McGUIREWOODS
CONSULTING

TO: Congressional Staff

FROM: Brian Vanderbloemen
Vice President

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RE: Amending the "Oil Pollution Act of 1990": Vessel Liability Provisions

As Congress updates the Oil Pollution Act of 1990 to address liability issues associated with the removal costs and damages caused by the unprecedented disaster still unfolding in the Gulf of Mexico, it is critical that lawmakers remain focused on updating the sections of the law that address the areas of liability and financial responsibility associated with offshore facilities like the *Deepwater Horizon* mobile offshore drilling unit and take heed of the fact that the areas of OPA that deal with vessel liability and financial responsibility are a separate and distinct matter for legislative oversight.

Current Law-

The Oil Pollution Act of 1990 ("OPA") addresses an array of challenges associated with preventing, responding to and holding accountable those responsible for oil pollution in the navigable waters of the United States. The law established two distinct groups for application of its strict liability provisions: one for onshore and offshore facilities, and deepwater ports; the other for vessels. The strict liability limit for damages and removal costs for a vessel spill is based on a formula that considers the vessel tonnage and whether the vessel is a tank vessel (ship or barge) or non-tank vessel. Offshore and onshore facilities as well as deepwater ports are set at a fixed amount for damages and an unlimited amount for removal costs.

Like offshore facilities, vessels that carry oil are required to demonstrate their ability to meet their financial obligations under OPA through a variety of methods including insurance, surety bond, self-insurance, financial guaranty or other self-insurance methods approved by the National Pollution Funds Center ("NPFC").

The "Responsible Parties (owners, operators and demise charterers)" for vessels are required to obtain a "Certificate of Financial Responsibility ("COFR")" issued by the NPFC that certifies that the vessel has complied with the financial guaranty requirements of OPA. Shipowner's Insurance and Guaranty Co., Ltd ("SIGCo"), a Bermuda-based financial guarantor, is the leading provider of the required financial guaranty.

Under current law, a Responsible Party for a vessel is strictly liable for removal costs and OPA damages per incident up to a prescribed limit, based on the tonnage of the

vessel, unless it commits an egregious act specified in OPA which breaks limitation. SIGCo, the financial guarantor, is jointly and severally liable with the Responsible Party for removal costs and OPA damages but only up to the prescribed OPA limits based on tonnage. A financial guarantor's liability will under no circumstances exceed the prescribed OPA limit even if the limited liability of the responsible party is broken.

Legislative Response to Deepwater Horizon/BP Disaster:

Both Speaker Pelosi and Majority Leader Reid have called on the committees of jurisdiction to present legislation to them as they each work to craft bills that will address the disaster in the Gulf. While the OPA provisions for offshore oil production and facilities certainly warrant revisiting and updating, Congress must remain cognizant of the fact that for the past two decades, OPA provisions for vessels have worked as intended by the authors of the legislation. We respectfully request that Congress take into consideration the following:

- Inherent differences between vessels and offshore facilities under OPA are necessary.
- Unlimited or unreasonable liability requirements for vessels under OPA should be opposed.
- Attempts to replace OPA's formula for total liability of vessels based on tonnage and other factors with a "one-size-fits all" approach should be defeated.
- Overall, OPA's basic structure for addressing liability issues for vessels has been successful.

OPA rightly recognizes the inherent differences between the liability, financial responsibility and insurance issues of vessels as opposed to offshore facilities, yet some are arguing for amending OPA to reclassify vessels and offshore facilities into one category for determining liability requirements. Such a proposal misses the mark on several fronts. A vessel spill, while tragic, involves a known quantity of oil that has been released into the waters which is limited by that vessel's size. A facility disaster, like the *Deepwater Horizon* has shown us firsthand that measuring the amount of oil spilled from an offshore facility is unquantifiable. Chairman of the House Committee on Transportation and Infrastructure Jim Oberstar (D-MN) highlighted this distinction at a hearing on OPA on June 9, stating, "[T]he amount of oil carried by a vessel is known, while the amount of oil that would be released by a spill such as the Deepwater Horizon is highly speculative scientific guesswork."

When considering legislation to raise or remove the liability limits under OPA, Congress must adhere to these distinctions and resist attempts to lump vessels and offshore facilities into one group when considering whether to raise or remove liability limits found in OPA.

As it relates to revisiting the OPA provisions that deal with vessels' liability and financial responsibility, Congress should follow the lead of its predecessors who wrote the 1990 bill and keep intact the fundamental aspects of these provisions of the law. Congress should resist efforts to remove liability limits under OPA for vessels. Again, vessels

carry a limited amount of oil and should therefore be treated as such. Quoting again from Chairman Oberstar's June 9, statement, "A vessel carries a known quantity of oil or other cargo. There is a reasonable basis for estimating the worst possible case of damages that would result from release of all of the oil. This, in turn, establishes a basis for a liability cap and setting levels of required insurance."

Should the will of Congress be that liability limits are raised for vessels, we caution against raising the limits to a level that for all practical purposes makes a vessel's OPA liabilities uninsurable. There is a limited amount of reinsurance available to cover liabilities for companies engaged in providing COFR guaranties and unlike the large oil companies that own and operate drilling rigs, vessel owners for the most part do not have the financial resources to self-insure and must rely on insurance products to cover both their own insurance needs as well as the OPA requirement to maintain evidence of financial responsibility. Similarly, the OPA financial guarantors can only pool into a finite amount of reinsurance. Resetting limits to an unreasonable or unlimited level, or any obligation attributable to the financial guarantor that would break its absolute limited liability, will render the purchase of sufficient reinsurance cover impossible and as a result COFR guarantors would not be available to provide certification for ships wishing to trade to the US. Such a consequence could have a profound effect on US trade as well as on local businesses relying on such trade.

Some have been advocating for a "one-size-fits-all" approach for assessing vessel owners' liability, which essentially means that a tugboat should be insured at the same levels required of a supertanker. This approach abandons twenty years of well-documented application of the law, which takes into account both vessel type and tonnage. The vessel liability provisions in OPA represent a complex balancing act that has worked well over the past twenty years to provide appropriate levels of responsibility for a broad range of watercraft covered under the law, from fishing vessels to the supertankers responsible for most of the cargo that enters the country on a daily basis.

The "one-size-fits-all" approach would considerably tighten the reinsurance capacity in the marketplace to which a company like SIGCo would have access and could jeopardize the ability of most vessels to demonstrate the financial responsibility required by OPA to operate their ships in US waters. Without the COFR that is required under OPA, severe trade disruptions in the United States would occur since vessels would be prohibited from entering US waters to load and unload their cargo without a COFR issued by the NPFC.

The administration of OPA's liability provisions related to vessels has a proven track record of success. The sections relating to vessel liability (administered by the Coast Guard) have been used regularly, and vessel limits were updated by Congress as recently as 2006 in the Delaware River Protection Act. The vessel limits were further increased in 2009 by the Coast Guard and the current liability limits reflect an almost threefold increase in the original limits. There is no pressing need to revisit these

maritime issues at this time particularly when so many sectors of the maritime economy could be impacted.

"This material is submitted on behalf of our client "SIGCo" by McGuireWoods Consulting L.L.C., which is registered under 22 USC Chapter 11 with the Department of Justice, Washington, D.C., as an agent of SIGCo.

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