**Testimony of**
**Charles B. Anderson,**
**SKULD North America, Inc.**
**on behalf of the**
**International Group of P&I Clubs**

**June 9, 2010**

**Before the House Committee on Transportation and Infrastructure**

**Subcommittee on Coast Guard and Maritime Transportation**


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**HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

**SUBCOMMITTEE ON COAST GUARD AND MARINE TRANSPORTATION**

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**Charles B. Anderson,**
**Senior Vice President,**
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Mr. Chairman and Members of the Committee:

Good morning. My name is Charles Anderson. I am a Senior Vice President of Skuld North America, Inc., the US representative of Assuranceforeningen Skuld Gjensidig which is one of the thirteen Principal Member associations which make up the International Group of P&I Clubs. In addition to my present responsibilities as an executive with Skuld, I have practiced maritime law in private practice and am an Adjunct Professor of Admiralty Law at Columbia University Law School. I am also co-author, with Mr. Colin de la Rue, of "Shipping and the Environment" a comprehensive treatise on legal regimes governing maritime environmental issues in the United States and in the major maritime trading areas of the world.

I very much appreciate the opportunity to speak with you today on behalf of the International Group of P&I Clubs.

## A. The International Group and its Interest in the Continued Effectiveness of the Oil Pollution Act of 1990.

The International Group of P&I (Protection and Indemnity) Clubs is made up of 13 not-for-profit mutual insurance associations (Clubs) that insure third-party liabilities relating to the use and operation of ships.[1] Group Clubs between them insure over 90% of world ocean-going tonnage and over 95% of ocean-going tankers. The member Clubs compete among themselves and with the commercial insurance market, but operate a claims-sharing system for larger claims falling on them individually. The member clubs each retain the first US$8 million of exposure, above which level claims are shared across all 13 member clubs through the Group Pool. The Pool is in turn reinsured by commercial reinsurers worldwide, including reinsurers in the US market. Through these pooling and reinsurance arrangements the Group member Clubs are able to offer the highest levels and broadest range of cover for shipowners.

The recent tragic loss of the DEEPWATER HORIZON and the ongoing environmental disaster in the Gulf of Mexico have led to an appropriate and necessary interest in Congress in the legal regimes governing the prevention of and response to marine

[1] The International Group of P&I Clubs is comprised of thirteen principal underwriting associations, six affiliated associations and one reinsured subsidiary, namely ; American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Skuld, Skuld Mutual Protection and Indemnity Association (Bermuda) Ltd., Gard P&I (Bermuda) Ltd., Assuranceforeningen Gard, The Britannia Steam Ship Insurance Association Limited, The Japan Ship Owners' Mutual Protection & Indemnity Association, The London Steam-Ship Owners' Mutual Insurance Association Limited, The North of England Protecting & Indemnity Association Limited, The Shipowners' Mutual Protection & Indemnity Association (Luxembourg), The Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Limited, The Standard Steamship Owners' Protection and Indemnity Association (Europe) Ltd., The Standard Steamship Owners' Protection and Indemnity Association (London) Ltd., The Standard Steamship Owners' Protection and Indemnity Association (Asia) Ltd., The Steamship Mutual Underwriting Association (Bermuda) Limited, The Steamship Mutual Underwriting Association Ltd.,The Swedish Club, United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, United Kingdom Mutual Steam Ship Assurance Association (Europe) Ltd., and The West of England Ship Owners Mutual Insurance Association (Luxembourg).

environmental casualties from vessels as well as offshore facilities. The primary statute governing these types of incidents in the United States is the Oil Pollution Act of 1990 (OPA 90), legislation that was passed in the aftermath of the EXXON VALDEZ casualty in 1989. OPA 90 addresses, among other things, prevention, response planning, and financial and operational responsibility for response to environmental casualties and compensation for pollution damage to third parties. We have roughly twenty years of experience with OPA 90. In reviewing all vessel-source marine oil pollution events since the enactment of OPA 90, we can see that, at least in the vessel sector, the statute has provided a system that ensures sound financial responsibility, promotes effective prevention measures, prompt response, and verifiable contingency planning. OPA 90 also provides prompt relief for third party claimants, and establishes an effective coordination of efforts between industry and government. In my testimony today, I ask that you keep in clear sight these elements of OPA 90 and that your review of OPA 90 provisions be undertaken with a view toward protecting the many positive contributions of that statute. Specifically the International Group suggests that your review consider the following basic points:

- Targeted, not Sweeping, Changes to OPA 90 are Warranted: OPA 90 is a broad statute that covers a wide range of oil spills, including spills from onshore and offshore wells and facilities, ships and other watercraft of all types. Congress should avoid making hasty changes sections of OPA 90 that are not relevant to the recent DEEPWATER HORIZON casualty. The OPA 90 program for vessels has functioned well for two decades, and has been reviewed and updated by Congress and the Coast Guard recently, whereas the OPA 90 program relating to offshore drilling and productions has not. Dramatic changes could have broad and unintended impacts on a wide range of maritime-related industries.

- Vessel Liability Provisions In OPA 90 Strike a Careful Balance: The vessel liability provisions of OPA 90 represent a careful balancing (taking into account both vessel type and tonnage) to provide appropriate levels of financial responsibility for a broad range of watercraft. OPA 90 applies to virtually all vessel types, including fishing vessels, passenger ships, work boats, and cargo vessels, as well as oil tankers. OPA 90 has

ensured that the whole spectrum of vessel operators have appropriate financial security for pollution, at levels that are reasonable and insurable.

- Unlimited or Disproportionate Liability for Vessels Would Undermine Objectives and Operation of OPA 90. The International Group of P&I Clubs strongly advises against any measures to amend OPA 90 that either remove liability limits for vessels or set those limits so high as to be virtually uninsurable. Limits must also be linked to vessel type and size to avoid disproportionate exposure and insurance cost or unavailability of insurance for smaller vessels. The system adopted in OPA 90, which has worked well, relies on the immediate availability of insurance resources to support clean-up and response operations and to pay third-party claimants for damages from an oil spill with minimal delay or litigation. However, unlimited liability is uninsurable. We cannot assume that insurance will always be available regardless of the liabilities and limits imposed or market conditions.

**B. Worldwide P&I Cover for Pollution Liabilities.**

The cover provided by Group Clubs includes cover for pollution liability. The international insurance industry is one of creative approaches to risk management and compensation for loss. However adaptable this market has been and will be, its resources are finite. Club cover for pollution liabilities is limited to a maximum of US$1 billion. For vessel operations in U.S. waters, the cover limit has proven to be more than adequate adequate to meet the maximum limits under OPA 90.

While the Clubs provide cover for pollution incidents, they do not provide the Certificates of Financial Responsibility (COFRs) required by the United States under OPA 90. These COFRs are issued by a small number of dedicated providers who, in turn, rely on market reinsurance to underwrite the potential exposure arising under their certificates based on the OPA 90 statutory limits applicable to the size and type of vessel covered (which under the current limits could reach approximately $525 million for large tankers).

**C. The Oil Pollution Act of 1990**

OPA 90 was enacted on August 18, 1990 following the EXXON VALDEZ casualty. EXXON VALDEZ represented an historical turning point for domestic and international

shipping, much as the DEEPWATER HORIZON spill doubtless will be for the offshore oil industry. The VALDEZ incident made it clear that the shipping industry could not continue to do "business as usual." By enacting OPA 90, Congress established, subject to certain narrow defences and rights of limitation, the strict, joint and several liability of the responsible party for removal costs and damages (as defined in the Act) and further established the Oil Spill Liability Trust Fund (OLSTF), a separate compensation fund supported by a tax on both imported and domestic oil paid by the oil industry. In drafting OPA 90 , one of Congress' stated aims was to protect the US taxpayer from having to meet spill response costs and damages, and to ensure that those costs would be shared appropriately within the oil and shipping industries. It is important to recognise that the funding of the OSLTF is not from government/public funds, but rather from oil companies, supplemented by collections from Responsible Parties.

In enacting OPA 90, Congress consolidated a previous patchwork of laws applicable to marine oil spills, including the Clean Water Act, the Outer Continental Shelf Lands Act, the Deepwater Ports Act, and other statutes. OPA 90 was organized around a primary "polluter pays" principle, establishing that responsible parties are liable for any discharge of oil (or threat of discharge) from a vessel or facility, up to specified limits, regardless of fault.

OPA 90 broadened the scope of damages for which a responsible party is liable, including cleanup costs incurred by private persons as well as government entities. In addition, OPA 90 provided for recovery of damages for injury to natural resources, loss of personal property (and resultant economic losses), loss of subsistence use of natural resources, lost revenues resulting from destruction of property or natural resource injury, lost profits resulting from property loss or natural resource injury, and costs of providing extra public services during or after spill response.

OPA 90 limits the responsible party's defenses to acts of God, acts of war, and acts or omissions of third parties (other than those acting as agents or in connection with a contract with the responsible party). OPA 90 also sets liability limits (or caps) for cleanup costs and other damages. Based on vessel types and gross tonnage, these limits ensure that smaller vessel owners and operators do not incur disproportionate liability and insurance costs. The limitations

do not apply, however, in cases of gross negligence or wilful misconduct, violation of applicable regulatory requirements, failure to report an oil spill, failure to cooperate with responsible officials or to comply with a government removal order. These exceptions to limitation have created a strong incentive for shipowners to ensure that their vessels are operated in strict compliance with US and international laws and regulations.

As an additional layer of security, OPA 90 requires that vessels maintain evidence of financial responsibility in the form of Certificates of Financial Responsibility (COFRs), which serve as guaranties of responsible parties' capacity to pay claims. In general, all vessels over 300 gross tons are required to have a valid COFR to operate in U.S. waters. OPA 90 also requires that guarantors submit to direct actions by claimants for removal costs and damages, subject only to the defenses available to the responsible party, or the defense that the incident was caused by the gross negligence or willful misconduct of the responsible party. The P&I Clubs, however, have a longstanding policy of not providing such anticipatory guarantees because of their obligations to the totality of their members, many of whom never trade to the United States, to ensure that mutual insurance structure and reinsurance arrangements noted above are not put at risk. During the Congressional debates on OPA in 1990, the lack of any workable substitute to the International Group's insurance program threatened to cause the withdrawal of the majority of the world's commercial shipping from the US trade, with the possible disruption of the US economy. Fortunately, alternative guarantors willing to provide the necessary guarantees emerged late in the OPA 90 legislative process. It is of the utmost importance to understand, however, that the continuing ability of these guarantors to respond to claims for response costs and damages is dependent on the P&I Clubs' proven record of payment of oil spill claims in the first instance, and on the continued availability of reinsurance in the very rare case that P&I cover is not available. Any proposal to remove the existing OPA vessel limits, if enacted into law, creates a significant risk that the vast majority of reputable shipowners and operators would be compelled to withdraw from the US trade.

For large tankers serving the US Trades today (VLCCs), the maximum COFR requirement under OPA's liability formulae is approximately $525 million. But, because COFRs are issued for a multitude of vessel types, functions, and sizes, the average COFR value is

approximately $65 million under current law. Were Congress to impose a one-size-fits-all liability limit, regardless of vessel capacity or type, the exposure of COFR providers (and the ensuing costs to the industry generally) would be magnified many times for no particular reason, given claims history and the relationship between COFR and P&I coverage. This would require an enormous increase in reinsurance capacity at a time when it is questionable whether such capacity would be available.

OPA 90 also introduced comprehensive requirements for prevention and response to oil spills in the marine environment, including the phase-out of single-hull tank vessels and their replacement by modern double-hull tankers and verifiable requirements for oil spill contingency planning and response to pollution incidents. As mandated by OPA 90, the US Coast Guard carries out an intensive program of port state control inspections of all US and foreign-flag vessels calling at US ports. These inspections include verification of vessel response plans which require the identification and engagement of the resources necessary to respond to a worst-case discharge of the vessel's entire cargo in adverse weather conditions. It should be emphasized that the US Coast Guard does not rely on industry self-assessments but rather on systematic and vigorous on-site inspections by highly motivated and well-trained personnel of all vessels entering US ports to verify compliance with federal law and regulations and applicable international conventions. The statistics (which will be provided in a separate submission to the Committee) confirm that the Coast Guard port state control program, in partnership with the shipping industry, has led to a remarkable decrease in the number of ship-source oil pollution incidents both in the US and worldwide.

**D. Differences Between Offshore Drilling and Vessel Operations Warrant Different Liability Regimes**

The risk profile and exposures of offshore production and exploration activities are very different from those entailed in commercial shipping activity. Vessels have a finite cargo and fuel capacity. Vessel owners and operators are required by OPA 90 to respond to a discharge of the vessel's entire cargo in adverse weather conditions. The "worst case" discharge from a vessel is measurable and the necessary response resources must be identified and their

availability assured by contractual arrangements verified by the US Coast Guard in advance of a spill incident. (By contrast, a "worst case discharge" from an offshore facility is defined in OPA 90 as the "largest **foreseeable** discharge in adverse weather conditions [emphasis added]." As the DEEPWATER HORIZON spill has made abundantly clear, a "foreseeability" standard in relation to offshore exploration and drilling in the deep ocean environment is simply unworkable even with the best engineering and technology.)

As noted above, OPA 90 provides for strict liability of the responsible party up to specified monetary limits of liability which, in the case of commercial vessels, are tonnage-based and vary by vessel type and construction characteristics. The right to assert defenses to liability or to limit liability under OPA 90 is narrowly circumscribed. The economics of the vessel industry are also distinguishable from those of the offshore exploration and extraction industry. Vessel owners often operate at relatively low profit margins and are frequently organized in relatively small, but numerous corporate and partnership entities. Although some major oil companies still operate tank vessels, the trend in the industry has been for major oil companies to curtail or eliminate their shipping operations and to rely on smaller, independent shipowners for transport of oil and petroleum product. These smaller, independent enterprises lack the capital resources of large international oil companies.

## E. Limitation and Insurability

The right of a shipowner to limit liability is an integral part of International Conventions as well as OPA and is fundamental to the insurability of such liability. No insurer will underwrite unlimited liability. Without insurance (and adequate evidence thereof) a shipowner cannot trade. The current OPA 90 limits provide certainty of exposure for the purposes of facilitating certification of insurance or other evidence of financial responsibility for such exposure. If enacted into law, the Administration's current proposals, and in particular the strikeout of the current vessel type and tonnage based limitation system and replacement with an as yet unquantified damages limit (which is mirrored in the proposed COFR changes) would bring to an end the current system of certification of financial responsibility, with no practicable alternatives.

The effect of the proposed legislation would also eliminate the need for oil industry participation in financing of the National Pollution Fund, since responsible parties for vessels would be strictly liable for 100 per cent of all cleanup costs and damages, even where the vessel owner and operator were in full compliance with their regulatory responsibilities.

**F. The Record of OPA 90 Since its Enactment Has Been Positive.**

The offshore drilling provisions of OPA, administered by the Minerals Management Service, have been largely untested and unchanged since the mid-1990s. Reviewing and reforming those provisions and the MMS oversight and enforcement program represents a substantial legislative undertaking. However, current problems stemming from the DEEPWATER HORIZON incident are specific to the offshore exploration and production sector. The original OPA 90 limits for offshore facilities, in contrast to the provisions limiting vessel liability, have never been revised since OPA 90's enactment. To the extent amendments to OPA 90 are needed to address the type of exposure and liabilities arising out of the DEEPWATER HORIZON incident, they should be proportionate and specific to offshore activities and should not, intentionally or inadvertently, extend to the carriage of oil cargoes by vessels where the risk and exposure is different and where an effective and proven compliance system is already in place.

By contrast, the OPA 90 provisions relating to vessel liability (administered by the Coast Guard) have been tested regularly in actual spill situations and were updated by Congress as recently as 2006 in the Delaware River Protection Act. The Coast Guard adjusted the vessel limits again in 2009 to account for significant increases in inflation. The current liability limits reflect an almost threefold increase in the original limits. There is no pressing need to revisit the vessel limits at this time, particularly where many segments of the US economy could be affected. Data maintained and reported by the Oil Spill Liability Trust Fund confirm that very few incidents exceed OPA 90 limits.

Vessel liability limits under OPA 90 have been proven to be adequate and workable. In the few cases where vessel limits have been exceeded, additional resources have come from oil industry funding – not taxpayers – via the Oil Spill Liability Trust Fund (OSLTF). The OSLTF,

an industry-funded resource held in trust by the US Coast Guard, has been adequate to meet additional liabilities. The OSLTF is a key element of OPA 90's balanced and tiered response to financial responsibility, ensuring that oil industry resources are available to pay for oil spills that exceed vessel owners' individual liability thresholds.

## G. Summary and Conclusion

(1) The current OPA system for limitation of liability and the associated COFR provisions have worked well in the context of commercial vessel operations.

(2) Changing the system to impose on shipowners unlimited liability for removal costs and a single vessel limit for damages not dependent on vessel type or size will undermine the insurance and COFR arrangements on which the success of OPA 90 rests.

(3) The DEEPWATER HORIZON incident may indicate a need to review the provisions relating to liability arising from offshore exploration and production where the nature of the risk and exposure is very different from the commercial shipping sector. Addressing offshore sector issues does not require a parallel review of the commercial shipping sector where the system is robust, has been reviewed and adjusted over the years, and is effective in promoting prompt response and quick settlement of claims.

(4) Subjecting vessel operators trading to the U.S. to unlimited and uninsurable liabilities will place at risk the ability of the majority of the world's commercial fleets to trade to the United States. Such action would not be consistent with Congress' aim of having a comprehensive energy transportation system with an effective, predictable liability and response regime. The absence of limits of liability, or limits set at uninsurable levels, will exclude all participants other than a very few, very large companies that can self-insure -- or worse, undercapitalized risk-takers who are willing to gamble with financial extinction in return for short-term enrichment on inflated transport rates.

The International Group of P&I Clubs is grateful for this opportunity to comment on these important issues and stands ready to assist the Committee as it conducts its review of liability and financial responsibility provisions of the Oil Pollution Act of 1990.