to" and, second, to clarify its meaning by adding the words "or who agree by contract to become responsible" [for a vessel in the capacity of an operator]. The first change was made to make the definition less open ended. There are entities, such as agents, "manager", traditional time charterers and traditional voyage charterers (i.e., charterers who do not take operational responsibility for the

vessels they charter) that are not intended to be included in this definition. The second change was made for the benefit of persons, such as ship repair yards, who objected to the word "repairer" in the definition of operator. For example, one commenter stated that the owner or operator who brings a vessel to the shipyard remains absolutely the owner or operator, and there is no transfer of rights or responsibilities to the repair facility. In a case such as this, the term "operator" would not apply to repair facilities. However, in a case where a ship repair yard either is responsible under law, or for commercial reasons agrees with owners to become responsible for pollution liability in connection with a vessel under the repairer's custody, that repair facility is and has been subject to vessel financial responsibility requirements since 1971. See discussion at 43 FR 35705, August 11, 1978. In short, this rule does not transform non-liable repairers of vessels into legally liable "operators" of those vessels. Shipyards and other persons who would not otherwise be responsible for vessels are free, of course, to contract with vessel owners, as they may see fit, with respect to becoming responsible for (i.e., becoming the operators of) vessels in their custody. As always, if repairers or other person are not responsible for the non-owned vessels in their custody, this rule will not apply to them. In a case such as that, any valid COFR, issued to a vessel's owner, operator, or bareboat charterer, will remain valid and must be retained aboard the vessel while in the repairer's custody. The third change to the definition of "operator" was the addition of the word "custodian". This change was made merely to confirm that a person who is responsible for a vessel need not physically operate the vessel—move it from place to place—to be its "operator" for purposes of this rule.

Public Vessel: In accordance with a ruling by the General Counsel of the Department of Transportation interpreting the statutory definition of "public vessel", this definition has been modified by deleting the words "and operated". Accordingly, any vessel owned or bareboat chartered by the United States, or by a State or political subdivision of a State, or by a foreign nation, is a public vessel except when engaged in a commercial service. (An example of a commercial service is holding oneself out for hire to carry passengers or cargo, and the lack of profit is not necessarily determinative of a commercial service.)

Accordingly, it is no longer necessary that a vessel be physically operated by a governmental entity or under its direct day-to-day control in order to qualify as a public vessel, i.e., vessels owned or bareboat chartered by governmental agencies may be crewed by commercial entities and remain "public vessels", for the purpose of this reguiation, provided the vessels engage only in governmental (noncommercial) service.

Self-elevating lift vessel: This definition was added because OPA 90 defines a "mobile offshore drilling unit" (MODU) as a vessel, other than a "self-elevating lift vessel", capable of use as an offshore facility. It has been argued that because a self-elevating lift vessel can, literally, be a type of MODU known as a jack-up drilling rig, Congress intended the term "self-elevating lift vessel" to include a jack-up drilling rig, i.e., that MODUs do not include jack-up drilling rigs. One argument to the contrary is that Congress could not have meant to exclude jack-up drilling rigs from the definition of MODUs because jack-up drilling rigs constitute the most common type of MODU; had Congress intended to exclude from the classification of MODUs the most common type of MODU (jack-up drilling rigs), it surely would have at least hinted at that result, in the law's legislative history. Another argument to the contrary is that had Congress intended to exclude jack-up drilling rigs, it would have used the term "self-elevating drilling vessel", not "self-elevating lift vessel." The Coast Guard interprets OPA 90's use of the term "self-elevating lift vessel" to mean a self-elevating, offshore work boat (or work barge) that does not engage in actual drilling operations.

Tank Vessel: This definition has been changed by deleting the proposed regulatory definition and substituting the definition in section 1001(34) of OPA 90 (33 U.S.C. 2701(34)), with three clarifications. This accords with Congressional intent expressed in the Conference Report at page 102. First, the word "liquid" has been inserted before the words "hazardous material", in accordance with the definition of hazardous material in 46 U.S.C. 2101(14) (see explanation under "hazardous material"). Second, specific exclusions to the definition of "tank vessel" have been added in accordance with section 5209 of Public Law 102–587, which was enacted after the NPRM was published. Third, in accordance with one comment, the definition has been amended to make it clear that a vessel towing or pushing, or having in its custody, a tank barge, cannot for those reasons alone, be deemed included in the definition of tank vessel. Some carriers of liquefied natural gas (LNG) argued that they should be able to demonstrate lower levels of financial responsibility than is required for oil-carrying tank vessels. Tank vessel limits are set by Congress and the Coast Guard is not empowered to lower those limits. A vessel carrying LNG clearly meets the definition of "tank vessel".

Section 138.30 General

Paragraph (a): A number of commenters were concerned that the NPRM was ambiguous, possibly multiplying the liability limit with respect to a vessel by three—that is, the owner, operator, and demise charterer would each have liability up to the specified limit, and their liabilities would be added together. That was not the intent of the NPRM. Nevertheless, potential guarantors were likewise concerned that they might be liable for three times the amount of the guaranty. The Coast Guard believes that OPA 90 and CERCLA impose only one limit of liability, per incident or release or threatened release, under each Act for a guarantor with respect to a vessel. Therefore, this subsection has been amended to clarify the fact that even though the owner, demise charterer, and operator of a vessel are jointly and severally liable, and must all be covered by the evidence of financial responsibility submitted for a COFR, the amount of that financial responsibility provided by a guarantor is for the single limit. For example, if the operator of a 40,000 gross ton tanker spills oil and the $1,200 per gross ton limit of liability is not broken, the owner, demise charterer, operator, and guarantor would be jointly and severally liable for that incident, and the guarantor's liability (without regard to whether the limit is broken) under OPA 90 should the owner, demise charterer, and operator pay nothing, cannot exceed the amount of financial responsibility provided by the guarantor, in this case $48 million ($1,200 × 40,000).

This section also has been amended to confirm that the total amount of financial responsibility provided by a guarantor is not applicable to an incident or release or threatened release of just oil or just hazardous substances—only the amount guarantied for an oil incident is available for that incident, and only the amount guarantied for a hazardous substance release or threatened release is available for that event.

Paragraph (b): As recommended by some commenters, this paragraph has been amended to state that this rule does not apply to time charterers or voyage charterers, i.e., charterers who do not assume, and do not have imposed upon them by contract or

otherwise, the responsibility associated with operation of a vessel.

Paragraphs (c)–(f): Potential insurance guarantors commented that guarantors should be able to rely upon official tonnage certificates, particularly with respect to tank vessels under OPA 90. A tank vessel greater than 3,000 gross tons carries a minimum liability of ten million dollars while a tank vessel of 3,000 gross tons or less carries a minimum liability of two million dollars. Guarantors justifiably relying on tonnage set out in tonnage certificates understandably wish to avoid situations where, after incidents involving tank vessels, they could find themselves exposed in a direct action to a ten million dollar liability rather than the anticipated lower limit applicable to tank vessels of 3,000 gross tons or less.

Thus, in a case where a tank vessel's official, applicable tonnage document declares the vessel's official tonnage to be (for example) 2,990 gross tons, the Coast Guard agrees that the vessel's guarantor should be able to rely on a maximum liability under OPA 90 of $3,588,000 (2,990 tons × $1,200 per ton) even if it develops that 2,990 gross tons was a typographical error on the official, applicable tonnage certificate or the vessel was incorrectly measured, and that the vessel's true tonnage is over 3,000 gross tons. The rule has been amended in order to provide that protection to guarantors, except where a guarantor knew or should have known that the applicable tonnage certificate was incorrect. (This additional defense is reflected in the various guaranty forms appended to this rule.) Paragraphs (c), (d), and (e) have been revised slightly to clarify the appropriate tonnage to use for various vessel types and flags, and a clause has been added to each section to clarify the appropriate tonnage used for determining the limits of liability under OPA 90 CERCLA.

Section 138.50 Time to Apply

Paragraph (a): Paragraph (a) was amended at the request of one commenter, to provide that the Coast Guard may waive the requirement to file an application for a Certificate of Financial Responsibility at least 21 days before the Certificate is required. This same amendment was made in § 138.70(a), concerning applications to renew Certificates. An example of a circumstance when the 21-day requirement might be waived is when a tank vessel, not having a current COFR and not planning on entering the United States, does not have an opportunity to file an application 21 days in advance because it is redirected on short notice to call at a United States port. The Coast Guard makes every attempt to accommodate unusual circumstances.

Section 138.60 Application, General Instructions

Paragraph (c): This paragraph was amended at the request of one commenter, by deleting the words "other empowered" and substituting therefore the more correct words "the chief executive officer, or any other duly authorized", to describe who may sign an application on behalf of a corporate applicant.

Paragraph (d): This paragraph was amended at the request of one commenter, to change "days" to "business days" in order to provide more time for an applicant to inform the Coast Guard of a change in the information provided in an application. For the same reason, "days" was changed to "business days" in § 138.80(b)(3)(iii)(B).

Section 138.65 Issuance and Carriages of Certificates

This new section is derived from the text of proposed § 130.1(c). It is placed more properly in a section other than "scope."

The text has been amended to make it clear that vessels are not subject to sanctions for failure to carry a valid Certificate of Financial Responsibility in cases where a COFR is removed from a vessel temporarily, at the request of U.S. law enforcement personnel.

Section 138.70 Renewal of Certificates

A new paragraph (c) was added to clarify that the first time a Certificate is required under part 138, to replace a Certificate issued under 33 CFR part 130, a new full application form, rather than a letter, is required. However, the Coast Guard is not requiring a "first time" application fee under these circumstances, recognizing that under preexisting practice, a "first time" fee is not required for a renewal application. Once a new application form has been filed for a part 138 Certificate, any additional Certificates may be applied for by letter.

Section 138.80 Financial Responsibility, How Established

A number of changes, explained under each paragraph, were made to address several comments. These changes concern use of multiple guarantors, defenses available to guarantors, and the addition of a catchall method, "other evidence of financial responsibility".

Paragraph (b)(1) (Insurance): In the proposed phrase "executed by an insurer that has been approved by * * * the Director, NPFC, for purposes of this part", the word "approved" was deleted and the words "found acceptable" were substituted. The word "acceptable" is preferred because it is used in the definition of "Insurer" in § 138.20(b). Section 138.80(b)(1) also has been amended to clarify the fact that more than one insurer may execute an insurance guaranty, and that the subscribing insurers shall be jointly and severally liable unless percentages of participation are provided on the guaranty by each subscribing insurer. For purposes of this part, and as discussed below, a percentage means a vertical percentage (rather than a horizontal layering).

One commenter recommended that the Coast Guard incorporate standards for approval of insurers, sureties, and financial guarantors. Standards for sureties are set by the Department of the Treasury, as OPA 90 requires bonding companies to be authorized to do business in the United States, a reference to Treasury-approved sureties. Financial guarantors must meet the detailed standards for self-insurers. Insurers must be acceptable to the Coast Guard, and for many years, acceptability had been determined by the Federal Maritime Commission (FMC) on a case-by-case basis. The Coast Guard has followed the criteria established by these decisions. Any insurer desiring to be recognized, as an acceptable insurer may telephone, write to, or meet with the Coast Guard to review the factors considered. The Coast Guard is evaluating the possibility of a future rulemaking adopting acceptability standards, but has decided not to develop these standards through this financial responsibility rule.

Paragraph (b)(2) (Surety bond): This paragraph was amended to clarify the fact that more than one surety may execute a surety bond guaranty form. As in the cage of insurers, sureties must state vertical percentages of participation if they wish to avoid joint and several liability.

Paragraph (b)(3) (Self-insurance): A number of commenters recommended that the Coast Guard adjust the net worth and working capital formulae by allowing worldwide assets rather than only U.S.-based assets to be counted in the asset side of the equation. The Coast Guard has not adopted this suggestion. The reasons are explained fully in the Regulatory Impact Analysis associated with this rulemaking. Paragraph (b)(3)(vi) permits the Coast Guard to waive the working capital requirement under certain circumstances. Under paragraph (b)(3)(vi)(A) the Coast Guard may waive the working capital

requirement for prospective self-insurers who are regulated public utilities, municipal or other governmental entities, or charitable, non-profit making organizations under section 501(c) of the Internal Revenue Code. One commenter stated that it is a tax-exempt, not-for-profit U.S. oil spill response corporation, that operates vessels for that purpose. It commented that it does not believe it will be able to obtain a surety bond, insurance or financial guaranty, or be able to qualify as a self-insurer under the proposed rule. It, therefore, believes that the proposed rule will hamper "reliable" response organizations and thus, undermine an essential purpose of OPA 90—a quick, effective response to oil spills. It proposes, among other things, that the section in question be amended so that the availability of the working capital waiver would not be limited to charitable organizations; i.e., that the waiver be made available to any non-profit response organization qualifying as a social welfare organization under section 501(c)(4) of the Internal Revenue Code.

This comment requesting an extension of the applicability of the working capital requirement under proposed § 130.8(b)(3)(vi)(A) apparently does not take into consideration the next paragraph (i.e., § 138.80(b)(3)(vi)(B)) of the rule which allows an alternative basis for certain organizations to apply for waivers. Accordingly, paragraph (b)(3)(vi)(A) of § 138.80 has not been amended. The Coast Guard does not believe that this rule will inhibit the commenter's ability to obtain COFRs, or otherwise undermine any essential purpose of the law. The essential purpose of OPA 90 to be implemented by this rule is to deny the use of United States waters to entities which do not have the financial capacity to meet OPA 90 and CERCLA liability, by demonstrating self-insurance capacity, or by purchasing an insurance or surety bond guaranty or by obtaining a financial guaranty.

Paragraph (b)(4) (Financial Guaranty): This paragraph was amended, consistent with the insurance and surety bond guaranty methods, to allow more than one financial guarantor to execute a financial guaranty form. Financial guarantors also must state vertical (i.e., non-layering type) percentages of participation to avoid joint and several liability.

Paragraph (b)(5) (Other evidence): This is a new paragraph which has been added to the rule as a result of the numerous comments requesting the Coast Guard to accept evidence of financial responsibility by methods other than the four proposed methods. This new paragraph will permit "other evidence of financial responsibility" if it meets the criteria set forth in this new paragraph and in expanded § 138.80(d). "Other evidence" meeting that criteria, if being submitted for the first time, must be submitted at least 45 days before a Certificate is required. The Coast Guard will not accept an "other evidence" method that merely alters or deletes a provision of one of the established methods. For example, a proposed "other evidence" guaranty form that includes a clause requiring COFRs to be renewed each year rather than every three years as provided in the rule would not be accepted. Some commenters suggested that the use of letters of credit be authorized. The use of letters of credit is discussed at the end of this section. Since commenters stated they would not utilize this method, it has not been included separately. However, it is a method that could be proposed under paragraph (b)(5). An applicant seeking approval of "other evidence" must submit a sample, proposed guaranty form.

Paragraph (c): This paragraph has been amended in response to comments that neither OPA 90 nor CERCLA specifically requires the Coast Guard to make co-subscribers to an insurance, surety bond, or financial guaranty jointly and severally liable. The Coast Guard agrees with these comments.

The gist of these comments is that if the Coast Guard would permit co-subscribers to be liable only up to their individual limits of participation on a particular bond, no individual amount of financial responsibility required by OPA 90 and CERCLA (the Total Applicable Amount) would be impossible to write. For example, a major surety broker commented that at least 32 Treasury-approved sureties have indicated to that broker an interest in writing surety bond guaranties. One of these companies is approved to write bonds in excess of $200 million, and the 32 companies have an approved, combined underwriting capacity in excess of $1 billion. Accordingly, the Coast Guard has acceded to this request and has amended proposed § 130.8(c) (new § 138.80(c)) to specifically allow limited (i.e., non-joint and several as among themselves) participation on a single bond or other guaranty.

The Coast Guard will only accept, for purposes of a guaranty, percentages of participation on a vertical, non-layered basis (tiers, one in excess of another, are not acceptable). For example, four insurers may each limit their participation to 25 percent. If a spill results in $10,000 in costs and damages, each insurer would be liable as a guarantor for $2,500. The Coast Guard will not accept a horizontal arrangement whereby one insurer subscribes to a first tier of $2,500, a second insurer to the next tier of $2,500, and so forth. Under this latter, layered arrangement, if the total costs and damages were $10,000, but the first insurer, subscribing for only the first $2,500 layer was bankrupt, the other insurers may be under no obligation to pay. The Coast Guard cannot accept this result.

In addition, the Coast Guard has limited this shared participation to no more than four guarantors executing a guaranty form. The Coast Guard believes this limitation is needed to provide a manageable process for claimants dealing with guarantors. More than four insurers or sureties, however, can still participate in a guaranty by appointing a lead underwriter or surety to act on their behalf, such as is done by Lloyd's Underwriters. Further, in order to facilitate dealing with multiple guarantors and to avoid complications that might ensue if the guarantors do not all agree on a particular action, the Coast Guard is requiring the guarantors to appoint a lead guarantor to act on behalf of, and have the authority to bind, the co-guarantors. Paragraph (c) further provides that if one or more guarantors do not specify percentages of participation, then as between or among them, they share joint and several liability for the total of the unspecified portion. Those guarantors specifying percentages will be liable only up to respective specified limits, as noted above. The Coast Guard considers this an important incentive to permit new providers of financial responsibility to become guarantors under OPA 90 and CERCLA.

Paragraph (d) (Direct action): This paragraph has been rewritten in response to comments requesting clarification of the exposure and limits of liability of guarantors under OPA 90 and CERCLA. Anything that might be considered new, e.g., a guarantor's right to limit its liability to the tonnage on an official tonnage document, has already been discussed herein, or is discussed below in connection with specific guaranty forms. It is appropriate to note in this section of the preamble, however, that a claim against an insurer or a surety in connection with an insurance or surety bond guaranty established under this part does not entitle a claimant to somehow "cut-through" the guarantor and reach the guarantor's ensuring entity. No right of direct action against a guarantor relating to financial responsibility provided under this part endows a claimant with

rights against a guarantor's reinsurer. This is not to say, of course, that a guarantor and its reinsurer are in any way precluded from entering into a reinsurance arrangement that permits cut-throughs by claimants against reinsurers. Such cut-through clauses, however, are not imposed by this rule.

Letters of Credit: Section 1016(e) of OPA 90 allows the Coast Guard to consider inclusion of a letter of credit in the permissible methods of establishing financial responsibility. The use of letters of credit as evidence of financial responsibility has never been and is not now being requested by the international vessel operating industry. Years ago, lengthy, in-depth exploration of this matter was undertaken with one of the largest U.S. financial institutions in an effort to determine the value of irrevocable letters of credit as evidence of financial responsibility under direct action statutes. It was concluded by all concerned that such instruments were of little or no value for such purposes. One of the reasons for that conclusion was that, unlike insurance companies defending their own money, banks and other financial institutions that issue letters of credit generally would have no interest in providing the legal and other resources necessary to seriously investigate or defend claims against their principals' money for removal costs and economic damages.

During this rulemaking, not one financial institution came forward to state that it would be willing to issue letters of credit as OPA 90 guaranties, and no commenter explained how letters of credit could be structured so that they could become appropriate mechanisms for the financial responsibility purposes of OPA 90 and CERCLA. Nor has any vessel operator come forward to state that it would be willing to allow a bank to act as a guarantor and put at risk millions of dollars of the operator's money without a vigorous defense mechanism.

In the proposal stage of this rulemaking, it was assumed that there may be some vessel operators who did not wish to use insurance, financial or surety bond guaranties. The Coast Guard, therefore, encouraged comments on how letters of credit might be used as evidence of financial responsibility. Several commenters stated that letters of credit were not viable options for demonstrating financial responsibility.

Although no commenter stated that it would or could use a letter of credit as evidence of financial responsibility, some commenters argued that, nevertheless, the non-inclusion of letters of credit constituted a fatal flaw in the NPRM. The Coast Guard does not agree, given the general convergence of views among the commenters. Therefore, no change is being made, i.e., letters of credit are not being specifically included in this final rule.

No door on any financial responsibility method is being closed with finality, however. The Coast Guard has taken the advice of several commenters that an additional category, permitted by section 1016(e) of OPA 90, be included in the rule, and has added a catchall category, "other evidence of financial responsibility" (see discussion under § 138.80(b)(5)). If an applicant and bank wish to use a letter of credit, it can be proposed, in a specific situation, as "other evidence" under the guidelines established in § 138.80(b)(5).

Paragraph (f): This new paragraph has been added to incorporate the "Applicable Amount Table" that was contained in Appendix G of the NPRM. This paragraph (and the corresponding applicable amount table in each guaranty form) sets out the means by which applicants and guarantors calculate the amounts of financial responsibility required to be established and maintained under this rule. As discussed earlier, this calculation has been amended to reflect the actual limits of liability applicable to vessels under CERCLA, rather than just the limit applicable to vessels carrying hazardous substances as cargo.

Section 138.90 Individual and Fleet Certificates

Fleet Certificates

This rule will further reduce the existing burden on operators of non-tank barges that sometimes carry oily cargo or small amounts of oil or hazardous substances. Such operators currently bear the expense and paperwork burden of obtaining individual COFRs and paying certification fees for a COFR for each barge, just on the chance that one or more of those barges may technically become subject to financial responsibility requirements. Examples of such non-tank barges are deck or hopper barges that might occasionally carry a few barrels of oil, oily metal shavings or non-bulk hazardous substances. Upon request (and with the cooperation of a guarantor), a single COFR, designated as a Fleet Certificate, may now be issued to the operator of these non-tank barges. Only a certified copy of that single Fleet COFR would need to be carried on each barge, and then only when that barge had oil or hazardous substances aboard. See § 138.90(b) of this rule.

Paragraph (b): Paragraph (b) has been changed in one respect. In the proposal, only an insurance guaranty was envisioned as being an appropriate method of establishing financial responsibility for Fleet Certificates. Upon reflection, there is no reason why other types of guaranties should be excluded. This paragraph reflects this broader approach.

Paragraphs (d) and (e): Some of the notice requirements in these paragraphs have been stated more precisely by adding specific time limits.

Section 138.120 Certificates, Denial or Revocation

Some commenters recommended that this section be revised to afford more procedural protections to certificants whose Certificates are subject to revocation. Proposed § 130.12 (new § 138.120) has been redrafted to afford greater procedural protections to applicants and certificants, and to remove ambiguities from the proposed text.

Paragraph (a): This paragraph governs the circumstances under which the issuance of a Certificate may be denied. It is derived from paragraphs (a) and (b) of proposed § 130.12.

Paragraph (b): This paragraph governs the circumstances under which a Certificate may be revoked. It also is derived from paragraphs (a) and (b) of proposed § 130.12.

Paragraph (c): Paragraph (c) governs the circumstances under which a Certificate is automatically revoked, without prior notice. It is derived from paragraph (b) of proposed § 130.12(b).

Paragraph (d): This paragraph is derived from proposed § 130.12(c) and provides that before a Certificate is denied under paragraph (a) of this section or revoked under paragraph (b), the Coast Guard will advise the applicant or certificant, in writing, of the proposed denial or revocation, and the reasons therefore.

Paragraph (e): This paragraph is derived from proposed § 130.12(d) and provides that proposed revocations due to failure to file required financial statements and other information become effective within 10 days of the notice, unless the certificant demonstrates that the information has been filed.

Paragraph (f): This paragraph is derived from proposed § 130.12(e) and provides an applicant or certificant the opportunity to present information showing why a proposed denial under paragraph (a)(1) or (a)(3) of this section or revocation under paragraph (b)(1) or (b)(2) is unwarranted. A new sentence is added to clarify that a Certificate

remains valid pending a decision under this paragraph. Note that these procedures do not apply to an immediate revocation under paragraph (c) of this section.

Paragraph (g): Paragraph (g) is new, and provides an applicant or certificant the opportunity to request reconsideration of an unfavorable decision on issuance or revocation. This paragraph states the applicable procedures for filing a request for reconsideration, and also provides that a revoked certificate remains invalid pending a decision on reconsideration.

Section 138.130 Fees

A few commenters objected to the doubling of the fees charged for applications and for Certificates. The preexisting fees were instituted in 1977 to implement the general user fee statute, now codified at 31 U.S.C. 9701. Since that time the U.S. Consumer Price Index has more than doubled. Office of Management and Budget revised Circular Number A–25 provides general guidelines for calculating the proper level of fees. Applying these principles, the Coast Guard calculates that currently, average COFR revenues do not cover average COFR costs. COFR costs include salaries, rent, computers and other office equipment, travel, and supplies. Doubling the fees, as proposed, will more closely recover for the Coast Guard the costs of administering the vessel financial responsibility certification program. Accordingly, to fulfill the intent of 31 U.S.C. 9101, this rule maintains the fees at the levels proposed. Calculations showing these program costs and projected revenues from the fees are available for inspection in the docket.

The justification for the assessment of different fees for new "first-time" applications than for Certificates is based upon the amount of processing time required by vessel certification program personnel. On average, it takes twice as long to process a new application and issue a new Certificate than it does to issue additional or modified Certificates.

Although vessel certification fees must be paid, the Coast Guard has decided not to collect the application fee for an application filed to obtain a Certificate under part 138 that will replace an existing Certificate issued under 33 CFR 130. This is reflected in the first clause of § 138.130(c), which references § 138.70(c). This approach continues the scheme currently in place whereby an application fee is not paid each time a Certificate is replaced or renewed. The only fee collected in that circumstance is the certification fee.

Section 138.140 Enforcement

Some commenters believed the penalties identified in this section are unfair. This section simply restates, for the convenience of the user, the sanctions prescribed by Congress in OPA 90 and CERCLA. The Coast Guard has no discretion to alter these potential sanctions. Another commenter recommended that an appeals process be incorporated in connection with the Coast Guard's detention of a vessel. This suggestion is beyond the scope of this rulemaking, which deals with methods for demonstrating financial responsibility, and associated matters. It is noted that actions by Coast Guard enforcement personnel are governed by other regulations. For example, certain actions taken by Coast Guard Captains of the Port may be appealed according to procedures elaborated in 33 CFR part 160.

Section 138.150 Service of Process

Text has been added to this section to reflect responsibilities placed upon responsible parties and guarantors by OPA 90, such as receipt of a notice of designation of source. The additional text clarifies that the persons designated by applicants and guarantors as agents to receive service of process also may be served with notices of designations and presentations of claims under the Acts. The Application Form and guaranty forms have also been amended to reflect this clarification.

Appendix A—Application for Certificate

The application form was left basically the same as in the proposal. Substantive changes are as follows:

Part I, Question 4: This portion of the application was amended to permit United States applicants the option of appointing themselves as U.S. agents for service of process, as is currently permitted under part 130. Doing so would preclude the need for the applicant and U.S. agent to complete part IV, Concurrence of Agent. As is presently the case, Certificates will not be issued to vessel operators who have not appointed U.S. agents for service of process, with accompanying written concurrence by such agents. This is the purpose of part IV of the application form. Since 1971, each P&I Club has arranged for a blanket concurrence of agent for service of process to be maintained on file with the Coast Guard's National Pollution Funds Center. This makes it unnecessary for vessel owners and operators who are members of the P&I Clubs, or their U.S. agents for service of process, to complete part IV of the application form.

Because vessel owners and operators who are members of P&I Clubs apparently will not currently permit their Clubs to act as guarantors for purposes of this rule, it has to be further assumed that the P&I Clubs will not be permitted to continue to arrange blanket concurrences of U.S. agents for service of process for purposes of this rule. Accordingly, each applicant who is a member of a P&I Club now will have to: (1) Locate in the United States an entity willing to act as that applicant's agent for service of process and; (2) mail to that agent part IV of an application form, with a request to forward the completed, executed part IV–A to the National Pollution Funds Center (part IV–B is to be completed by the applicant before mailing to the agent). Applicants are encouraged to mail parts I, II and III, fees, and any evidence of financial responsibility directly to the National Pollution Funds Center to minimize mail handling. In most cases, guarantors are instructed by vessel operators to mail guaranties directly to the National Pollution Funds Center.

A U.S. agent for service of process who is willing to act as agent for an operator's entire fleet of vessels need complete part IV–A only once. An agent for service of process, acting solely as agent, does not incur any OPA 90/CERCLA liability for removal costs or damages. An agent's responsibilities are as agreed between itself and the vessel operator on whose behalf the agent agrees to act.

Part II, column (d): As proposed, column (d) requested an applicant to indicate a vessel's "Registration Number". As amended, column (d) requests a "Documentation Number" for U.S.-flag vessels and an "IMO Number" for non-U.S.-flag vessels. A "Registration Number" is requested if an "IMO Number" has not been assigned.

Part III, question 11: Question 11 is an addition to the proposed Part II, and was necessary to accommodate an applicant who wishes to establish evidence of financial responsibility other than by self-insurance, insurance guaranties, surety bond guaranties, or financial guaranties. If that is the case, new question 11 requests the applicant to provide, separately, all of the information required by § 138.80(b)(5) of this rule (see discussion under § 138.80(b)(5)).

Appendices B Through F

These appendices are, respectively, the insurance guaranty form, the master insurance guaranty form, the surety

bond guaranty form, the financial guaranty form and the master financial guaranty form. Each of these guaranty forms has undergone numerous changes in format and wording which have no impact on meaning or content. However, each guaranty form has undergone the following common substantive amendments:

Defenses: The defenses are those enumerated in § 138.80(d). Rather than merely say that in the event of a direct action a guarantor may invoke only the rights and defenses specifically permitted by the Acts, those rights and defenses are now mentioned in more detail in each guaranty form. These statutorily permitted rights and defenses comprise defense numbers one and two of a new section in each guaranty form, which new section lists the rights and defenses available to guarantors in the event of a direct action. Right or defense number three confirms that a guarantor shall have the right to limit its OPA 90/CERCLA liability under its guaranty to the amount of that guaranty, despite the number of claimants and venues in which claims are brought against the guarantor for the same incident, release or threatened release. Number four, in this new listing of rights and defenses, provides that a guarantor shall have the right to limit its liability to the amount obtained by using the gross tonnage entered on the involved vessel's international tonnage certificate or other certificate of measurement, whichever is the vessel's official, applicable declaration of tonnage, except where the guarantor knew or should have known that the applicable tonnage certificate was incorrect. The Coast Guard intends the right to so limit liability to be available to guarantors despite any higher or different tonnage which may be listed on the COFR application form or guaranty form. Indeed, the Coast Guard intends this right of a guarantor to so limit its liability to apply even if it is determined after an incident or release that the official tonnage document is incorrect and that a vessel's correctly admeasured tonnage exceeds the tonnage listed on the incorrect tonnage document. The Coast Guard agrees with a commenter that a guarantor should be able to rely on a vessel's official tonnage document rather than find itself liable for a $10 million tank vessel liability when it accepted an exposure and a premium based on a tonnage document that indicated a substantially lesser amount of liability (see the liability minimums for tank vessels under section 1004(a) of OPA 90). This right is being extended to guarantors under the general rulemaking authority contained in OPA 90 and CERCLA to define terms such as gross tons, and under section 1016(e) of OPA 90. Only a guarantor may invoke this right or defense. The responsible party's liability is based on the actual gross tonnage of the vessel.

Right or defense number five in the new section of the guaranty forms is that "the claim is not one made under either of the Acts." Potential guarantors were concerned that by executing the guaranty form, they would be subjecting themselves to direct action under other laws as well, whether in federal or state courts. The Coast Guard does not believe that this was the intent of Congress. Accordingly, the purpose of this defense is to ensure that guarantors are not subject to direct actions under other laws solely because they executed the OPA 90/CERCLA guaranty to the Coast Guard.

The Coast Guard does not intend, and does not believe Congress intended, that execution of a guaranty appended to or acceptable under this part in any way indicates that the guarantor is implicitly agreeing to liability in an amount or scope different than set forth in such guaranty. No guaranty accepted under and executed for purposes of this part, without more, is to be construed as subjecting the guarantor to unlimited liability in any venue for any purpose. The Coast Guard considers this defense to be absolute, and necessary to effectuate the purposes of OPA 90, in accordance with section 1016(e) of OPA 90.

Joint and several liability: The second common change to the guaranty forms is the granting of an option to co-subscribing guarantors. In the proposed rule, joint guarantors to a single guaranty form would be jointly and severally liable for the full amount of the guaranty. This second common amendment to the guaranty forms, however, permits each joint guarantor the option of limiting its liability to less than the full amount of the guaranty by specifying its particular percentage of participation in each guaranty it co-executes. However, that participation must be in a vertical, non-layered share (see discussion under § 138.80(c)). Any co-insurer not specifying a percentage of participation would be held liable for the unspecified portion of any risk. If no co-insurers specify a percentage of participation, each would be held jointly and severally liable up to the full amount of the guaranty. The Coast Guard will continue to permit acceptable market entities such as the Institute of London Underwriters and the Underwriters at Lloyd's to execute a guaranty under the signature of a lead underwriter, or underwriters, with each co-subscribing, limited-liability signatory counting as only one guarantor. Thus, for example, twenty or so Lloyd's syndicates may join together under one lead underwriter (i.e., one signature on the guaranty form) for 40 percent of a risk, with numerous Institute of London Underwriters joining together under one lead underwriter (i.e., one signature guaranty on the guaranty form) for the remaining 60 percent. This method would count as only two guarantors under this new rule. Co-guarantors must appoint and name on the form a lead guarantor, having authority to bind all co-guarantors. This will facilitate handling of claims or other activities under the Acts. The co-guarantors decide among themselves which guarantor will serve as lead, and certainly should specify among themselves how claims or other activities under the Acts will be handled.

Deletion of the sixty-day notice: The third common change made to the guaranty forms is the deletion of the proposed requirement for a sixty-days written notice of cancellation requirement in connection with laden tankers. The Coast Guard concludes that, based on 23 years experience, thirty days written notice of cancellation of a guaranty will provide adequate notice in almost all cases.

Service of process: The fourth common change is the clarification that an agent designated to receive service of process also is required to receive notices of designation or presentations of claims under the Acts.

Total Applicable Amount: The fifth and final common change made to the guaranty forms is the relaxation in the method of calculating the total applicable amount with respect to vessels carrying hazardous substances as cargo. The relaxation (with respect to guaranties) of the proposed requirement that financial responsibility always would have to be demonstrated at the minimum amount of $5 million, already has been discussed in this preamble under the heading "Applicable Amounts of Financial Responsibility."

As already discussed, a guarantor and its principal or insured may decide among themselves as to the level of premium to be paid for the cover, it being understood that the guarantor will in any case be liable for the limit of liability applicable to the type of vessel in question at the time of the incident, release or threatened release, despite the level of premium accepted by the guarantor. This concept of full coverage, regardless of the type of vessel, applies under current part 130 and was the,

basis for certain language in all of the guaranty forms appended to this part. Nevertheless, in view of the relaxation of the total applicable amount calculation, all of the guaranty forms appended to this part (except the two insurance guaranty forms) have been amended to emphasize that concept of full coverage, including tank vessel liability. Thus, the surety bond guaranty form, for example, has been amended by adding the following clause:

> Principal and Surety or Sureties further agree that if at the time of an incident, release, or threatened release a covered vessel is a tank vessel or is carrying a hazardous substance as cargo, the penal sum of this surety bond guaranty automatically increases, if necessary, to the total applicable amount appropriate for such vessel as determined in accordance with the Applicable Amount Table below. In no case, however, shall the penal sum be increased to an amount greater than the total applicable amount.

This change is especially appropriate to the surety bond guaranty form (Appendix D) because of the bond guaranty's provision for showing the penal sum of the guaranty. It was believed appropriate to also amend the financial guaranty forms (Appendices E and F) in order to remind prospective financial guarantors that the amounts of working capital and/or net worth to be demonstrated (in order to qualify as financial guarantors) would be based on the minimum $5 million formula for CERCLA, and $1,200 per gross ton/$10 million for OPA 90, when calculating the total applicable amount to be guarantied.

Appendix D Surety Bond Guaranty Form

A change peculiar to the bond guaranty form is the addition of the following clause:

> If the Principal is responsible for more than one vessel covered by this guaranty, then the penal sum is the total applicable amount for the vessel having the greatest liability under the Acts.

This change was made solely to clarify the surety's limit of OPA 90/CERCLA liability under a bond guaranty, regardless of the actual penal sum indicated on the bond guaranty. This new clause, when coupled with a second new clause that has been added to the form, permits the bond guaranty automatically to cover all of the vessels for which the vessel operator-principal is responsible under the Acts, yet provides protection to the surety if any of such vessels are specifically named in other evidence of financial responsibility (on behalf of the vessel operator-principal named on the bond guaranty) applicable during an incident, release or threatened release giving rise to a claim against the surety or vessel operator-principal. This second new clause appears directly above the name of the surety's U.S. agent for service of process, and will aid in determining the specific vessels covered by a bond guaranty, should such question ever arise.

Assessment

The NPRM was classified as not "major" under former Executive Order 12291, which was revoked and replaced by Executive Order 12866 (September 30, 1993), but was considered significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979) because of substantial public interest. Many commenters to the NPRM stated that the proposed should be classified as major under Executive Order 12291. In fact, this rulemaking has followed most of the procedural aspects of a "major" rule, notably, the publication of the PRIA for public comment. Executive Order 12866 now governs this proceeding.

This rule is a significant regulatory action under section 3(f) of Executive Order 12866 because it is perceived to raise novel legal and policy issues. It has been reviewed by the Office of Management and Budget under that order. It requires an assessment of potential costs and benefits under section 6(a)(3) of that order. It is significant under the regulatory policies and procedures of DOT. A Regulatory Impact Analysis ("assessment" under the new Executive Order) has been prepared and is available in the docket for inspection or copying where indicated under **ADDRESSES.** The purpose of Executive Order 12866 (and its predecessor) is to improve the internal management of the federal government and it does not create any procedural or substantive rights or benefits enforceable at law by a party against the United States.

These regulations are promulgated under section 1016(a) of OPA 90 (33 U.S.C. 2716) and section 108(a)(1) of CERCLA (42 U.S.C. 9608(a)(1)), concerning the "establishment and maintenance" of evidence of financial responsibility for vessels. This rulemaking is intended to implement that joint statutory mandate and, therefore, primarily is limited to matter relating to "establishment and maintenance" of financial responsibility, such as how to apply for a COFR and how to establish evidence of financial responsibility.

This rule imposes no new paperwork burdens on vessel operators. The methods for applying for a COFR and establishing evidence are similar to those in the preexisting regulations under the FWPCA, TAPAA, OCSLAA, and DPA. Vessel operators will be required to complete and submit a prescribed application form for a COFR and, if other than a self-insurer, a prescribed form, completed by their guarantors, evidencing acceptable financial responsibility. A similar requirement, however, is being imposed presently under preexisting 33 CFR parts 130, 131, and 132, and subpart D of part 137. This rule not only adopts these application procedures but actually reduces the paperwork burden by requiring that only one application be submitted under OPA 90/CERCLA, rather than separate applications under the FWPCA, TAPAA, and OCSLAA, which is now the case. The implementation schedule, discussed under § 138.15, will also alleviate some burden in that, for most vessels, new COFRs will only have to be obtained at their normal renewal cycle.

This rule may affect a slightly different population of vessels than under the preexisting regulations. This difference results from section 1016(a) of OPA 90 (33 U.S.C. 2716(a)). Before OPA 90 was enacted, the most encompassing Federal statute concerning financial responsibility (the FWPCA) was limited to vessels over 300 gross tons. (TAPAA, OCSLAA, and DPA have no vessel tonnage limits, but very few vessels of 300 gross tons or less operate under those regimes.) Under section 1016(a)(2) of OPA 90, all vessels "using the waters of the exclusive economic zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States" also must meet the financial responsibility requirements. The exact number of vessels of 300 gross tons or less engaged in transshipping or lightering oil, not already subject to the preexisting regulations, is unknown. The Coast Guard requested information on the vessel population not subject to a financial responsibility regime under Federal law before enactment of OPA 90 and which must now comply with the requirements of section 1016 of OPA 90, but none was provided.

Regulatory Impact Analysis

General Issues

Due to the substantial public interest in this rulemaking, on July 21, 1993, a Preliminary Regulatory Impact Analysis was made available for public comment (58 FR 38994), in accordance with the

request of many commenters to the NPRM. Nearly 600 copies of the PRIA were distributed worldwide. The PRIA analyzed the costs and benefits of four options, namely: (1) Retain the preexisting rules; (2) adopt the NPRM; (3) amend the NPRM to accept entry in a Protection and Indemnity Club (P&I Club) as an asset for self-insurance; and (4) amend the NPRM's self-insurance formulate (i.e., eliminate the working capital requirement and/or the requirement to maintain assets in the United States by allowing worldwide assets to be measured against worldwide liabilities). The PRIA noted that these were the options (not all of which are, necessarily, legally permissible options) most often mentioned in comments to the NPRM.

Over 60 letters commenting on the PRIA were received. The comments fall into four general categories: (1) Those that support the NPRM; (2) those that support the P&I Club membership as an asset option, with an added feature of making the Oil Spill Liability Trust Fund an assignee of the member's rights under the Club policy; (3) those that oppose the NPRM altogether (primarily the P&I Clubs and Lloyd's of London); (4) and those that support enactment of legislation to create a Mandatory Excess Insurance Facility (MEIF), to address tank vessel owners' desires to be granted higher levels of insurance than appear to be available in the commercial marketplace. The MEIF then could also serve as a COFR insurance guarantor.

The central concern expressed by most vessel owners and operators is how to provide evidence of financial responsibility if their P&I Clubs do not issue insurance guaranties. The Clubs act in unison through the International Group of P&I Clubs. They have unequivocally stated in their comments that these same vessel owners and operators will not permit the Clubs to provide insurance guaranties, and that there is no rule change that could be made to induce them to do so. The reason for this position has not, in the Coast Guard's judgment, been made clear nor has it been adequately justified. Thus, the PRIA and final RIA assess the so-called "train-wreck" scenario, i.e., the unlikely scenario whereby the NPRM is adopted as a rule, the P&I Clubs remain prohibited by their shipowner members to provide insurance guaranties, and no other sources of financial responsibility exist. The final RIA takes into account all the comments and concludes that a "train-wreck" is not likely to occur because it appears that other sources of financial responsibility will develop. Even if they do not develop, there need not be a "train-wreck" because the shipowners can vote to permit their Clubs to issue the guaranties. The choice of compliance with this rule is entirely up to the shipowners.

Summary of Costs and Benefits

The options have been measured against the fundamental legislative precept, namely, that the polluter should pay promptly and with assurance for removal costs and damages resulting from an oil spill or release of hazardous substances. The option that most closely fulfills this congressional objective is the approach proposed in the NPRM and adopted in this rule. It is legally defensible, it enhances claimants' rights to compensation, it does not impose undue administrative burdens, and it need not impose measurable costs on consumers. On the other hand, the other options all lack the Congressionally intended assurance that the polluter or its guarantor will pay promptly for costs and damages.

The "do nothing" approach means that financial responsibility is maintained at much lower levels than are required by OPA 90, and that CERCLA vessel financial responsibility remains unimplemented. If an oil spill or hazardous substance release occurs under this circumstance, there is serious concern whether a guarantor or the spiller will pay removal costs and damages that exceed the lower, preexisting limits of liability.

The P&I Club membership-as-an-asset approach is not supported by Generally Accepted Accounting Principles, and allows the P&I Clubs to avoid paying claims by invoking an unlimited number of policy defenses and the pay-to-be-paid rule. Under this rule, a Club only is required to "indemnify" its shipowner-member for payments actually made by the shipowner. In the case of bankruptcy, for example, where the shipowner is discharged from paying removal costs and damages, there would be no obligation for the shipowner's P&I Club to pay claimants. This option, even with the added feature of the assignment clause, offers not much greater protection to claimants because policy defenses could still be invoked. Additionally, the assignment clause would require the assent of the P&I Clubs, and there is no evidence in the record that the Clubs would provide this assent. Hence, there is no assurance that shipowners would have this method available to them, even if it could be adopted under OPA 90 and CERCLA.

The Mandatory Excess Insurance Facility (MEIF), proposed primarily to provide shipowners with very high levels of insurance, could provide assurance of payment fulfilling, on the surface, the polluter pays concept. This approach, however, requires legislation, a necessarily long-term endeavor. Its initially conceived funding mechanisms place the cost of this approach on U.S. consumers and taxpayers, but the funding mechanisms have not been fully developed. A full assessment of the MEIF, including the demands that might be placed on the public treasury, has not been possible. Even though the funding details have not been fully developed, the MEIF, overall, would be a more costly option than the NPRM approach. Its tanker owner proponents have stated that their primary objective is to address the lack of high levels of insurance to cover a shipowner's potential unlimited liability under OPA 90. Most of the MEIF's costs are attributable to the higher levels of insurance and not with OPA 90 financial responsibility requirements. For these reasons, and since there appear to be commercial alternatives to P&I Club insurance guaranties, the MEIF currently is not viewed as a timely or practical source of insurance guaranties. Nevertheless, the Coast Guard understands tankers owners' concerns regarding the lack of very high levels of oil pollution insurance in the commercial marketplace. The Coast Guard intends to continue examining the MEIF for this purpose, recognizing that this is, fundamentally, a liability issue beyond the scope of this rulemaking and one that would have to be dealt with through legislation.

The main concern about the NPRM approach is whether it will cause a "train-wreck." Representatives of two new insurance entities now being formed commented in response to the PRIA that they were developing insurance alternatives to P&I Clubs for the purpose of providing financial responsibility guaranties. Representatives of surety companies commented that surety bonds can be a source of financial responsibility guaranties. The major provider of financial responsibility backing for FWPCA COFRs for the inland and near coastal fleet, the Water Quality Insurance Syndicate, has not stated any refusal to issue OPA 90 and CERCL A financial responsibility guaranties. One domestic insurance company and one independent P&I Club voiced an interest as well, and many domestic and foreign insurance companies would be able to issue guaranties immediately, if they chose to do so. Thus, the record demonstrates that alternative sources of

financial responsibility backing are likely to be available, suggesting that the "train-wreck" will not occur.

This is not to say that if the P&I Clubs and their members maintain their refusal to issue financial responsibility guaranties this rule will not result in more costs to the shipowner. Most of those costs are likely to be passed to the end consumer, principally in a fractional increase in the cost of a gallon of refined product, such as gasoline. Assessment of costs is very difficult because, for commercial reasons, the intended insurance providers have been unwilling to submit cost estimates to the docket. On the other hand, one surety company did submit rough cost estimates. The final RIA makes a number of assumptions about possible costs, and calculates the possible range of costs. The presumed "worst-case" cost translates to less than two-fifths of one cent per gallon of refined product.

The final RIA, which is available in the docket for inspection or copying, as indicated under **ADDRESSES**, details the cost calculations and assumptions. The Coast Guard concludes that the cost of the approach taken in this rule is minimal and that the benefits to the public justify these costs. Further, since these costs need not be incurred, the Coast Guard concludes that cost is not the sole controlling factor in the decision on which option to select.

Small Entities

In the NPRM, the Coast Guard solicited comments from small businesses, as defined by the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), to ascertain whether the proposed rule will have a significant economic impact on their business. One commenter, the Delta Queen Steamboat Company ("Delta"), seeks exemption from this regulation, as it believes is permitted under 5 U.S.C. 603(c)(4).

Delta states that it is a small cruise line operator, whose two overnight, passenger, paddlewheel steamboats operate on the inland rivers of the Mississippi, Ohio, Cumberland and Tennessee. The largest of those vessels, at 3,364 gross tons, requires combined OPA 90 and CERCLA financial responsibility under the NPRM of $7,018,400. Even though the company stated it currently has $500,000,000 of oil pollution insurance with a P&I Club, the Club has indicated that it will not provide a guaranty of insurance for purposes of the COFR rule. Delta also states that it cannot demonstrate financial responsibility using the other methods listed in the NPRM. Therefore, Delta requests exemption from the final COFR rule.

The Coast Guard believes that Delta will be able to demonstrate financial responsibility through alternative means, and is in no different position than any other vessel owner or operator. For example, one of the alternative insurance companies indicated that it believed the cost of insurance for non-tankers would be minimal. The amount of financial responsibility required by Delta is within the capacity of the Water Quality Insurance Syndicate, which has not declared it will not provide the guarantees of insurance, and any number of surety companies.

Title 5 U.S.C. 603(c)(4) provides that consistent with the objectives of the relevant statutes (in this case OPA 90 and CERCLA), this analysis shall discuss significant alternatives, such as an exemption from the rule for small entities. Neither OPA 90 nor CERCLA provide a basis to exempt covered vessels from the requirement to demonstrate evidence of financial responsibility. Accordingly, no provision for exemptions is provided in this rule. As noted above, no exemption is warranted in the case of Delta (or similar entities) as alternative sources of financial responsibility guaranties are expected to be available.

This rule will have minimal direct economic impact on small business. The rule retains procedures presently in effect, and through consolidation, eliminates duplication of effort on the part of the regulated industry. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This rule contains collection-of-information requirements. The Coast Guard has submitted these requirements to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), and OMB has approved them. The information collection requirements under this rule continue previous requirements. OMB Control Number 2115–0545 was assigned to 33 CFR parts 130, 131, 132, and 137. The collection-of-information requirements in these four parts are being consolidated into part 138. Under this rule, the need to apply for separate Certificates under separate laws is eliminated, along with the associated paperwork. Because of the phase-in provisions in this rule, the information collection requirements in 33 CFR parts 130, 131, 132, and 137 remain in effect for varying periods of time. The table in 33 part 4 is being amended to show this approval number.

Federalism

The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 12612. Section 1018 of OPA 90 specifically allows states to enact their own liability laws, and many states have indeed established their own requirements. Therefore, the Coast Guard has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under section 2.B.2 of Commandant Instruction M16475.1B, this rule is categorically excluded from further environmental documentation. This rulemaking is administrative in nature and has no environmental impact. This rule provides the procedure by which a vessel operator establishes evidence of financial responsibility.

A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under **ADDRESSES**.

List of Subjects

33 CFR Part 4

Reporting and recordkeeping requirements.

33 CFR Part 130

Insurance, Maritime carriers, Reporting and recordkeeping requirements, Water pollution control.

33 CFR Part 131

Alaska, Insurance, Maritime carriers, Oil pollution, Pipelines, Reporting and recordkeeping requirements.

33 CFR Part 132

Continental shelf, Insurance, Maritime carriers, Oil pollution, Reporting and recordkeeping requirements.

33 CFR Part 137

Claims, Harbors, Insurance, Oil pollution, Reporting and recordkeeping requirements, Vessels.

33 CFR Part 138

Insurance, Maritime carriers, Reporting and recordkeeping requirements, Water pollution control.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR parts 4, 130, 131, 132, and 137, and adds a new part 138, as follows:

PART 4—OMB CONTROL NUMBERS ASSIGNED PURSUANT TO THE PAPERWORK REDUCTION ACT

1. The authority citation for part 4 continues to read as follows:

Authority: 44 U.S.C. 3507; 49 CFR 1.45(a).

§4.02 [Amended]

2. In § 4.02, add the following entries in numerical order to the table:

Part 130	2115–0545
Part 131	2115–0545
Part 132	2115–0545
Part 138	2115–0545.

PART 130—FINANCIAL RESPONSIBILITY FOR WATER POLLUTION

3. The authority citation for part 130 is revised to read as follows:

Authority: 33 U.S.C. 2716; 49 CFR 1.46.

4. Section 130.0 is added to read as follows:

§130.0 Dates.

(a) A Certificate will not be issued under this part on or after December 28, 1997.

(b) A Certificate issued under this part on or after July 1, 1994, has the expiration date specified in § 138.15 of this chapter.

PART 131—FINANCIAL RESPONSIBILITY FOR OIL POLLUTION—ALASKA PIPELINE

5. The authority citation for part 131 is revised to read as follows:

Authority: 33 U.S.C. 2716; 49 CFR 1.46.

6. Section 131.0 is added to read as follows:

§131.0 Dates.

(a) A Certificate will not be issued under this part on or after July 1, 1995.

(b) A Certificate issued under this part on or after July 1, 1994, has the expiration date specified in § 138.15 of this chapter.

PART 132—FINANCIAL RESPONSIBILITY FOR OIL POLLUTION—OUTER CONTINENTAL SHELF

7. The authority citation for part 132 is revised to read as follows:

Authority: 33 U.S.C. 2716; 49 CFR 1.46.

8. Section 132.0 is added to read as follows:

§132.0 Dates.

(a) A Certificate will not be issued under this part on or after December 28, 1997.

(b) A Certificate issued under this part on or after July 1, 1994, has the expiration date specified in § 138.15 of this chapter.

PART 137—DEEPWATER PORT LIABILITY FUND

9. The authority citation for part 137 is revised to read as follows:

Authority: 33 U.S.C. 2716; 49 CFR 1.46.

Subparts B and C—[Removed and Reserved]

10. Subparts B and C of part 137 are removed and reserved.

Subpart D—[Amended]

11. Section 137.300 is added to subpart D to read as follows:

§ 137.300 Dates.

(a) The Fund Administrator will not accept certification of coverage of a vessel under this part on or after July 1, 1995.

(b) The Fund Administrator will only accept certification of coverage of a vessel under this part if that vessel holds a Certificate issued under part 130 of this chapter.

Note: The functions of the Fund Administrator have been assumed by the Director, National Pollution Funds Center, United States Coast Guard, 4200 Wilson Boulevard, suite 1000, Arlington, Virginia 22203–1804, attention: cv. The telephone number is 703–235–4813 and the facsimile number is 703–235–4835.

Subpart E—[Removed and Reserved]

12. Subpart E of part 137 is removed and reserved.

13. Part 138 is added to read as follows:

PART 138—FINANCIAL RESPONSIBILITY FOR WATER POLLUTION (VESSELS)

Sec.

Authority: 33 U.S.C. 2716; 42 U.S.C. 9608; sec. 7(b), E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 198; 49 CFR 1.46; § 138.30 also issued under the authority of 46 U.S.C. 2103; 46 U.S.C. 14302; 49 CFR 1.46.

§ 138.10 Scope.

This part sets forth the procedures by which an operator of a vessel may establish and maintain, for itself, and, where the operator is not the owner or demise charterer, for the owner and demise charterer of the vessel, evidence of financial responsibility to cover liability of the owner, operator, and demise charterer arising under—

(a) Section 1002 of the Oil Pollution Act of 1990 (OPA 90) (33 U.S.C. 2702); and

(b) Senate 107(a)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (CERCLA) (42 U.S.C. 9607(a)(1)).

§ 138.12 Applicability.

(e) This part applies to—

(1) A tank vessel of any size, and to a foreign-flag vessel of any size, using the waters of the exclusive economic zone to transship or lighter oil (whether delivering or receiving) destined for a place subject to the jurisdiction of the United States; and

(2) A vessel using the navigable waters of the United States or any port or place subject to the jurisdiction of the United States, including an offshore facility subject to the jurisdiction of the United States, except—

(i) A vessel that is 300 gross tons or less; and

(ii) A non-self-propelled barge that does not carry oil as cargo or fuel and does not carry hazardous substances as cargo.

(b) For the purposes of financial responsibility under OPA 90, a mobile offshore drilling unit is treated as a tank vessel when it is being used as an offshore facility and there is a discharge, or a substantial threat of a discharge, of oil on or above the surface of the water. A mobile offshore drilling unit is treated as a vessel other than a tank vessel when it is not being used as an offshore facility.

(c) For the purposes of financial responsibility under CERCLA, this part applies to a self-propelled vessel over

300 gross tons, even if it does not carry hazardous substances.

(d) This part does not apply to a public vessel.

§ 138.15 Implementation schedule.

(a) A tank vessel is subject to the following implementation schedule:

(1) Until December 28, 1994, a tank vessel is required to carry a Certificate issued under parts 130, 131, and 132 of this chapter, as may be applicable to that vessel. On or after that date, and until July 1, 1995, a non-self-propelled tank vessel must carry a Certificate issued under parts 130, 131, and 132 of this chapter, as may be applicable to that vessel, unless it carries a Certificate issued under this part.

(2) A self-propelled tank vessel to which this part applies and which carries a valid Certificate issued under part 130 of this chapter may not operate on or after December 28, 1994, unless the operator of that vessel has submitted to the Director, NPFC, before that date acceptable evidence of financial responsibility applicable to that vessel under this part. A self-propelled tank vessel covered by that evidence of financial responsibility before December 28, 1994, may continue to operate with the Certificate issued under part 130 of this chapter. The expiration date of the Certificate issued under part 130 of this chapter for that vessel will be deemed to be December 28, 1995, regardless of the expiration date appearing on the Certificate. Thereafter, a Certificate issued under this part is required.

(3) A self-propelled tank vessel to which this part applies, but which does not carry a valid Certificate issued under part 130 of this chapter before December 28, 1994, may not operate on or after that date unless it carries a Certificate under this part.

(4) A non-self-propelled tank vessel to which this part applies may not operate on or after July 1, 1995, without a Certificate issued under this part. A non-self-propelled tank vessel may continue to operate with a Certificate issued under parts 130, 131, and 132 of this chapter, as may be applicable to that vessel, until that date.

(b) A vessel that is not a tank vessel (non-tank vessel) is subject to the following implementation schedule:

(1) Until December 28, 1997, a non-tank vessel is required to carry a Certificate issued under parts 130 and 132 of this chapter, as may be applicable to that vessel, unless that vessel carries a Certificate issued under this part. On or after December 28, 1997, each non-tank vessel subject to this part must carry a Certificate issued under this part.

(2) A Certificate is issued, on and after December 28, 1994, and before December 28, 1997, under parts 130 and 132 of this chapter only to replace a lost Certificate or to replace a Certificate due to a vessel or operator name change (a change of legal identity, such as reincorporation or other reorganization, is not considered a name change). The expiration date that will appear on the replacement Certificate will be the same as the expiration date of the Certificate being replaced. During that three-year time period, with respect to part 132 of this chapter, the expiration date that will appear on a Certificate being replaced, or on an existing Certificate being renewed, will be adjusted to coincide with the expiration date of the Certificate, if any, for that vessel issued under part 130 of this chapter.

(3) A non-tank vessel that has a Certificate issued before December 28, 1994, under part 130 of this chapter is not required to carry a Certificate under this part until the date of expiration of the Certificate issued under part 130 of this chapter.

(4) Except as provided in paragraph (b)(5) of this section, a Certificate issued on and after July 1, 1994, and before December 28, 1994, under parts 130 and 132 of this chapter is issued with an expiration date three years from the date of issuance.

(5) If a Certificate issued under part 130 of this chapter with an expiration date of December 28, 1994, or later is surrendered, and a new Certificate is requested for the same non-tank vessel before December 28, 1994, the new Certificate will have the same expiration date as that of the surrendered Certificate.

(c) On or after July 1, 1994, a vessel that is subject to either part 131 or 132, or both, of this chapter but that is not subject to part 130 of this chapter because the vessel is 300 gross tons or less is not required to comply with part 131 or 132 of this chapter, unless that vessel is subject to this part under § 138.12(a)(1).

§ 138.20 Definitions.

(a) As used in this part (including the appendices to this part), the following terms have the same meaning as set forth in—

(1) Section 1001 of the Oil Pollution Act of 1990 (33 U.S.C. 2701), respecting the financial responsibility referred to in § 138.10(b)(1): *claimant, damages, discharge, exclusive economic zone, navigable waters, mobile offshore drilling unit, natural resources, offshore facility, oil, person, remove, removal, removal costs,* and *United States;* and

(2) Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601), respecting the financial responsibility referred to in § 138.10(b)(2): *claimant, damages, environment, hazardous substance, navigable waters, natural resources, person, release, remove, removal,* and *United States.*

(b) As used in this part (including the appendices to this part)—

Acts means OPA 90 and CERCLA.

Applicant means an operator who has applied for a Certificate or for the renewal of a Certificate under this part.

Application means "Application for Vessel Certificate of Financial Responsibility (Water Pollution)", as illustrated in Appendix A of this part.

Cargo means goods or materials on board a vessel for purposes of transportation, whether proprietary or nonproprietary. A hazardous substance or oil carried solely for use aboard the carrying vessel is not "cargo".

CERCLA means title I of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (42 U.S.C. 9601 *et seq.*).

Certificant means an operator who has been issued a Certificate under this part.

Certificate means a "Vessel Certificate of Financial Responsibility (Water Pollution)" issued under this part, unless otherwise indicated.

Director, NPFC, means the head of the U.S. Coast Guard National Pollution Funds Center (NPFC).

Financial responsibility means statutorily required financial ability to meet liability under the Acts.

Fish tender vessel and fishing vessel have the same meaning as set forth in 46 U.S.C. 2101.

Fuel means any oil or hazardous substance used or capable of being used to produce heat or power by burning, including power to operate equipment.

Guarantor means any person who provides evidence of financial responsibility, under the Acts, on behalf of a vessel owner, operator, and demise charterer. A vessel operator who can qualify as a self-insurer may act as both a self-insurer of vessels it operates and as a financial guarantor of other vessels, under § 138.80(b)(4).

Hazardous material means a liquid material or substance that is—

(1) Flammable or combustible;

(2) Designated a hazardous substance under section 311(b) of the Federal Water Pollution Control Act (33 U.S.C. 1221); or

(3) Designated a hazardous material under section 104 of the Hazardous Material Transportation Act (49 App. U.S.C. 1803).

Incident means any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon the navigable waters or adjoining shorelines or the exclusive economic zone.

Insurer is a type of guarantor and means one or more insurance companies, associations of underwriters, shipowners' protection and indemnity associations, or other persons, each of which must be acceptable to the Coast Guard.

Master Certificate means a Certificate issued under this part to a person acting as vessel operator in its capacity as a builder, repairer, scrapper, or seller of vessels.

Offshore supply vessel has the same meaning as set forth in 46 U.S.C. 2101.

OPA 90 means title I of the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*).

Operator means a person who is an owner, a demise charterer, or other contractor, who conducts the operation of, or who is responsible for the operation of, a vessel. A builder, repairer, scrapper, or seller who is responsible, or who agrees by contract to become responsible, for a vessel is an operator.

Owner means any person holding legal or equitable title to a vessel. In a case where a Certificate of Documentation or equivalent document has been issued, the owner is considered to be the person or persons whose name or names appear thereon as owner. For purposes of CERCLA only, "owner" does not include a person who, without participating in the management of a vessel, holds indicia of ownership primarily to protect the owner's security interest in the vessel.

Public vessel means a vessel Owned or bareboat chartered by the United States, or by a State or political subdivision thereof, or by a foreign nation, except when the vessel is engaged in commerce.

Self-elevating lift vessel means a vessel with movable legs capable of raising its hull above the surface of the sea and that is an offshore work boat (such as a work barge) that does not engage in drilling operations.

Tank vessel means a vessel (other than an offshore supply vessel, a fishing or fish tender vessel of 750 gross or less that transfers fuel without charge to a fishing vessel owned by the same person, or a towing or pushing vessel (tug) simply because it has in its custody a tank barge) that is constructed or adapted to carry, or that carries, oil or liquid hazardous material in bulk as cargo or cargo residue, and that—

(1) Is a vessel of the United States;

(2) Operates on the navigable waters; or

(3) Transfers oil or hazardous material in a place subject to the jurisdiction of the United States.

Total Applicable Amount means the amount determined under § 138.80(f)(3).

Vessel means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

§ 138.30 General.

(a) The regulations in this part set forth the procedures whereby an operator of a vessel subject to this part can demonstrate that it and the owner and demise charterer of the vessel are financially able to meet potential liability for costs and damages in the amounts established by this part. The owner, operator, and demise charterer are strictly, jointly, and severally liable for the costs and damages resulting from an incident or a release or threatened release, but together they need only establish and maintain an amount of financial responsibility equal to the single limit of liability per incident, release, or threatened release. Only that portion of the evidence of financial responsibility under this part with respect to—

(1) OPA 90 is required to be made available by a guarantor for the costs and damages related to an incident where there is not also a release or threatened release; and

(2) CERCLA is required to be made available by a guarantor for the costs and damages related to a release or threatened release where there is not also an incident. A guarantor (or a self-insurer for whom the exceptions to limitations of liability are not applicable), therefore, is not required to apply the entire amount of financial responsibility to an incident involving oil alone or a release or threatened release involving a hazardous substance alone.

(b) Where a vessel is operated by its owner, or the owner is responsible for its operation, the owner is considered to be the operator and shall submit the application for a Certificate. In all other cases, the vessel operator shall submit the application. A time or voyage charterer that does not assume responsibility for the operation of the vessel is not considered an operator for the purposes of this part.

(c) For a United States-flag vessel, the applicable gross tons or gross tonnage, as referred to in this part, is determined as follows:

(1) *For a documented U.S. vessel measured under both 46 U.S.C. Chapters 143 (Convention Measurement) and 145 (Regulatory Measurement).* The vessel's regulatory gross tonnage is used to determine whether the vessel exceeds 300 gross tons where that threshold applies under the Acts. If the vessel's regulatory tonnage is determined under the Dual Measurement System in 46 CFR part 69, subpart D, the higher gross tonnage is the regulatory tonnage for the purposes of the 300 gross ton threshold. The vessel's gross tonnage as measured under the International Convention on Tonnage Measurement of Ships, 1969 ("Convention"), is used to determine the vessel's required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA.

(2) *For all other United States vessels.* The vessel's gross tonnage under 46 CFR part 69 is used for determining both the 300 gross ton threshold, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA. If the vessel is measured under the Dual Measurement System, the higher gross tonnage is used in all determinations.

(d) For a vessel of a foreign country that is a party to the Convention, gross tonnage, as referred to in this part, is determined as follows:

(1) *For a vessel assigned, or presently required to be assigned, gross tonnage under Annex I of the Convention.* The vessel's gross tonnage as measured under Annex I of the Convention is used for determining the 300 gross ton threshold, if applicable, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA.

(2) *For a vessel not presently required to be assigned gross tonnage under Annex I of the Convention.* The highest gross tonnage that appears on the vessel's certificate of documentation or equivalent document and that is acceptable to the Coast Guard under 46 U.S.C. chapter 143 is used for determining the 300 gross ton threshold, if applicable, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA. If the vessel has no document or the gross tonnage appearing on the document is not acceptable under 46 U.S.C. chapter 143, the vessel's gross tonnage is determined by applying the Convention Measurement System under 46 CFR part 69, subpart B, or if applicable, the Simplified Measurement

System under 46 CFR part 69, subpart E. The measurement standards applied are subject to applicable international agreements to which the United States Government is a party.

(e) For a vessel of a foreign country that is not a party to the Convention, gross tonnage, as referred to in this part, is determined as follows:

(1) *For a vessel measured under laws and regulations found by the Commandant to be similar to Annex I of the Convention.* The vessel's gross tonnage under the similar laws and regulations is used for determining the 300 gross ton threshold, if applicable, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA. The measurement standards applied are subject to applicable international agreements to which the United States Government is a party.

(2) *For a vessel not measured under laws and regulations found by the Commandant to be similar to Annex I of the Convention.* The vessel's gross tonnage under 46 CFR part 69, subpart B, or, if applicable, subpart E, is used for determining the 300 gross ton threshold, if applicable, the required amount of financial responsibility, and limit of liability under section 1004(a) of OPA 90 and under section 107(a) of CERCLA. The measurement standards applied are subject to applicable international agreements to which the United States is a party.

(f) A person who agrees to act as a guarantor or a self-insurer is bound by the vessel's gross tonnage as determined under paragraphs (c), (d), or (e) of this section, regardless of what gross tonnage is specified in an application or guaranty form illustrated in the appendices to this part. Guarantors, however, may limit their liability under a guaranty of financial responsibility to the applicable gross tonnage appearing on a vessel's International Tonnage Certificate or other official, applicable certificate of measurement and shall not incur any greater liability with respect to that guaranty, except when the guarantors knew or should have known that the applicable tonnage certificate was incorrect.

§ 138.40 Where to apply for and obtain forms.

(a) An operator shall file an application for a Certificate and a renewal of a Certificate together with fees and evidence of financial responsibility, with the Coast Guard National Pollution Funds Center at the following address: U.S. Coast Guard, National Pollution Funds Center (cv), 4200 Wilson Boulevard, Suite 1000, Arlington, VA 22203–1804, telephone (703) 235–4813, Telex 248324 (Answerback CGNPFC UR), Telefax (703) 235–4835.

(b) Forms may be obtained at the address in paragraph (a) of this section, and all requests for assistance, including telephone inquiries, in completing applications should be directed to the U.S. Coast Guard at that same address.

§ 138.50 Time to apply.

(a) A vessel operator who wishes to obtain a Certificate shall file a completed application form, evidence of financial responsibility and appropriate fees at least 21 days prior to the date the Certificate is required. The Director, NPFC, may waive this 21-day requirement.

(b) The Director, NPFC, generally processes applications in the order in which they are received at the National Pollution Funds Center.

§ 138.60 Applications, general instructions.

(a) The application for a Certificate (Form CG–5585) is illustrated in Appendix A of this part. An application and all supporting documents must be in English. All monetary terms must be expressed in United States dollars.

(b) An authorized official of the applicant shall sign the application. The title of the signer must be shown in the space provided on the application.

(c) The application must be accompanied by a written statement providing authority to sign, where the signer is not disclosed as an individual (sole proprietor) applicant, a partner in a partnership applicant, or a director, chief executive officer, or any other duly authorized officer of a corporate applicant.

(d) If, before the issuance of a Certificate, the applicant becomes aware of a change in any of the facts contained in the application or supporting documentation, the applicant shall, within five business days of becoming aware of the change, notify the Director, NPFC, in writing, of the change.

§ 138.65 Issuance and carriage of Certificates.

Upon the satisfactory demonstration of financial responsibility and payment of fees, the Director, NPFC, issues a Vessel Certificate of Financial Responsibility (Water Pollution), the original of which (except as provided in §§ 138.90 (a) and (b) and 138.110(f)) is to be carried aboard the vessel covered by the Certificate. The carriage of a valid Certificate or authorized copy indicates compliance with these regulations. Failure to carry a valid Certificate or authorized copy subjects the vessel to enforcement action, except where a Certificate is removed temporarily from a vessel for inspection by a United States Government official.

§ 138.70 Renewal of Certificates.

(a) An operator shall file a written application for the renewal of a Certificate at least 21 days, but not earlier than 90 days, before the expiration date of the Certificate. Except as provided in paragraph (c) of this section, a letter may be used for this purpose. The Director, NPFC, may waive this 21-day requirement.

(b) The applicant shall identify in the renewal application any changes which have occurred since the original application for a Certificate was filed, and set forth the correct information in full.

(c) An applicant that applies for the first time for a Certificate issued under this part to replace a Certificate issued under part 130 of this chapter shall submit an application form illustrated in Appendix A of this part. An applicant is not required to pay an application fee under § 138.130(c) for this first-time application.

§ 138.80 Financial responsibility, how established.

(a) *General.* In addition to submitting an application and fees, an applicant shall submit, or cause to be submitted, evidence of financial responsibility in an amount determined under § 138.80(f). A guarantor may submit directly to the Director, NPFC, the evidence of financial responsibility.

(b) *Methods.* An applicant shall establish evidence of financial responsibility by one or more of the following methods:

(1) *Insurance.* By filing with the Director, NPFC, an insurance guaranty form CG–5586, illustrated in Appendix B of this part (or, when applying for a Master Certificate, a master insurance guaranty form CG–5586–1, illustrated in Appendix C of this part), executed by not more than four insurers that have been found acceptable by and remain acceptable to the Director, NPFC, for purposes of this part.

(2) *Surety bond.* By filing with the Director, NPFC, a surety bond guaranty form CG–5586–2, illustrated in Appendix D of this part, executed by not more than four acceptable surety companies certified by the United States Department of the Treasury with respect to the issuance of Federal bonds in the maximum penal sum of each bond to be issued under this part.

(3) *Self-insurance.* By filing the financial statements specified in paragraph (b)(3)(i) of this section for the applicant's last fiscal year preceding the date of application and by demonstrating that the applicant maintains, in the United States, working capital and net worth each in amounts equal to or greater than the total applicable amount calculated in accordance with § 138.80(f), based on a vessel carrying hazardous substances as cargo. As used in this paragraph, *working capital* means the amount of current assets located in the United States, less all current liabilities anywhere in the world; and *net worth* means the amount of all assets located in the United States, less all liabilities anywhere in the world. After the initial submission, for each of the applicant's fiscal years, the applicant or certificant shall submit statements as follows:

(i) *Initial and annual submissions.* An applicant or certificant shall submit annual, current, and audited non-consolidated financial statements with the associated notes, certified by an independent Certified Public Accountant. These financial statements must be accompanied by an additional statement from the Treasurer (or equivalent official) of the applicant or certificant certifying both the amount of current assets and the amount of total assets included in the accompanying balance sheet, which are located in the United States. If the financial statements cannot be submitted in non-consolidated form, a consolidated statement may be submitted if accompanied by an additional statement prepared by the same Certified Public Accountant, certifying to the amount by which the applicant's or certificant's—

(A) Total assets, located in the United States, exceed its total (i.e., worldwide) liabilities; and

(B) Current assets, located in the United States, exceed its total (i.e., worldwide) current liabilities. This additional statement must specifically name the applicant or certificant, indicate that the amounts so certified relate only to the applicant or certificant, apart from any other affiliated entity, and identify the consolidated financial statement to which it applies.

(ii) *Semiannual submissions.* When the applicant's or certificant's demonstrated net worth is not at least ten times the total applicable amount of financial responsibility, the applicant's or certificant's Treasurer (or equivalent official) shall file affidavits covering the first six months of the applicant's or certificant's fiscal year. The affidavits must state that neither the working capital nor the net worth have, during the first six months of the current fiscal year, fallen below the applicant's or certificant's required amount of financial responsibility as determined in accordance with this part.

(iii) *Additional submissions.* An applicant or certificant—

(A) Shall, upon request of the Director, NPFC, submit additional financial information; and

(B) Who establishes financial responsibility under paragraph (b)(3) of this section shall notify the Director, NPFC, within five business days of the date the applicant or certificant knows, or has reason to believe, that the working capital or net worth has fallen below the amounts required by this part.

(iv) *Time for submissions.* All required annual financial statements must be received by the Director, NPFC, within 90 days after the close of the applicant's or certificant's fiscal year, and all affidavits required by paragraph (b)(3)(ii) of this section within 30 days after the close of the applicable six-month period. Upon written request, the Director, NPFC, may grant an extension of the time limits for filing the annual financial statements or affidavits. An applicant or certificant that requests an extension must set forth the reason for the extension and deliver the request at least 15 days before the statements or affidavits are due. The Director, NPFC, will not consider a request for an extension of more than 60 days.

(v) *Failure to submit.* The Director, NPFC, may revoke a certificate for failure of the certificant to submit any statement, data, notification, or affidavit required by paragraph (b)(3) of this section.

(vi) *Waiver of working capital.* The Director, NPFC, may waive the working capital requirement for any applicant or certificant that—

(A) Is a regulated public utility, a municipal or higher-level governmental entity, or an entity operating solely as a charitable, non-profit making organization qualifying under section 501(c) Internal Revenue Code. The applicant or certificant must demonstrate in writing that the grant of a waiver would benefit a local public interest; or

(B) Demonstrates in writing that working capital is not a significant factor in the applicant's or certificant's financial condition. An applicant's or certificant's net worth in relation to the amount of its required amount of financial responsibility and a history of stable operations are the major elements considered by the Director, NPFC.

(4) *Financial Guaranty.* By filing with the Director, NPFC, a Financial Guaranty Form CG–5586–3, illustrated in Appendix E of this part (when applying for a Master Certificate, a Master Financial Guaranty Form CG–5586–4, illustrated in Appendix F of this part), executed by not more than four financial guarantors, such as a parent or affiliate acceptable to the Coast Guard. A financial guarantor shall comply with all of the self-insurance provisions of paragraph (b)(3) of this section. In addition, a person that is a financial guarantor for more than one applicant or certificant shall have working capital and net worth no less than the aggregate total applicable amounts of financial responsibility provided as a guarantor for each applicant or certificant, plus the amount required to be demonstrated by a self-insurer under this part, if also acting as a self-insurer.

(5) *Other evidence of financial responsibility.* The Director, NPFC, will not accept a self-insurance method other than the one described in paragraph (b)(3) of this section. An applicant may in writing request the Director, NPFC, to accept a method different from one described in paragraph (b) (1), (2), or (4) of this section to demonstrate evidence of financial responsibility. An applicant submitting a request under this paragraph shall submit the request to the Director, NPFC, at least 45 days prior to the date the Certificate is required. The applicant shall describe in detail the method proposed, the reasons why the applicant does not wish to use or is unable to use one of the methods described in paragraph (b) (1), (2), or (4) of this section, and how the proposed method assures that the applicant is able to fulfill its obligation to pay costs and damages in the event of an incident or a release or threatened release. The Director, NPFC, will not accept a method under this paragraph that merely deletes or alters a provision of one of the methods described in paragraph (b) (1), (2), or (4) of this section (for example, one that alters the termination clause of the insurance guaranty form illustrated in Appendix B of this part). An applicant that makes a request under this paragraph shall provide the Director, NPFC, a proposed guaranty form that includes all the elements described in paragraphs (c) and (d) of this section. A decision of the Director, NPFC, not to accept a method requested by an applicant under this paragraph is final agency action.

(c) *Forms*—(1) *Multiple guarantors.* Four or fewer insurers (a lead underwriter is considered to be one insurer) may jointly execute an insurance guaranty form. Four or fewer sureties (including lead sureties) may

jointly execute a surety bond guaranty form. Four or fewer financial guarantors may jointly execute a financial guaranty form. If more than one insurer, surety, or financial guarantor executes the relevant form—

(i) Each is bound for the payment of sums only in accordance with the percentage of vertical participation specified on the relevant form for that insurer, surety, or financial guarantor. Participation in the form of layering (tiers, one in excess of another) is not acceptable; only vertical participation on a percentage basis is acceptable unless none of the participants specifies a percent of participation. If no percentage of participation is specified for an insurer, surety, or financial guarantor, the liability of that insurer, surety, or financial guarantor is joint and several for the total of the unspecified portions; and

(ii) The guarantors must designate a lead guarantor having authority to bind all guarantors for actions required of guarantors under the Acts, including but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims.

(2) *Operator name.* An applicant shall ensure that each form submitted under this part sets forth in full the correct legal name of the vessel operator to whom a certificate is to be issued.

(d) *Direct Action.* (1) *Acknowledgment.* Any evidence of financial responsibility submitted under this part must contain an acknowledgment by the insurer or other guarantor that an action in court by a claimant (including a claimant by right of subrogation) for costs and damage claims arising under the provisions of the Acts, may be brought directly against the insurer or other guarantor. The evidence of financial responsibility must also provide that, in the event an action is brought under the Acts directly against the insurer or other guarantor, the insurer or other guarantor may invoke only the following rights and defenses:

(i) The incident, release, or threatened release was caused by the willful misconduct of the person for whom the guaranty is provided.

(ii) Any defense that the person for whom the guaranty is provided may raise under the Acts.

(iii) A defense relating to the amount of a claim or claims, filed in any action in any court or other proceeding, that exceeds the amount of the guaranty with respect to an incident or with respect to a release or threatened release.

(iv) A defense relating to the amount of a claim or claims that exceeds the amount of the guaranty, which amount is based on the gross tonnage of the vessel as entered on the vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except when the guarantor knew or should have known that the applicable tonnage certificate was incorrect.

(v) The claim is not one made under either of the Acts.

(2) *Limitation on guarantor liability.* A guarantor that participates in any evidence of financial responsibility under this part shall be liable because of that participation, with respect to an incident or a release or threatened release, in any proceeding only for the amount and type of costs and damages specified in the evidence of financial responsibility. A guarantor shall not be considered to have consented to direct action under any law other than the Acts, or to unlimited liability under any law or in any venue, solely because of the guarantor's participation in providing any evidence of financial responsibility under this part. In the event of any finding that liability of a guarantor exceeds the amount of the guaranty provided under this part, that guaranty is considered null and void with respect to that excess.

(e) *Public access to data.* Financial data filed by an applicant, certificant, and any other person is considered public information to the extent required by the Freedom of Information Act (5 U.S.C. 552) and permitted by the Privacy Act (5 U.S.C. 552a).

(f) *Total applicable amount.* (1) The applicable amount under OPA 90 is determined as follows:

(i) For a tank vessel—

(A) Over 300 gross tons (and a vessel of 300 gross tons or less using the waters of the United States Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States, as specified in § 138.12(a)(1)) but not exceeding 3,000 gross tons, the greater of $2,000,000 or $1,200 per gross ton; and

(B) Over 3,000 gross tons, the greater of $10,000,000 or $1,200 per gross ton.

(ii) For a vessel other than a tank vessel, over 300 gross tons, the greater of $500,000 or $600 per gross ton.

(2) The applicable amount under CERCLA is determined as follows:

(i) For a vessel over 300 gross tons carrying a hazardous substance as cargo, the greater of $5,000,000 or $300 per gross ton.

(ii) For any other vessel over 300 gross tons, the greater of $500,000 or $300 per gross ton.

(3) The total applicable amount is the maximum applicable amount calculated under paragraph (f)(1) of this section plus maximum applicable amount calculated under paragraph (f)(2) of this section.

§ 138.90 Individual and Fleet Certificates.

(a) The Director, NPFC, issues an individual Certificate for each vessel listed on a completed application when the Director, NPFC, determines that acceptable evidence of financial responsibility has been provided and appropriate fees have been paid, except where a Fleet Certificate is issued under this section or where a Master Certificate is issued under § 138.110. Each Certificate of any type issued under this part is issued only in the name of a vessel operator and is effective for not more than three years from the date of issue, as indicated on each Certificate. An authorized official of the applicant may submit to the Director, NPFC, a letter requesting that additional vessels be added to a previously submitted application for an individual Certificate. The letter must set forth all information required in item 5 of the application form. The authorized official shall also submit or cause to be submitted acceptable evidence of financial responsibility, if required, and certification fees for these additional vessels. The certificant shall carry the original individual Certificate on the vessel named on the Certificate, except that a legible copy (certified as accurate by a notary public or other person authorized to take oaths in the United States) may be carried instead of the original if the vessel is an unmanned barge and does not have a document carrying device which the vessel operator believes would offer suitable protection for the original Certificate. If a notarized copy of an individual Certificate is carried aboard a barge, the Certificate shall retain the original in the United States and shall make it readily available for inspection by United States Government officials.

(b) An operator of two or more barges that are not tank vessels and that from time to time may be subject to this part (e.g., a hopper barge over 300 gross tons when carrying oily metal shavings or similar cargo), so long as the operator of such a fleet is a self-insurer or arranges with an acceptable guarantor to cover, automatically, all such barges for which the operator may from time to time be responsible, may apply to the Director, NPFC, for issuance of a Fleet Certificate. A legible copy of the Fleet Certificate, certified as accurate by a notary public or other person authorized to take oaths in the United States, must be carried on each barge when subject to this part. In addition, the certificant shall retain in the United States the original Fleet

Certificate and shall make it readily available for inspection by United States Government officials. The original Fleet Certificate, when invalid, must be completed on the reverse side and returned immediately to the Director, NPFC, and all copies must be destroyed. When the certificant ceases to be responsible for a barge covered by a Fleet Certificate, the certificant shall immediately destroy the copy of the Fleet Certificate carried aboard that barge.

(c) A person shall not make any alteration on any Certificate issued under this part or copy of that Certificate, except the notarized certifications permitted in § 138.110(f) and paragraphs (a) and (b) of this section. A Certificate or copy containing any alteration is void.

(d) If, at any time after a Certificate has been issued, a certificant becomes aware of a change in any of the facts contained in the application or supporting documentation, the certificant shall notify the Director, NPFC, in writing within 10 days of becoming aware of the change. A vessel or operator name change or change of a guarantor shall be reported as soon as possible by telefax or other electronic means to the Director, NPFC, and followed by a written notice sent within three business days.

(e) Except as provided in § 138.90(f), at the moment a certificant ceases to be the operator of a vessel for any reason, including a vessel that is scrapped or transferred to a new operator, the individual Certificate naming the vessel, and any copies of the Certificate, are void and their further use is prohibited. In that case, the certificant shall, within 10 days of the Certificate becoming void, complete the reverse side of the original individual Certificate naming the involved vessel and return the Certificate to the Director, NPFC. If the Certificate cannot be returned because it has been lost or destroyed, the certificant shall, within three business days, submit the following information in writing to the Director, NPFC:

(1) The number of the individual Certificate and the name of the vessel.

(2) The date and reason why the certificant ceased to be the operator of the vessel.

(3) The location of the vessel on the date the certificant ceased to be the operator.

(4) The name and mailing address of the person to whom the vessel was sold or transferred.

(f) In the event of the temporary transfer of custody of an unmanned barge certificated under this part, where the certificant transferring the barge continues to be liable under the Acts and continues to maintain on file with the Director, NPFC, acceptable evidence of financial responsibility with respect to the barge, the existing individual Certificate remains in effect. A temporary new individual Certificate is not required. A transferee is encouraged to require the transferring certificant to acknowledge in writing that the transferring certificant agrees to remain responsible for pollution liabilities.

§ 138.100 Non-owning operator's responsibility for identification.

(a) Each operator that is not an owner of a vessel certificated under this part, other than an unmanned barge, shall ensure that the original or a legible copy of the demise charter-party (or other written document on the owner's letterhead, signed by the vessel owner, which specifically identifies the vessel operator named on the Certificate) is maintained on board the vessel.

(b) The demise charter-party or other document required by paragraph (a) of this section must be presented, upon request, for examination to a United States Government official.

§ 138.110 Master Certificates.

(a) A contractor or other person who is responsible for a vessel in the capacity of a builder, a scrapper, or seller (including a repairer who agrees to be responsible for a vessel under its custody) may apply for a Master Certificate instead of applying for an individual Certificate for each vessel. A Master Certificate covers all of the vessels subject to this part held by the applicant solely for purposes of construction, repair, scrapping, or sale. A vessel which is being operated commercially in any business venture, including the business of building, repairing, scrapping, or selling (e.g., a slop barge used by a shipyard) cannot be covered by a Master Certificate. Any vessel for which a Certificate is required, but which is not eligible for a Master Certificate, must be covered by either an individual Certificate or a Fleet Certificate.

(b) An applicant for a Master Certificate shall submit an application form in the manner prescribed by § 138.60. An applicant shall establish evidence of financial responsibility in accordance with § 138.80, by submission, for example, of an acceptable Master Insurance Guaranty Form, Surety Bond Guaranty Form, Master Financial Guaranty Form, or acceptable self-insurance documentation. An application must be completed in full, except for Item 5. The applicant shall make the following statement in Item 5: "This is an application for a Master Certificate. The largest tank vessel to be covered by this application is [insert applicable gross tons] gross tons. The largest vessel other than a tank vessel is [insert applicable gross tons] gross tons." The dollar amount of financial responsibility evidenced by the applicant must be sufficient to meet the amount required under this part.

(c) Each Master Certificate issued by the Director, NPFC, indicates—

(1) The name of the applicant (i.e., the builder, repairer, scrapper, or seller);

(2) The date of issuance and termination, encompassing a period of not more than three years; and

(3) The gross tons of the largest tank vessel and gross tons of the largest vessel other than a tank vessel eligible for coverage by that Master Certificate. The Master Certificate does not identify the name of each vessel covered by the Certificate.

(d) Each additional vessel which does not exceed the respective tonnages indicated on the Master Certificate and which is eligible for coverage by a Master Certificate is automatically covered by that Master Certificate. Before acquiring a vessel, by any means, including conversion of an existing vessel, that would have the effect of increasing the certificant's required amount of financial responsibility (above that provided for issuance of the existing Master Certificate), the certificant shall submit to the Director, NPFC, the following:

(1) Evidence of increased financial responsibility.

(2) A new certification fee.

(3) Either a new application or a letter amending the existing application to reflect the new gross tonnage which is to be indicated on a new Master Certificate.

(e) A person to whom a Master Certificate has been issued shall submit to the Director, NPFC, every six months beginning the month after the month in which the Master Certificate is issued, a report indicating the name, previous name, type, and gross tonnage of each vessel covered by the Master Certificate during the preceding six-month reporting period and indicating which vessels, if any, are tank vessels.

(f) The certificant shall ensure that a legible copy of the Master Certificate (certified as accurate by a notary public or other person authorized to take oaths in the United States) is carried aboard each vessel covered by the Master Certificate. The certificant shall retain the original Master Certificate at a location in the United States and shall

make it readily available for inspection by United States Government officials.

(g) Upon revocation or other invalidation of the Master Certificate, the certificant shall return the original Certificate within 10 days to the Director, NPFC. The certificant shall ensure that all copies of the Certificate are destroyed.

§ 138.120 Certificates, denial or revocation.

(a) The Director, NPFC, may deny a Certificate when an applicant—

(1) Willfully or knowingly makes a false statement in connection with an application for an initial or renewal Certificate;

(2) Fails to establish acceptable evidence of financial responsibility as required by this part;

(3) Fails to pay the required application or certificate fees;

(4) Fails to comply with or respond to lawful inquiries, regulations, or orders of the Coast Guard pertaining to the activities subject to this part; or

(5) Fails to timely file required statements, data, notifications, or affidavits.

(b) The Director, NPFC, may revoke a Certificate when a certificant—

(1) Willfully or knowingly makes a false statement in connection with an application for an initial or a renewal Certificate, or in connection with any other filing required by this part;

(2) Fails to comply with or respond to lawful inquiries, regulations, or orders of the Coast Guard pertaining to the activities subject to this part; or

(3) Fails to timely file required statements, data, notifications, or affidavits.

(c) A Certificate is immediately invalid, and considered revoked, without prior notice, when the certificant—

(1) Fails to maintain acceptable evidence of financial responsibility as required by this part;

(2) Is no longer the responsible operator of the vessel in question; or

(3) Alters any Certificate or copy of a Certificate except as permitted by this part in connection with notarized certifications of copies.

(d) The Director, NPFC, advises the applicant or certificant, in writing, of the intention to deny or revoke a Certificate under paragraph (a) or (b) of this section and states the reason therefor. Written advice from the Director, NPFC, that an incomplete application will be considered withdrawn unless it is completed within a stated period, is the equivalent of a denial.

(e) If the intended revocation under paragraph (b) of this section is based on failure to timely file the required financial statements, data, notifications, or affidavits, the revocation is effective 10 days after the date of the notice of intention to revoke, unless, before revocation, the certificant demonstrates to the satisfaction of the Director, NPFC, that the required documents were timely filed or have been filed.

(f) If the intended denial is based on paragraph (a)(1) or (a)(4) of this section, or the intended revocation is based on paragraph (b)(1) or (b)(2) of this section, the applicant or certificant may request, in writing, an opportunity to present information for the purpose of showing that the applicant or certificant is in compliance with the part. The request must be received by the Director, NPFC, within 10 days after the date of the notification of intention to deny or revoke. A Certificate subject to revocation under this paragraph remains valid until the Director, NPFC, issues a written decision revoking the Certificate.

(g) An applicant or certificant whose Certificate has been denied under paragraph (a) of this section or revoked under paragraph (b) or (c) of this section may request the Director, NPFC, to reconsider the denial or revocation. The certificant shall file a request for reconsideration, in writing, to the Director, NPFC, within 20 days of the date of the denial or revocation. The certificant shall state the reasons for reconsideration. The Director, NPFC, issues a written decision on the request within 30 days of receipt, except that failure to issue a decision within 30 days shall be deemed an affirmance of a denial or revocation. Until the Director, NPFC, issues this decision, a revoked certificate remains invalid. A decision by the Director, NPFC, affirming a denial or revocation, is final agency action.

§ 138.130 Fees.

(a) The Director, NPFC, will not issue a Certificate until the fees set forth in paragraphs (c) and (d) of this section have been paid.

(b) Fees must be paid in United States currency by check, draft, or postal money order made payable to the "U.S. Coast Guard". Cash will not be accepted.

(c) Except as provided in § 138.70(c), an applicant that submits an application for the first time under this part, shall pay an initial, non-refundable application fee of $150 for each type of application (i.e., individual Certificate(s), Fleet Certificate, and Master Certificate). An applicant that submits an application for an additional (i.e., supplemental) individual Certificate, or to replace, amend or renew an existing Certificate, is not required to pay a new application fee. However, if an applicant for any reason withdraws or permits the withdrawal of an application for an individual Certificate(s) and the applicant holds no valid individual Certificate(s), in order to reapply for an individual Certificate(s) covering the same or different vessels the applicant shall submit a new application form and an application fee of $150. Similarly, an applicant shall submit a new application form and fee to obtain a new Fleet or Master Certificate following invalidation of a Fleet or Master Certificate.

(d) In addition to the application fee of $150, an applicant shall also pay a certification fee of $80 for each Certificate requested. An applicant shall submit the certification fee for each vessel listed in, or later added to, an application for an individual Certificate(s). An applicant shall submit the $80 certification fee to renew or to reissue a Certificate for any reason, including, but not limited to, a vessel or operator name change or a lost certificate.

(e) A certification fee is refunded, upon receipt of a written request, if the application is denied or withdrawn before issuance of the Certificate. Overpayments of application and certification fees are refunded, on request, only if the refund is for $50 or more. However, any overpayments not refunded will be credited, for a period of three years from the date of receipt of the monies by the Coast Guard, for the applicant's possible future use or transfer to another applicant under this part.

§ 138.140 Enforcement.

(a) Any person who fails to comply with this part with respect to evidence of financial responsibility under section 1016 of OPA 90 (33 U.S.C. 2716) is subject to a civil penalty of not more than $25,000 per day of violation, in accordance with section 4303(a) of OPA 90 (33 U.S.C. 2716a(a)). In addition, under section 4303(b) of that Act (33 U.S.C. 2716a(b)), the Attorney General may secure such relief as may be necessary to compel compliance with this part including termination of operations. Further, any person who fails to comply with this part with respect to evidence of financial responsibility under section 108(a)(1) of CERCLA (42 U.S.C. 9608(a)(1)) is subject to a Class I administrative civil penalty of not more than $25,000 per violation and a Class II administrative civil penalty or judicial penalty of $25,000

per day of violation (or $75,000 per day in the case of a second or subsequent violation), in accordance with section 109(a) of CERCLA (42 U.S.C. 9609(a)).

(b) The Secretary of the Treasury shall withhold or revoke the clearance required by section 4197 of the Revised Statutes (46 U.S.C. 91) to any vessel subject to this part that does not produce evidence of financial responsibility required by this part.

(c) The Coast Guard may deny entry to any port or place in the United States or the navigable waters of the United States, and may detain at a port or place in the United States in which it is located, any vessel subject to this part, which, upon request, does not produce evidence of financial responsibility required by this part.

(d) Any vessel subject to this part which is found in the navigable waters without the necessary evidence of financial responsibility is subject to seizure by and forfeiture to the United States.

(e) Knowingly and willfully using an invalid Certificate, or any copy thereof, is fraud.

§ 138.150 Service of process.

(a) When executing the forms required by this part, each applicant and guarantor shall designate thereon a person located in the United States as its agent for service of process for purposes of this part and for receipt of notices of designations and presentations of claims under the Acts (collectively referred to as "service of process"). Each designated agent shall acknowledge the designation in writing unless the agent has already furnished the Director, NPFC, with a "master" (i.e., blanket) concurrence showing that it has agreed in advance to act as the United States agent for service of process for the applicant, certificant, or guarantor in question.

(b) If any applicant, certificant, or guarantor desires, for any reason, to change any designated agent, the applicant, certificant, or guarantor shall notify the Director, NPFC, of the change and furnish the relevant information, including the new agent's acknowledgment in accordance with paragraph (a) of this section, if a "master" concurrence is not applicable. In the event of death, disability, or unavailability of a designated agent, the applicant, certificant, or guarantor shall designate another agent in accordance with paragraph (a) of this section within 10 days of knowledge of any such event. The applicant, certificant, or guarantor shall submit the new designation to the Director, NPFC. The Director, NPFC, may revoke a certificate if an applicant, certificant, or guarantor fails to designate and maintain an agent for service of process.

(c) If a designated agent can not be served because of death, disability, unavailability, or similar event and another agent has not been designated under this section, then service of process on the Director, NPFC, will constitute valid service of process. Service of process on the Director, NPFC, will not be effective unless the server—

(1) Sends the applicant, certificant, or guarantor (by registered mail, at its last known address on file with the Director, NPFC), a copy of each document served on the Director, NPFC; and

(2) Attests to this registered mailing, at the time process is served upon the Director, NPFC, indicating that the intent of the mailing is to effect service of process on the applicant, certificant, or guarantor and that service on the designated agent is not possible, stating the reason why.

BILLING CODE 4910-14-M

Appendix A to Part 138 - Application Form

(30 min. per respondent)
Approved OMB No. 2115-0545

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-5585

APPLICATION FOR VESSEL CERTIFICATE OF FINANCIAL RESPONSIBILITY (WATER POLLUTION)

GENERAL
(PART 1 OF 4 PARTS)

INSTRUCTIONS

Please type or print and submit this application to Director, Coast Guard National Pollution Funds Center (cv), 4200 Wilson Boulevard, Suite 1000, Arlington, VA 22203-1804. The application is in four parts: Part I - General; Part II - Evidence of Financial Responsibility; Part III - Declaration; Part IV - Concurrence of Agent. Applicants must answer all applicable questions. If a question does not apply, answer "not applicable." Incomplete applications will be returned. If additional space is required, supplemental sheets may be attached. All information must be provided in the English language.

THIS SPACE FOR USE BY USCG ONLY

1. (a) Legal name of applicant (name of responsible operator of all vessels listed in Part II):

(b) English equivalent of legal name if customarily written in language other than English:

(c) Trade name, if any:

2. Is this the first time the above-named applicant is submitting application Form CG-5585?

☐ YES ☐ NO

If "NO", what Coast Guard control number was assigned to the first application Form CG-5585?

_____

3. State applicant's legal form of organization, i.e., whether operating as an individual, corporation, partnership, association, joint stock company, business trust, or other organized group of persons (whether incorporated or not) or as a receiver, trustee, or other liquidating agent and briefly describe current business activities and length of time engaged therein.

(a) If a corporation, association, or other organization, indicate:

State in the United States, or foreign country, in which incorporated or organized:	Date of incorporation or organization:

(b) If a partnership, provide name and address of each partner:

4. Name and address of applicant's United States agent or other person authorized by applicant to accept service of process and receipt of notices of designations and presentations of claims in the United States (collectively referred to as "service of process"). (See Part IV) (U. S. applicants may appoint themselves as agent, eliminating the need to complete Part IV.)

PREVIOUS EDITION IS OBSOLETE

Reverse of CG-5585

EVIDENCE OF FINANCIAL RESPONSIBILITY (PART II OF 4 PARTS)

5. List all applicant's vessels which require Certificates of Financial Responsibility under 33 CFR 138.12. In column (f) indicate the number "1" if the operator is also the registered owner. Indicate "2" in column (f) if the operator is not the registered owner.

NAME OF VESSEL (a)	TYPE OF VESSEL *(See note below)* (b)	COUNTRY OF REGISTRY (c)	US VESSELS: Documentation Number FOREIGN VESSELS: International Maritime Organization (IMO) Number or Country of Registration Number if no IMO number has been assigned. (d)	GROSS TONS (e)	"1" or "2" (f)

NOTE: Designate the type of vessel by using a number from one of the following categories:

CARGO VESSELS, SELF-PROPELLED

Breakbulk freighter 10
Containership * 11
Roll on-roll off 12
Barge carrier *(e.g., lash, seabee)* 13
Combination breakbulk containership * 14
Combination roll on-roll off containership * 15
Combination barge carrier containership * 16
Tanker 17
Dry bulk carrier 18
All other self-propelled cargo vessels 19
Oil/bulk/ore carrier (OBO) 20

PASSENGER VESSELS

Passenger vessel * * 30
Combination passenger/cargo vessel * * 31
Ferry * * 32

RECREATIONAL VESSELS

All types of pleasure craft 40

UTILITY CRAFT

Tank barge 50
Tug and towboat 51
Barge and scow 52
Mobile offshore drilling unit 53
Fishing vessel 54
Factory vessel 55
Research vessel 56
All other utility craft *** 57

MISCELLANEOUS

Vessels not otherwise specified 60

* Containership categories should be assigned only to vessels having fixed container cells or regularly carrying multi-tier container deckloads.
** Passenger categories should be assigned only to vessels carrying more than 12 passengers for hire.
*** Includes floating cranes, dredges, docks, etc.

5. (g) If applicant indicated "2" for any vessel listed above in column 5(f), indicate:

NAME OF VESSEL	OWNER	OWNER'S MAILING ADDRESS

PART II (CONT'D)

6. Items 7 through 11 are methods of establishing financial responsibility. Check the appropriate box(es) below and answer only the item(s) which are applicable to this application:

☐ Insurance *(Answer item 7)*	☐ Surety Bond *(Answer item 8)*	☐ Financial Guaranty *(Answer item 9)*	☐ Self-Insurance *(Answer item 10)*	☐ Other evidence *(Answer item 11)*

7. Name and address of applicant's insurance guarantor *(evidence of insurance acceptable to the Director, Coast Guard National Pollution Funds Center, on Insurance Guaranty Form CG-5586 or Master Insurance Guaranty Form CG-5586-1, must be filed before a Certificate will be issued)*:

8. Total amount of surety bond guaranty.

$_____

Name and address of applicant's surety bond guarantor *(Surety Bond Guaranty Form CG-5586-2 must be filed before a Certificate will be issued)*:

9. Name and address of applicant's financial guarantor *(Financial Guaranty Form CG-5586-3, or Master Financial Guaranty Form CG-5586-4, and all required financial data must be filed before a Certificate will be issued)*:

Financial Guarantor's fiscal year:

_____ (Month) _____ (Day) to _____ (Month) _____ (Day)

10. If applicant intends to qualify as a self-insurer, attach all required financial data and indicate fiscal year:

_____ (Month) _____ (Day) to _____ (Month) _____ (Day)

11. If applicant intends to qualify through other evidence, supply all information required by 33 CFR 138.80(b)(5).

Reverse of CG-5585

DECLARATION (PART III OF 4 PARTS)

12. Applicant's mailing address (street, number, post office box, city, state or country. Indicate ZIP code if in the United States):	14. Type or print in this space the name and title of the offical who is signing this application: 15. Address of principal office in the United States *(if any)*:
13. Telefax number and/or telex number and answerback:	16. Telephone no. *(area code and number)*:

I declare that I have examined this application, including any accompanying schedules and statements, and, to the best of my knowledge and belief, it is true, correct, and complete. Furthermore, the applicant named in item 1(a) of Part I above is the responsible operator of all vessels now listed in or later added to this application. I agree that in the event the agent designated in item 4 of Part I above, or that agent's replacement as may be designated later with the approval of the Director, Coast Guard National Pollution Funds Center, cannot be served due to death, disability, unavailability, or similar event, the Director, Coast Guard National Pollution Funds Center, is considered the agent for service of process. I have signed this application in my capacity as an authorized official of the applicant, or, **if acting under a power of attorney,** pursuant to the power vested in me by the applicant **as evidenced by the attached power of attorney.**

IMPORTANT

DATE	SIGNATURE OF AUTHORIZED OFFICIAL

NOTE: Please be sure that Parts I, II, and III have been completed in full and that Part III has been dated and signed. Then proceed to Part IV, attached.

NO CERTIFICATE WILL BE ISSUED UNLESS A COMPLETED APPLICATION FORM HAS BEEN RECEIVED, PROCESSED AND APPROVED.

COMMENTS:

Any person who knowingly and willfully makes a false statement in this application is subject to the sanctions prescribed in 18 U.S.C. 1001.

CONCURRENCE OF AGENT (PART IV OF 4 PARTS)

PART IV–A must be completed by the person designated in item 4 of Part I to serve as applicant's United States agent for service of process. Part IV–B must be completed by the applicant. After Parts IV–A and IV–B are completed, Part IV should be submitted to the Director, Coast Guard National Pollution Funds Center, by the applicant or by the agent, either separately or together with Parts I, II, and III. *(Part IV need not be completed if the agent designated in item IV of Part I already has submitted to the U.S. Coast Guard an acceptable blanket Concurrence of Agent, agreeing to serve on behalf of certain applicants who designate that agent. Part IV also need not be completed if the applicant is a United States entity and has appointed itself as agent in item 4 of Part I.)*

PART IV – A

It is hereby agreed that _____

shall serve as the applicant's United States agent for service of process for purposes of 33 CFR part 138. This designation and agreement shall cease immediately in the event the applicant designates a new agent acceptable to the Director, National Pollution Funds Center.

Date: _____

Signature of person signing on behalf of agent: _____

Title: _____

Business address: _____

_____

PART IV – B *(TO BE COMPLETED BY APPLICANT)*

Name of applicant (from item I(a)): _____

Signature of authorized official signing on behalf of applicant: _____

(Person signing here should also sign in appropriate place on Part III)

Date: _____

Type or Print Name and Title: _____

Appendix B to Part 138 - Insurance Guaranty Form

Insurance Co. Form No. _____

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-5586

INSURANCE GUARANTY FURNISHED AS EVIDENCE OF FINANCIAL RESPONSIBILITY UNDER THE OIL POLLUTION ACT OF 1990 AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, AS AMENDED

The undersigned insurer or insurers ("Insurer") hereby certifies that for purposes of complying with the financial responsibility provisions of the Oil Pollution Act of 1990 ("OPA 90") and the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), (referred to collectively as the "Acts"), the vessel owners, operators, and demise charterers ("Assured" or "Assureds") of each respective vessel named in the schedules below ("covered vessel") are insured by it against liability for costs and damages to which the Assureds may be subject under either section 1002 of OPA 90, as limited by section 1004(a), or section 107(a)(1) of CERCLA, as limited by sections 107(c)(1)(A) and (B), or both, in an amount equal to the total applicable amount determined in accordance with the Applicable Amount Table below, respecting each covered vessel.

The amount and scope of insurance coverage hereby provided by the Insurer is not conditioned or dependent in any way upon any contract, agreement, or understanding between an Assured and the Insurer. Coverage hereunder is for purposes of evidencing financial responsibility under each of the Acts, separately, at the levels in effect at the time of the incident(s), release(s) or threatened release(s) giving rise to claims.

_____,
(Name of Agent)

with offices at _____

_____,

is designated as the Insurer's agent in the United States for service of process for the purposes of this guaranty and for receipt of notices of designation and presentations of claims under the Acts. If the designated agent cannot be served due to death, disability, or unavailability, the Director, Coast Guard National Pollution Funds Center ("Center"), is the agent for these purposes.

The Insurer consents to be sued directly with respect to any claim, including any claim by right of subrogation, for costs and damages arising under section 1002 of OPA 90, as limited by section 1004(a), or section 107(a)(1) of CERCLA, as limited by sections 107(c)(1)(A) and (B), or both, against any Assured. However, in any direct action under OPA 90 the Insurer's liability per vessel per incident shall not exceed the amount determined under part I of the Applicable Amount Table below and, in any direct action under CERCLA,

the Insurer's liability per vessel per release or threatened release shall not exceed the amount determined under part II of the Applicable Amount Table below. The Insurer shall be entitled to invoke only the following rights and defenses in any direct action:

(1) The incident, release, or threatened release was caused by the willful misconduct of the Assured.

(2) Any defense that the Assured may raise under the Acts.

(3) A defense relating to the amount of a claim or claims, filed in any action in any court or other proceeding, that exceeds the amount of this guaranty with respect to an incident or with respect to a release or threatened release.

(4) A defense relating to the amount of a claim or claims that exceeds the amount of this guaranty, which amount is based on the gross tonnage of a covered vessel as entered on the vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except where the guarantor knew or should have known that the applicable tonnage certificate was incorrect.

(5) The claim is not one made under either of the Acts.

No more than four Insurers (including lead underwriters) may execute this guaranty. If more than one Insurer executes this guaranty, each Insurer binds itself jointly and severally for the purpose of allowing joint action or actions against any or all of the Insurers, and for all other purposes each Insurer is bound for the payment of sums only in accordance with the percentage of participation set forth opposite the name of the Insurer below. If no percentage of participation is indicated for an Insurer or Insurers, the liability of such Insurer or Insurers shall be joint and several for the total of the unspecified portions.

_____

(Name of lead guarantor)

is designated as the lead guarantor having authority to bind all guarantors for actions of guarantors under the Acts, including but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims (inapplicable if only one Insurer executes this guaranty).

The insurance evidenced by this guaranty shall be applicable only in relation to each incident, release, and threatened release occurring on or after the effective date and before the termination date of this guaranty and shall be applicable only in relation to each incident, release and threatened release giving rise to claims under section 1002 of OPA 90 or section 107(a)(1) of CERCLA, or both, with respect to any of the covered vessels.

The effective date of this guaranty for each covered vessel is the date the vessel is named in or added to the schedules below. For each covered vessel, the termination date of this guaranty is 30 days

after the date of receipt by the Center of written notice that the Insurer has elected to terminate the insurance evidenced by this guaranty and has so notified the vessel operator identified on the schedule below.

Termination of this guaranty as to any covered vessel shall not affect the liability of the Insurer in connection with an incident, release, or threatened release occurring prior to the date the termination becomes effective.

If, during the currency of this guaranty, an Assured requests that an additional vessel be made subject to this guaranty and if the Insurer accedes to that request and so notifies the Center, then that vessel is considered included in the schedules below as a covered vessel.

Title 33 CFR part 138 governs this guaranty.

Effective date of coverage for vessels originally named in this guaranty:

_____
(day/month/year)

_____
(Name of Insurer)

_____
(Percentage of Participation)

_____
(Mailing Address)

_____

_____

By: _____
(Signature of Official Signing
On Behalf of Insurer)

_____
(Typed Name and Title of Signer)

[NOTE: For each additional Insurer, provide information in the same manner as for Insurer above.]

CG-5586

APPLICABLE AMOUNT TABLE

(I) Applicable Amount Under the Oil Pollution Act of 1990

VESSEL TYPE	VESSEL'S GROSS TONS	APPLICABLE AMOUNT
Tank vessel	Over 300 gross tons* but not to exceed 3,000 gross tons.	The greater of $2,000,000 or $1,200 per gross ton.
Tank vessel	Over 3,000 gross tons.	The greater of $10,000,000 or $1,200 per gross ton.
Vessel other than a tank vessel	Over 300 gross tons.	The greater of $500,000 or $600 per gross ton.

* This minimum gross ton limit does not apply to any vessel using the waters of the U.S. Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States (as specified in 33 CFR 138.12(a)(1)).

(II) Applicable Amount Under the Comprehensive Environmental Response, Compensation, and Liability Act, as Amended.

VESSEL TYPE	APPLICABLE AMOUNT
Vessel over 300 gross tons carrying hazardous substance as cargo	The greater of $5,000,000 or $300 per gross ton.
Any other vessel over 300 gross tons	The greater of $500,000 or $300 per gross ton.

(III) Total Applicable Amount = Maximum applicable amount calculated under (I) plus maximum applicable amount calculated under (II).

CG-5586

SCHEDULE OF VESSELS

VESSEL	GROSS TONS	ASSURED OPERATOR

Insurance Guaranty Form CG-5586 No._____

SCHEDULE OF VESSELS ADDED TO ABOVE VESSELS

VESSEL	GROSS TONS	ASSURED OPERATOR	DATE ADDED

Insurance Guaranty Form CG-5586 No._____

Appendix C to Part 138 - Master Insurance Guaranty Form

Insurance Co. Form No. _____

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-5586-1

MASTER INSURANCE GUARANTY FURNISHED AS EVIDENCE OF FINANCIAL RESPONSIBILITY FOR BUILDERS, REPAIRERS, SCRAPPERS, OR SELLERS OF VESSELS UNDER THE OIL POLLUTION ACT OF 1990 AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, AS AMENDED

The undersigned insurer or insurers ("Insurer") hereby certifies that for purposes of complying with the financial responsibility provisions of the Oil Pollution Act of 1990 ("OPA 90") and the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), (referred to collectively as the "Acts"),

_____
(Name of Assured Operator)

and any separate demise charterer and owner (collectively referred to as "Assured") of each vessel covered hereunder are insured by it against liability for costs and damages to which the Assured may be subject under either section 1002 of OPA 90, as limited by section 1004(a), or section 107(a)(1) of CERCLA, as limited by sections 107(c)(1)(A) and (B), or both, in an amount equal to the total applicable amount determined in accordance with the Applicable Amount Table below, respecting each covered vessel. This guaranty is applicable in relation to any vessel for which either or both Acts require financial responsibility and which the Assured holds for purposes of construction, repair, scrapping, or sale.

The amount and scope of insurance coverage hereby provided by the Insurer is not conditioned or dependent in any way upon any contract, agreement, or understanding between the Assured and the Insurer. Coverage hereunder is for purposes of evidencing financial responsibility under each of the Acts, separately, at the levels in effect at the time of the incident(s), release(s), or threatened release(s) giving rise to claims.

_____
(Name of Agent)

with offices at _____

_____,

is designated as the Insurer's agent in the United States for service of process for purposes of this guaranty and for receipt of notices of designation and presentations of claims under the Acts. If the designated agent cannot be served due to death,

disability, or unavailability, the Director, Coast Guard National Pollution Funds Center ("Center"), is the agent for these purposes.

The Insurer consents to be sued directly with respect to any claim, including any claim by right of subrogation, for costs and damages arising under section 1002 of OPA 90, as limited by section 1004(a), or section 107(a)(1) of CERCLA, as limited by sections 107(c)(1)(A) and (B), or both, against the Assured. However, in any direct action under OPA 90, the Insurer's liability per vessel per incident shall not exceed the amount determined under part I of the Applicable Amount Table below and, in any direct action under CERCLA, the Insurer's liability per vessel per release or threatened release shall not exceed the amount determined under part II of the Applicable Amount Table below. The Insurer shall be entitled to invoke only the following rights and defenses in any direct action:

(1) The incident, release, or threatened release was caused by the willful misconduct of the Assured.

(2) Any defense that the Assured may raise under the Acts.

(3) A defense relating to the amount of a claim or claims, filed in any action in any court or other proceeding, that exceeds the amount of this guaranty with respect to an incident or with respect to a release or threatened release.

(4) A defense relating to the amount of a claim or claims that exceeds the amount of this guaranty, which amount is based on the gross tonnage of a covered vessel as entered on the vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except where the guarantor knew or should have known that the applicable tonnage certificate was incorrect.

(5) The claim is not one made under either of the Acts.

No more than four Insurers (including lead underwriters) may execute this guaranty. If more than one Insurer executes this guaranty, each Insurer binds itself jointly and severally for the purpose of allowing joint action or actions against any or all of the Insurers, and for all other purposes each Insurer is bound for the payment of sums only in accordance with the percentage of participation set forth opposite the name of the Insurer below. If no percentage of participation is indicated for an Insurer or Insurers, the liability of such Insurer or Insurers shall be joint and several for the total of the unspecified portions.

_____

(Name of lead guarantor)

is designated as the lead guarantor having authority to bind all guarantors for actions of guarantors under the Acts, including

but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims (inapplicable if only one Insurer executes this guaranty).

The insurance evidenced by this guaranty shall be applicable only in relation to each incident, release, or threatened release occurring on or after the effective date of this guaranty and before the termination date of this guaranty and shall be applicable only in relation to each incident, release and threatened release giving rise to claims under section 1002 of OPA 90 or section 107(a)(1) of CERCLA, or both, with respect to any covered vessel. The termination date is 30 days after the date of receipt by the Center of written notice that the Insurer has elected to terminate the insurance evidenced by this guaranty and has so notified the above named Assured operator.

Termination of this guaranty does not affect the liability of the Insurer in connection with an incident, release, or threatened release occurring prior to the date the termination becomes effective.

Title 33 CFR part 138 governs this guaranty.

Effective Date: _____
(day/month/year)

_____
(Name of Insurer)

_____
(Percentage of Participation)

_____
(Mailing Address)

_____

_____

By: _____
(Signature of Official Signing
On Behalf of Insurer)

_____
(Typed Name and Title of Signer)

[NOTE: For each additional Insurer, provide information in the same manner as for Insurer above.]

Master Insurance Guaranty Form CG-5586-1 No. _____

APPLICABLE AMOUNT TABLE

(I) Applicable Amount Under the **Oil Pollution Act of 1990**

VESSEL TYPE	VESSEL'S GROSS TONS	APPLICABLE AMOUNT
Tank vessel	Over 300 gross tons* but not to exceed 3,000 gross tons.	The greater of $2,000,000 or $1,200 per gross ton.
Tank vessel	Over 3,000 gross tons.	The greater of $10,000,000 or $1,200 per gross ton.
Vessel other than a tank vessel	Over 300 gross tons.	The greater of $500,000 or $600 per gross ton.

* This minimum gross ton limit does not apply to any vessel using the waters of the U.S. Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States (as specified in 33 CFR 138.12(a)(1)).

(II) Applicable Amount Under the **Comprehensive Environmental Response, Compensation, and Liability Act**, as Amended.

VESSEL TYPE	APPLICABLE AMOUNT
Vessel over 300 gross tons carrying hazardous substance as cargo	The greater of $5,000,000 or $300 per gross ton.
Any other vessel over 300 gross tons	The greater of $500,000 or $300 per gross ton.

(III) Total Applicable Amount = Maximum applicable amount calculated under (I) plus maximum applicable amount calculated under (II).

CG-5586-1

Appendix D to Part 138 - Surety Bond Guaranty Form

SURETY CO. BOND NO. _____

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-5586-2

SURETY BOND GUARANTY FURNISHED AS EVIDENCE OF FINANCIAL RESPONSIBILITY UNDER THE OIL POLLUTION ACT OF 1990 AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, AS AMENDED

_____
(Name of Vessel Operator)

of _____,
(City, State and Country)

("Principal"), and the undersigned surety company or companies ("Surety" or "Sureties"), each authorized by the United States Department of the Treasury to do business in the United States as an approved surety, are held and firmly bound unto the United States of America and other claimants in the penal sum of

$_____

for costs and damages for which the Principal is liable under the Oil Pollution Act of 1990 ("OPA 90") and the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA") (referred to collectively as the "Acts"). "Principal" includes, in addition to the vessel operator, the owner and demise charterer of each vessel covered by this guaranty ("covered vessel").

The Principal has elected to file with the Director, Coast Guard National Pollution Funds Center ("Center") this surety bond guaranty as evidence of financial responsibility to obtain from the Coast Guard a Certificate, or Certificates, of Financial Responsibility (Water Pollution) under 33 CFR part 138, to meet any liability for costs and damages incurred in connection with a covered vessel under section 1002 of OPA 90, as limited by section 1004(a), or section 107(a)(1) of CERCLA, as limited by sections 107(c)(1)(A) and (B), or both.

The Surety agrees that the penal sum of this surety bond guaranty shall be available to pay to the United States of America or other claimants under the Acts any sum or sums for which the Principal may be held liable under the Acts. The penal sum shall be the total applicable amount, determined in accordance with the Applicable Amount Table below, for which payment we, the undersigned, bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally.

No more than four Sureties (including lead Sureties) may execute this guaranty. If there is more than one surety company executing this guaranty, we, the Sureties, bind ourselves in the penal sum jointly and severally for the purpose of allowing a joint action or actions against any or all of us, and for all

other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of the percentage of the penal sum only as is set forth opposite the name of each Surety. If no percentage is indicated for a Surety or Sureties, the liability of such Surety or Sureties shall be joint and several for the total of the unspecified portions.

_____
(Name of lead guarantor)

is designated as the lead guarantor having authority to bind all guarantors for actions of guarantors under the Acts, including but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims (inapplicable if only one Surety executes this guaranty).

Principal and the Surety or Sureties agree that if all or a portion of the penal sum is paid, the penal sum is considered reinstated to its full amount until 30 days after receipt from the Surety of written notice to the Director, NPFC, that the penal sum has not been reinstated. Principal and the Surety or Sureties further agree that if at the time of an incident, release, or threatened release a covered vessel is a tank vessel or is carrying a hazardous substance as cargo, the penal sum of this surety bond guaranty automatically increases, if necessary, to the total applicable amount appropriate for such vessel as determined in accordance with the Applicable Amount Table below. In no case, however, shall the penal sum be increased to an amount greater than the total applicable amount.

The penal sum is not further conditioned or dependent in any way upon any contract, agreement or understanding between the Principal and Surety. If the Principal is responsible for more than one vessel covered by this guaranty, then the penal sum is the total applicable amount for the vessel having the greatest liability under the Acts.

The liability of the Surety as guarantor under OPA or CERCLA, or both, shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments amount in the aggregate to the penal sum of this bond guaranty.

Any claim, including any claim by right of subrogation, against the Principal for costs and damages arising under either section 1002 of OPA 90, as limited by section 1004(a), or section 107(a)(1) of CERCLA, as limited by sections 107(c)(1)(A) and (B), or both, may be brought directly against the Surety, and the Surety consents to suit with respect to these claims. However, in any direct action under OPA 90 the Surety's liability shall not exceed the amount determined under part I of the Applicable Amount Table below and, in any direct action under CERCLA the Surety's liability shall not exceed the amount determined under part II of the Applicable Amount Table below. In the event of a direct claim, the Surety may invoke only the following rights and defenses:

(1) The incident, release, or threatened release was caused by the willful misconduct of the Principal.

(2) Any defense that the Principal may raise under the Acts.

(3) A defense relating to the amount of a claim or claims, filed in any action in any court or other proceeding, that exceeds the amount of this guaranty with respect to an incident or with respect to a release or threatened release.

(4) A defense relating to the amount of a claim or claims that exceeds the amount of this guaranty, which amount is based on the gross tonnage of the vessel as entered on the vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except where the surety knew or should have known that the applicable tonnage certificate was incorrect.

(5) The claim is not one made under either of the Acts.

This bond is effective the _____ day of _____, _____, 12:01 a.m., standard time at the address of the Surety first named herein, and shall continue in force until discharged or terminated as herein provided. The above named Vessel Operator or the Surety may at any time terminate this bond guaranty by written notice sent by certified mail to the other party, with a copy (showing that the original notice was sent to the other party by certified mail) to the Center. The termination is effective thirty (30) days after the Center receives the written notice of termination. The Surety shall not be liable hereunder in connection with an incident, release, or threatened release occurring after the termination of this bond guaranty as herein provided, but the termination shall not affect the liability of the Surety in connection with an incident, release, or threatened release occurring prior to the date the termination becomes effective. Nor shall the Surety be liable hereunder in connection with a non-covered vessel, which is a vessel specifically named in other evidence of financial responsibility, which is applicable to that vessel on behalf of the above named Vessel Operator, and which is accepted by and on file with the Center during an incident, release, or threatened release giving rise to a claim against the Surety or Principal.

The Surety designates _____
(Name of Agent)

with offices at _____

_____

as the Surety's agent in the United States for service of process for the purposes of this surety bond guaranty and for receipt of notices of designation and presentations of claims under the Acts. If the designated agent cannot be served due to death, disability, or unavailability, the Director, Coast Guard National Pollution Funds Center, is the agent for these purposes.

CG-5586-2

Title 33 CFR part 138 governs this bond guaranty.

In witness whereof, the Vessel Operator, for itself and owners and demise charterers, if any, and Surety have executed this instrument on the _____ day of _____, _____.

VESSEL OPERATOR

_____ _____
(Signature of Sole Proprietor or Partner) (Business Address)
_____

_____ _____
(Typed)

_____ _____
(Signature of Sole Proprietor or Partner) (Business Address)
_____

_____ _____
(Typed)

_____ _____
(Signature of Sole Proprietor or Partner) (Business Address)
_____

_____ _____
(Typed)

_____
(Corporation)

_____
(Business Address)

_____

(Affix Corporate Seal)

_____
(Signature)

_____
(Typed Name and Title)

CG-5586-2 SURETY BOND NO. _____

SURETY

(Name) (Percentage of Participation)

(Address) (Affix Corporate Seal)

(Signature(s))

(State of Incorporation)

(Typed Name(s) and Title(s))

[NOTE: For every co-Surety, provide information in the same manner as for Surety above.]

APPLICABLE AMOUNT TABLE

(I) Applicable Amount Under the Oil Pollution Act of 1990

VESSEL TYPE	VESSEL'S GROSS TONS	APPLICABLE AMOUNT
Tank vessel	Over 300 gross tons* but not to exceed 3,000 gross tons.	The greater of $2,000,000 or $1,200 per gross ton.
Tank vessel	Over 3,000 gross tons.	The greater of $10,000,000 or $1,200 per gross ton.
Vessel other than a tank vessel	Over 300 gross tons.	The greater of $500,000 or $600 per gross ton.

* This minimum gross ton limit does not apply to any vessel using the waters of the U.S. Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States (as specified in 33 CFR 138.12(a)(1)).

(II) Applicable Amount Under the Comprehensive Environmental Response, Compensation, and Liability Act, as Amended.

VESSEL TYPE	APPLICABLE AMOUNT
Vessel over 300 gross tons carrying hazardous substance as cargo	The greater of $5,000,000 or $300 per gross ton.
Any other vessel over 300 gross tons	The greater of $500,000 or $300 per gross ton.

(III) Total Applicable Amount = Maximum applicable amount calculated under (I) plus maximum applicable amount calculated under (II).

CG-5586-2

Appendix E to Part 138 - Financial Guaranty Form

FINANCIAL GUARANTY NO._____

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-5586-3

FINANCIAL GUARANTY FURNISHED AS EVIDENCE OF FINANCIAL RESPONSIBILITY UNDER THE OIL POLLUTION ACT OF 1990 AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, AS AMENDED

1. _____,
(Name of Vessel Operator)
the operator of each vessel named in the annexed schedules ("covered vessel"), desires to establish evidence of financial responsibility for the owner, operator, and demise charterer (referred to collectively as "Operator") of each covered vessel in accordance with the Oil Pollution Act of 1990 ("OPA 90") and the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA") (referred to collectively as the "Acts"). The undersigned Financial Guarantor or Guarantors ("Guarantor") hereby guarantees, subject to the provisions hereof, to discharge the Operator's liability with respect to each covered vessel for costs and damages under section 1002 of OPA 90, as limited by section 1004(a), or section 107(a)(1) of CERCLA, as limited by sections 107(c)(1)(B) and (A), or both, in an amount equal to the total applicable amount determined in accordance with the Applicable Amount Table below. The Operator and the Guarantor agree that if at the time of an incident, release, or threatened release a covered vessel is a tank vessel or is carrying a hazardous substance as cargo, the limit of liability of the Guarantor hereunder shall be the total applicable amount appropriate for such a vessel determined in accordance with the Applicable Amount Table below. The amount and scope of the Guarantor's liability are not further conditioned or dependent in any way upon any contract, agreement, or understanding between the Operator and the Guarantor. The Guarantor shall furnish written notice to the Director, Coast Guard National Pollution Funds Center ("Center"), of all judgments rendered and payments made by the Guarantor under this Financial Guaranty.

2. Any claim, including any claim by right of subrogation, against the Operator for costs and damages arising under either section 1002 of OPA 90 as limited by section 1004(a), or section 107(a)(1) of CERCLA as limited by sections 107(c)(1)(A) and (B), or both, may be brought directly against the Guarantor and the Guarantor consents to suit with respect to these claims. However, in any direct action under OPA 90 the Guarantor's liability per vessel per incident shall not exceed the amount determined under part I of the Applicable Amount Table below and, in any direct action under CERCLA the Guarantor's liability per vessel per release or threatened release shall not exceed the amount determined under part II of the Applicable Amount Table below. The Guarantor shall be entitled to invoke only the

following rights and defenses in any direct action:

(1) The incident, release, or threatened release was caused by the willful misconduct of the Operator.

(2) Any defense that the Operator may raise under the Acts.

(3) A defense relating to the amount of a claim or claims, filed in any action in any court or other proceeding, that exceeds the amount of this Guaranty with respect to an incident or with respect to a release or threatened release.

(4) A defense relating to the amount of a claim or claims that exceeds the amount of this Guaranty, which amount is based on the gross tonnage of the covered vessel as entered on the Vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except where the guarantor knew or should have known that the applicable certificate was incorrect.

(5) The claim is not one made under either of the Acts.

3. The Guarantor's liability under this Guaranty shall attach only in relation to each incident, release, or threatened release occurring on or after the effective date and before the termination date of this Guaranty. The effective date of this Guaranty for each covered vessel listed below is the date the vessel is named in or added to the schedules below. For each covered vessel, the termination date of the Guaranty is 30 days after the date of receipt by the Center of written notice that the Guarantor has elected to terminate this Guaranty, with respect to any of the covered vessels, and has so notified the vessel Operator identified above on the schedule below. Termination of this Guaranty as to any vessel does not affect the liability of the Guarantor in connection with an incident, release, or threatened release occurring prior to the date the termination becomes effective.

4. If, during the currency of this Guaranty, the Operator requests that a vessel become subject to this Guaranty, and if the Guarantor accedes to that request and so notifies the Center in writing, then that vessel shall be considered included in Schedule B as a covered vessel and subject to this Guaranty.

5. The Guarantor designates _____
(Name of Agent)

with offices at _____

_____

as the Guarantor's agent in the United States for service of process for purposes of this Guaranty and for receipt of notices of designation and presentations of claims under the Acts. If

the designated agent cannot be served due to death, disability or unavailability, the Director, Coast Guard National Pollution Funds Center, is the agent for service of process.

6. No more than four Financial Guarantors may execute this Guaranty. If more than one Guarantor executes this Guaranty, each Guarantor binds itself jointly and severally for the purpose of allowing a joint action or actions against any or all of the Guarantors, and for all other purposes each Guarantor binds itself, jointly and severally with the Operator, for the payment of the percentage of sums only as is set forth opposite the name of the Guarantor. If no limit is indicated for a Guarantor or Guarantors, the liability of such Guarantor or Guarantors shall be joint and several for the total of the unspecified portions.

_____
(Name of Lead Guarantor)

is designated as the lead guarantor having authority to bind all guarantors for actions of guarantors under the Acts, including but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims (inapplicable if only one Financial Guarantor executes this guaranty).

7. Title 33 CFR part 138 governs this Financial Guaranty.

EFFECTIVE DATE: _____
(Month/Day/Year and Place of Execution)

_____
(Typed Name of Guarantor)

_____
(Address of Guarantor)

_____

_____
(Percentage of Participation)

By: _____
(Signature)

_____
(Type Name and Title of Person Signing Above)

[NOTE: For each co-Guarantor, provide information in the same manner as for Guarantor above.]

CG-5586-3

APPLICABLE AMOUNT TABLE

(I) Applicable Amount Under the **Oil Pollution Act of 1990**

VESSEL TYPE	VESSEL'S GROSS TONS	APPLICABLE AMOUNT
Tank vessel	Over 300 gross tons* but not to exceed 3,000 gross tons.	The greater of $2,000,000 or $1,200 per gross ton.
Tank vessel	Over 3,000 gross tons.	The greater of $10,000,000 or $1,200 per gross ton.
Vessel other than a tank vessel	Over 300 gross tons.	The greater of $500,000 or $600 per gross ton.

* This minimum gross ton limit does not apply to any vessel using the waters of the U.S. Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States (as specified in 33 CFR 138.12(a)(1)).

(II) Applicable Amount Under the **Comprehensive Environmental Response, Compensation, and Liability Act**, as Amended.

VESSEL TYPE	APPLICABLE AMOUNT
Vessel over 300 gross tons carrying hazardous substance as cargo	The greater of $5,000,000 or $300 per gross ton.
Any other vessel over 300 gross tons	The greater of $500,000 or $300 per gross ton.

(III) Total Applicable Amount = Maximum applicable amount calculated under (I) plus maximum applicable amount calculated under (II).

CG-5586-3

SCHEDULE A

VESSELS INITIALLY LISTED

VESSEL	GROSS TONS	OPERATOR

CG-5586-3

Financial Guaranty No. _____

SCHEDULE B

VESSELS ADDED IN ACCORDANCE WITH CLAUSE 4

VESSEL	GROSS TONS	OPERATOR	DATE ADDED

Appendix F to Part 138 - Master Financial Guaranty Form

FINANCIAL GUARANTY NO._____

DEPARTMENT OF TRANSPORTATION
U.S. COAST GUARD
CG-5586-4

MASTER FINANCIAL GUARANTY FURNISHED AS EVIDENCE OF FINANCIAL RESPONSIBILITY FOR BUILDERS, REPAIRERS, SCRAPPERS OR SELLERS OF VESSELS UNDER THE OIL POLLUTION ACT OF 1990 AND THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, AS AMENDED

1. _____
(Name of Builder, Repairer, Scrapper or Seller)

is in, or from time to time may come into, possession of a vessel or vessels ("Vessel" or "Vessels") held for purposes of construction, repair, scrapping, or sale, and desires to establish evidence of financial responsibility for itself and any owner and demise charterer (collectively referred to as "Operator") of each Vessel in accordance with the Oil Pollution Act of 1990 ("OPA 90") and the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA") (referred to collectively as the "Acts"). The undersigned Financial Guarantor or Guarantors ("Guarantor") hereby guarantees, subject to the provisions hereof, to discharge the Operator's liability with respect to each Vessel for costs and damages under section 1002 of OPA 90, as limited by section 1004(a), or section 107(a)(1) of CERCLA, as limited by sections 107(c)(1)(A) and (B), or both, in an amount equal to the total applicable amount determined in accordance with the Applicable Amount Table below. The Operator and the Guarantor agree that if at the time of an incident, release, or threatened release a covered vessel is a tank vessel or is carrying a hazardous substance as cargo, the limit of liability of the Guarantor hereunder shall be the total applicable amount appropriate for such vessel determined in accordance with the Applicable Amount Table below. The amount and scope of liability are not further conditioned or dependent in any way upon any contract, agreement or understanding between the Operator and the Guarantor. The Guarantor shall furnish written notice to the Director, Coast Guard National Pollution Funds Center ("Center"), of all judgments rendered and payments made by the Guarantor under this Financial Guaranty.

2. Any claim, including any claim by right of subrogation, against the Operator for costs and damages arising under either section 1002 of OPA 90 as limited by section 1004(a), or section 107(a)(1) of CERCLA as limited by sections 107(c)(1)(A) and (B), or both, may be brought directly against the Guarantor and the Guarantor consents to suit with respect to these claims. However, in any direct action under OPA 90 the Guarantor's liability per vessel per incident shall not exceed the amount

determined under part I of the Applicable Amount Table below and, in any direct action under CERCLA the Guarantor's liability per vessel per release or threatened release shall not exceed the amount determined under part II of the Applicable Amount Table below. The Guarantor shall be entitled to invoke only the following rights and defenses in any direct action:

(1) The incident, release, or threatened release was caused by the willful misconduct of the Operator.

(2) Any defense that the Operator may raise under the Acts.

(3) A defense relating to the amount of a claim or claims, filed in any action in any court or other proceeding, that exceeds the amount of this Guaranty with respect to an incident or with respect to a release or threatened release.

(4) A defense relating to the amount of a claim or claims that exceeds the amount of this Guaranty, which amount is based on the gross tonnage of the covered vessel as entered on the Vessel's International Tonnage Certificate or other official, applicable certificate of measurement, except where the guarantor knew or should have known that the applicable tonnage certificate was incorrect.

(5) The claim is not one made under either of the Acts.

3. The Guarantor's liability under this Guaranty shall attach only in relation to each incident, release, or threatened release occurring on or after the effective date and before the termination date of this Guaranty. The termination date is 30 days after the date of receipt by the Center of written notice that the Guarantor has elected to terminate this Guaranty and has so notified the Operator. Termination of this Guaranty shall not affect the liability of the Guarantor in connection with an incident, release, or threatened release occurring prior to the date the termination becomes effective.

4. The Guarantor designates _____,
(Name of Agent)

with offices at _____

_____,

as the Guarantor's agent in the United States for service of process for purposes of this Guaranty and for receipt of notices of designation and presentations of claims under the Acts. If the designated agent cannot be served due to death, disability, or unavailability, the Director, National Pollution Funds Center, is the agent for these purposes.

5. No more than four Financial Guarantors may execute this

Guaranty. If more than one Guarantor executes this Guaranty, each Guarantor binds itself jointly and severally for the purpose of allowing a joint action or actions against any or all of the Guarantors, and for all other purposes each Guarantor binds itself, jointly and severally with the Operator, for the payment of the percentage of sums only as is set forth opposite the name of the Guarantor. If no percentage is indicated for a Guarantor or Guarantors, the liability of such Guarantor or Guarantors shall be joint and several for the total of the unspecified portions.

_____

(Name of lead guarantor)

is designated as the lead guarantor having authority to bind all guarantors for actions of guarantors under the Acts, including but not limited to receipt of designation of source, advertisement of a designation, and receipt and settlement of claims (inapplicable if only one Financial Guarantor executes this guaranty).

6. Title 33 CFR part 138 governs this Financial Guaranty.

EFFECTIVE DATE: _____

(Month/Day/Year and Place of Execution)

_____

(Typed Name of Guarantor)

_____

(Address of Guarantor)

_____

_____

(Percentage of Participation)

By: _____

(Signature)

_____

(Type Name and Title of Person Signing Above)

[NOTE: For each co-Guarantor, provide information in the same manner as for Guarantor above.]

CG-5586-4

APPLICABLE AMOUNT TABLE

(I) Applicable Amount Under the Oil Pollution Act of 1990

VESSEL TYPE	VESSEL'S GROSS TONS	APPLICABLE AMOUNT
Tank vessel	Over 300 gross tons* but not to exceed 3,000 gross tons.	The greater of $2,000,000 or $1,200 per gross ton.
Tank vessel	Over 3,000 gross tons.	The greater of $10,000,000 or $1,200 per gross ton.
Vessel other than a tank vessel	Over 300 gross tons.	The greater of $500,000 or $600 per gross ton.

* This minimum gross ton limit does not apply to any vessel using the waters of the U.S. Exclusive Economic Zone to transship or lighter oil destined for a place subject to the jurisdiction of the United States (as specified in 33 CFR 138.12(a)(1)).

(II) Applicable Amount Under the Comprehensive Environmental Response, Compensation, and Liability Act, as Amended.

VESSEL TYPE	APPLICABLE AMOUNT
Vessel over 300 gross tons carrying hazardous substance as cargo	The greater of $5,000,000 or $300 per gross ton.
Any other vessel over 300 gross tons	The greater of $500,000 or $300 per gross ton.

(III) Total Applicable Amount = Maximum applicable amount calculated under (I) plus maximum applicable amount calculated under (II).

CG-5586-4

Dated: June 27, 1994.

Robert E. Kramek,

Admiral, U.S. Coast Guard Commandant.

[FR Doc. 94–16034 Filed 6–30–94; 8:45 am]

BILLING CODE 4910–14–C

federal register

Friday
July 1, 1994

Part VIII

Department of the Interior

Fish and Wildlife Service

Department of Commerce

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Policy Statements; Notices

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to clarify the role of peer review in activities undertaken by the Services under authority of the Endangered Species Act of 1973 (Act), as amended, and associated regulations in Title 50 of the Code of Federal Regulations. This policy is intended to complement and not circumvent or supersede the current public review processes in the listing and recovery programs.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets, NW., Washington, D.C. 20240 (telephone 703/358–2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713–2322).

SUPPLEMENTARY INFORMATION:

Background

The Act requires the Services to make biological decisions based upon the best scientific and commercial data available. These decisions involve listing, reclassification, and delisting of plant and animal species, critical habitat designations, and recovery planning and implementation.

The current public review process involves the active solicitation of comments on proposed listing rules and draft recovery plans by the scientific community, State and Federal agencies, Tribal governments, and other interested parties on the general information base and the assumptions upon which the Service is basing a biological decision.

The Services also make formal solicitations of expert opinions and analyses on one or more specific questions or assumptions. This solicitation process may take place during a public comment period on any proposed rule or draft recovery plan, during the status review of a species under active consideration for listing, or at any other time deemed necessary to clarify a scientific question.

Independent peer review will be solicited on listing recommendations and draft recovery plans to ensure the best biological and commercial information is being used in the decisionmaking process, as well as to ensure that reviews by recognized experts are incorporated into the review process of rulemakings and recovery plans developed in accordance with the requirements of the Act.

Policy

A. In the following endangered species activities, it is the policy of the Services to incorporate independent peer review in listing and recovery activities, during the public comment period, in the following manner:

(1) Listing

(a) Solicit the expert opinions of three appropriate and independent specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomy, population models, and supportive biological and ecological information for species under consideration for listing;

(b) Summarize in the final decision document (rule or notice of withdrawal) the opinions of all independent peer reviewers received on the species under consideration and include all such reports, opinions, and other data in the administrative record of the final decision.

(2) Recovery

(a) Utilize the expertise of and actively solicit independent peer review to obtain all available scientific and commercial information from appropriate local, State and Federal agencies; Tribal governments; academic and scientific groups and individuals; and any other party that may possess pertinent information during the development of draft recovery plans for listed animal and plant species.

(b) Document and use, where appropriate, independent peer review to review pertinent scientific data relating to the selection or implementation of specialized recovery tasks or similar topics in draft or approved recovery plans for listed species.

(c) Summarize in the final recovery plan the opinions of all independent peer reviewers asked to respond on an issue and include the reports and opinions in the administrative record of that plan.

Independent peer reviewers should be selected from the academic and scientific community, Tribal and other native American groups, Federal and State agencies, and the private sector; those selected have demonstrated expertise and specialized knowledge related to the scientific area under consideration.

B. Special Circumstances

(1) Sometimes, specific questions are raised that may require additional review prior to a final decision, (e.g. scientific disagreement to the extent that leads the Service to make a 6-month extension of the statutory rulemaking period). The Services will determine when a special independent peer review process is necessary and will select the individuals responsible for the review. Special independent peer review should only be used when it is likely to reduce or resolve the unacceptable level of scientific uncertainty.

(2) The results of any special independent peer review process will be written, entered into the permanent administrative record of the decision, and made available for public review. If the peer review is in the context of an action for which there is a formal public comment period, e.g., a listing, designation of critical habitat, or development of a recovery plan, the public will be given an opportunity to review the report and provide comment.

Scope of Policy

The scope of this policy is Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 of the Act (16 U.S.C. 1532).

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1544).

Dated: June 27, 1994.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.

Rolland A. Schmitten,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 94–16021 Filed 6–30–94; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Information Standards Under the Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy to provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Services under the authority of the Endangered Species Act of 1973 (Act), as amended represent the best scientific and commercial data available. This policy is intended to complement the current public review processes prescribed by sections 4(b)(4)(6) and 10(a)(2)(B) of the Act and associated regulations in title 50 of the Code of Federal Regulations.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358–2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713–2322).

SUPPLEMENTARY INFORMATION:

Background

The Act requires the Secretary of the Interior and the Secretary of Commerce to determine whether any species is endangered or threatened (16 U.S.C. 1533). When making these determinations, the Secretary is directed to use the best scientific and commercial data available.

The Services receive and use information on the biology, ecology, distribution, abundance, status, and trends of species from a wide variety of sources as part of their responsibility to implement the Act. Some of this information is anecdotal, some of it is oral, and some of it is found in written documents. These documents include status surveys, biological assessments, and other unpublished material (that is, "gray literature") from State natural resource agencies and natural heritage programs, Tribal governments, other Federal agencies, consulting firms, contractors, and individuals associated with professional organizations and higher educational institutions. The Services also use published articles from juried professional journals. The reliability of the information contained in these sources can be as variable as the sources themselves. As part of their routine activities Service biologists are required to gather, review, and evaluate information from these sources prior to undertaking listing, recovery, consultation, and permitting actions.

Policy

To assure the quality of the biological, ecological, and other information that is used by the Services in their implementation of the Act, it is the policy of the Services:

a. To require biologists to evaluate all scientific and other information that will be used to (a) determine the status of candidate species; (b) support listing actions; (c) develop or implement recovery plans; (d) monitor species that have been removed from the list of threatened and endangered species; (e) to prepare biological opinions, incidental take statements, and biological assessments; and (f) issue scientific and incidental take permits. This review will be conducted to ensure that any information used by the Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.

b. To gather and impartially evaluate biological, ecological, and other information that disputes official positions, decisions, and actions proposed or taken by the Services during their implementation of the Act.

c. To require biologists to document their evaluation of information that supports or does not support a position being proposed as an official agency position on a status review, listing action, recovery plan or action, interagency consultation, or permitting action. These evaluations will rely on the best available comprehensive, technical information regarding the status and habitat requirements for a species throughout its range.

d. To the extent consistent with sections 4, 7, and 10 of the ESA, and to the extent consistent with the use of the best scientific and commercial data available, use primary and original sources of information as the basis for recommendations to (1) place a species on the list of candidate species, (2) promulgate a regulation to add a species to the list of threatened and endangered species, (3) to remove a species from the list of threatened and endangered species, (4) designate critical habitat, (5) revise the status of a species listed as threatened or endangered, (6) make a determination of whether a Federal action is likely to jeopardize a proposed, threatened, or endangered species or destroy or adversely modify critical habitat; and (7) issue a scientific or incidental take permit. These sources shall be retained as part of the administrative record supporting an action and shall be referenced in all official **Federal Register** notices and biological opinions prepared for an action.

e. To collect, evaluate, and complete all reviews of biological, ecological, and other relevant information within the schedules established by the Act, appropriate regulations, and applicable policies.

f. To conduct management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Services during their implementation of the Act.

Scope of Policy

This policy applies Servicewide for all species of fish and wildlife and plants, as defined pursuant to section 3 of the Act (16 U.S.C. 1532), and for listing, recovery, interagency consultation, management and scientific authorities, and permitting programs as outlined in, and to the extent consistent with, the provisions of sections 4(a)(c), 4(e)(g), 7(a)(c), 8A(c), and 10(a) of the Act, respectively.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1544).

Dated: June 27, 1994.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.

Rolland A. Schmitten,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 94–16022 Filed 6–30–94; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency cooperative policy to establish a procedure at the time a species is listed as threatened or endangered to identify to the maximum extent practicable those activities that would or would not constitute a violation of section 9 of the Endangered Species Act of 1973 (Act), as amended, and to increase public understanding and provide as much certainty as possible regarding the prohibitions that will apply under section 9. By identifying activities likely or not likely to result in violation of section 9 at the time a species is listed, the Services intend to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358–2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713–2322).

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the Act prohibits certain activities that directly or indirectly affect endangered species. These prohibitions apply to all individuals, organizations, and agencies subject to United States jurisdiction. Section 4(d) of the Act allows the promulgation of regulations that apply any or all of the prohibitions of section 9 to threatened species. Under the Act and regulations, it is illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import or export, ship in interstate or foreign commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered fish or wildlife species and most threatened fish and wildlife species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. With respect to endangered plants, analogous prohibitions make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, sell or offer for sale in interstate or foreign commerce, or to remove and reduce to possession any such plant species from areas under Federal jurisdiction. In addition, for endangered plants, the Act prohibits malicious damage or destruction of any such species on any area under Federal jurisdiction, and the removal, cutting, digging up, or damaging or destroying of any such species on any other area in knowing violation of any State law or regulation, or in the course of any violation of a State criminal trespass law.

Policy

It is the policy of the Services to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9. To the extent possible, activities that will be considered likely to result in violation also will be identified in as specific a manner as possible. For those activities whose likelihood of violation is uncertain, a contact will be identified in the final listing document to assist the public in determining whether a particular activity would constitute a prohibited act under section 9.

Scope of Policy

This policy applies for all species of fish and wildlife and plants, as defined under the Act, listed after October 1, 1994.

Authority

The authority for this policy is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1544).

Dated: June 27, 1994.

Mollie H. Beattie,

Director, U.S. Fish and Wildlife Service, Department of the Interior.

Dated: June 24, 1994.

Rolland A. Schmitten,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 94–16023 Filed 6–30–94; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Endangered and Threatened Wildlife and Plants: Notice of Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act

AGENCIES: Fish and Wildlife Service, Interior, and National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of policy statement.

SUMMARY: The Fish and Wildlife Service and National Marine Fisheries Service (hereafter referred to as Services) announce interagency policy relative to recovery plan participation and implementation under the Endangered Species Act of 1973, as amended. This cooperative policy is intended to minimize social and economic impacts consistent with timely recovery of species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). In addition, this policy provides a Participation Plan process, which involves all appropriate agencies and affected interests in a mutually-developed strategy to implement one or more recovery actions.

EFFECTIVE DATE: July 1, 1994.

FOR FURTHER INFORMATION CONTACT: Jamie Rappaport Clark, Chief, Division of Endangered Species, U.S. Fish and Wildlife Service, ARLSQ 452, 18th and C Streets NW., Washington, DC 20240 (telephone 703/358–2171), or Russell Bellmer, Chief, Endangered Species Division, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, Maryland 20910 (telephone 301/713–2322).