9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 138

[Docket No. USCG–2019-0392]

RIN 1625-AC53

Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability—Vessels, Deepwater Ports and Onshore Facilities

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is issuing this final rule to adjust the limits of liability for vessels, deepwater ports, and onshore facilities under the Oil Pollution Act of 1990 (OPA 90), as amended, to reflect the increase in the Consumer Price Index since 2015. These regulatory inflation increases to the limits of liability are required by OPA 90 and are necessary to preserve the deterrent effect and "polluter pays" principle embodied in the Act. This update promotes the Coast Guard's missions of maritime safety and stewardship.

DATES: This final rule is effective on [INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Documents mentioned in this rule are available in our online docket at *http://www.regulations.gov* and can be viewed by entering "USCG-2019-0392" in the search field and following the website's instructions.

FOR FURTHER INFORMATION CONTACT: For information about this document call or e-mail Benjamin White, Coast Guard; telephone (202)795-6066, e-mail

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SUPPLEMENTARY INFORMATION:

Table of Contents for Preamble

I. Abbreviations

BLS	Bureau of Labor Statistics
BOEM	Bureau of Ocean Energy Management
CPI	Consumer Price Index
CPI-U	Consumer Price Index—All Urban Consumers, Not Seasonally Adjusted, U.S. City Average, All Items, 1982–84=100
DHS	Department of Homeland Security
FR	**Federal Register**
NPRM	Notice of proposed rulemaking
OMB	Office of Management and Budget
OPA 90	Oil Pollution Act of 1990
U.S.C.	United States Code
§	Section

II. Basis and Purpose, and Regulatory History

Under the Oil Pollution Act of 1990 (OPA 90) (33 U.S.C. 2701, *et seq*.), the responsible parties for any vessel (other than a public vessel) or facility from which oil is discharged, or which poses a substantial threat of discharge of oil, into or upon the navigable waters or the adjoining shorelines or the exclusive economic zone of the United States are strictly liable, jointly and severally, under 33 U.S.C. 2702 (a) and (b), for the removal costs and damages that result from such incident. Under 33 U.S.C. 2704 (a), the responsible parties' liability with respect to OPA 90 and any one incident is limited, subject to certain exceptions specified in 33 U.S.C. 2704 (c).

In the instances when a limit of liability applies, the Oil Spill Liability Trust Fund ("the Fund") is available to compensate the OPA 90 removal costs and damages incurred by the responsible parties and third-party claimants in excess of the applicable limit of liability. The statutory limits of liability for vessels and three types of facilities are set forth in OPA 90: (1) Onshore facilities, (2) deepwater ports, and (3) offshore facilities other than deepwater ports. In addition, to prevent the real value of the OPA 90 statutory limits of liability from depreciating over time as a result of inflation, and to preserve the "polluter pays" principle, OPA 90 requires that the limits of liability be adjusted "not less than every 3 years" to reflect significant increases in the Consumer Price Index (CPI).[1]

The Coast Guard is responsible for adjusting the limits of liability for vessels, deepwater ports, and onshore facilities. The Department of the Interior's Bureau of Ocean Energy Management (BOEM) is responsible for adjusting the limits of liability for offshore facilities. Regarding vessels and deepwater ports, the Coast Guard adjusted the limits of liability in 2009 (74 FR 31357)[2] and in 2015 (80 FR 72342). Regarding onshore facilities, USCG adjusted the limits of liability only once, in 2015 (80 FR 72342), after the President issued Executive Order 13638, which restated and simplified the delegations in

[1] 33 U.S.C. 2704(d)(4).
[2] The 2009 interim rule was adopted without change as a final rule in 2010 (75 FR 750).

Executive Order 12777, section 4, and vested the authority to make CPI adjustments to the onshore facility statutory limit of liability in "the Secretary of the Department in which the Coast Guard is operating." The Secretary of the Department of Homeland Security (DHS) delegated that authority to the Coast Guard. Regarding offshore facilities, BOEM published a final rule and adjusted the limits of liability for offshore facilities in 2018 (83 FR 2540) from $133,650,000 to $137,659,500.

III. Background and Justification for Final Rule

The Coast Guard is promulgating this rule pursuant to the provisions of Title I of OPA, Executive Order 12777, as amended, and Coast Guard regulations in Title 33 of the Code of Federal Regulations (CFR) part 138, subpart B—OPA 90 Limits of Liability (Vessels, Deepwater Ports and Onshore Facilities). Under 5 U.S.C. 553(b)(B), the Coast Guard has good cause for issuing this final rule without notice or comment as providing notice and comment is unnecessary. Prior notice and comment is "unnecessary" when the change is minor or merely technical. [3] Prior notice and comment is also unnecessary when there is no need to allow "affected parties an opportunity to participate in agency decision making early in the process, when the agency is more likely to consider alternative ideas,"[4] and where Congress requires an agency to perform a non-discretionary act, and where no extent of notice or commentary could have altered the obligation of the agency. In this instance, a proposed rule is unnecessary because the adjustment in the limit of liability is mandated by statute, and is therefore non-discretionary for the Coast Guard. Furthermore, the methodology for determining the amount is defined in the Coast Guard's regulations, and the regulations in 33 CFR 138.240(a) provide that inflation adjustments to the limits of

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[3] Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 751 (10th Cir. 1987).
[4] Id.

liability for vessels, deepwater ports, and onshore facilities will be implemented through final rulemaking.[5] The full legislative and regulatory history for the OPA 90 limit of liability inflation adjustments can be found in the rulemaking preamble for the last inflation adjustment in the final rule found at 80 FR 72342.

IV. Calculation for the Adjustment

The Coast Guard is issuing this final rule to update the OPA 90 limits of liability for vessels, deepwater ports, and onshore facilities, as set forth in 33 CFR part 138, subpart B, to reflect significant increases in the CPI since the limits were last adjusted. OPA 90 requires adjustments to the limits of liability not less than every 3 years to reflect significant increases in the CPI. The method for calculating these adjustments is set forth in 33 CFR 138.240.

This final rule provides these periodic inflation adjustments to the limits of liability to reflect changes in the CPI since the limits were last adjusted for inflation in 2015 (80 FR 72342). As provided in 33 CFR 138.240, we calculate limit of liability adjustments, using the Consumer Price Index—All Urban Consumers, Not Seasonally Adjusted, U.S. City Average, All Items, 1982–84=100 (CPI-U) values published by the Bureau of Labor Statistics (BLS), as follows—

1. Formula to calculate the percent change in the Annual CPI-U:

   Percent change in the Annual CPI-U = [(Annual CPI-U for current

[5] In the NPRM for the 2015 adjustment, titled Consumer Price Index Adjustments of Oil Pollution Act of 1990 Limits of Liability-Vessels, Deepwater Ports and Onshore Facilities, the Coast Guard proposed a simplified regulatory procedure for making future inflation updates to the OPA 90 limits of liability. Under that procedure in new 33 CFR 138.240(a), the Director of NPFC publishes the inflation-adjusted limits of liability in the Federal Register as final rule amendments to 33 CFR 138.230. Further, the preamble of that NPRM stated that "[b]ecause the adjustment methodology was established by the CPI-1 Rule, and the simplified [regulatory] procedure will be established by this rulemaking, publication of an NPRM would not be necessary for these future mandated inflation adjustments." 79 FR 49206 at 49211; August 19, 2014.

period − Annual CPI-U for previous period) ÷ Annual CPI-U for previous period] × 100, then rounded to one decimal place.

2. Formula to derive the new limit of liability, applying the percent change in the Annual CPI-U:

   New Limit of Liability = Previous Limit of Liability + (Previous Limit of Liability × Percent Change in CPI), then rounded to the closest $100.

For this update, we used the 2018 Annual CPI-U value of 251.107 as the "current period" value, which is the most recent Annual CPI-U published by the BLS.[6] The Coast Guard used the 2014 Annual CPI-U value of 236.736 as the "previous period" value, which was the Annual CPI-U used as the "current period" value when the limits of liability were last adjusted in 2015. Applying the formula in Item 1 above, we have determined that there was a 6.1 percent increase in the Annual CPI-U since the OPA 90 limits of liability for vessels, deepwater ports, and onshore facilities were last adjusted. Table 1 below shows the previous and new limits of liability derived by applying the percent increase using the formula in Item 2 above.

Table 1. CPI-Adjusted Limits of Liability

Source Category	Previous Limit of Liability	Percent Increase in the Annual CPI-U	New CPI-Adjusted Limit of Liability
§ 138.230(a) Vessels			
(1) The OPA 90 limits of liability for tank vessels, other than edible oil tank vessels and oil spill			

[6] https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-201905.pdf.

response vessels, are—			
(i) For a single-hull tank vessel greater than 3,000 gross tons.[7]	The greater of $3,500 per gross ton or $25,845,600	6.1%	The greater of $3,700 per gross ton or $27,422,200
(ii) For a tank vessel greater than 3,000 gross tons, other than a single-hull tank vessel.	The greater of $2,200 per gross ton or $18,796,800	6.1%	The greater of $2,300 per gross ton or $19,943,400
(iii) For a single-hull tank vessel less than or equal to 3,000 gross tons.	The greater of $3,500 per gross ton or $7,048,800	6.1%	The greater of $3,700 per gross ton or $7,478,800
(iv) For a tank vessel less than or equal to 3,000 gross tons, other than a single-hull tank vessel.	The greater of $2,200 per gross ton or $4,699,200	6.1%	The greater of $2,300 per gross ton or $4,985,900
(2) The OPA 90 limits of liability for any vessel other than a vessel listed in subparagraph (a)(1) of § 138.230, including for any edible oil tank vessel and any oil spill response, vessel, are—	The greater of $1,100 per gross ton or $939,800	6.1%	The greater of $1,200 per gross ton or $997,100
§ 138.230(b) Deepwater ports.			

[7] As of January 1, 2015, tank vessels not equipped with a double hull can no longer operate on waters subject to the jurisdiction of the United States, including the Exclusive Economic Zone, carrying oil in bulk as cargo or cargo residue; and there are no waivers or extensions of the deadline. However, OPA 90 continues to specify limits of liability for single-hull tank vessels. The Coast Guard, therefore, continues to adjust those limits of liability for inflation.

(1) The OPA 90 limit of liability for any deepwater port, including for any component pipelines, other than a deepwater port listed in subparagraph (b)(2) of § 138.230, is—	$633,850,000	6.1%	$672,514,900
(2) The OPA 90 limits of liability for deepwater ports with limits of liability established by regulation under OPA 90 (33 U.S.C. 2704(d)(2)), including for any component pipelines, are—			
(i) For the Louisiana Offshore Oil Port (LOOP).	$96,366,600	6.1%	$102,245,000
(ii) [Reserved].	N/A	N/A	N/A
§ 138.230(c) Onshore facilities			
The OPA 90 limit of liability for onshore facilities, including, but not limited to, any motor vehicle, rolling stock or onshore pipeline, is—	$633,850,000	6.1%	$672,514,900

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. A summary of our analyses based on these statutes or Executive orders follows.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process."

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. Because this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. *See* the OMB Memorandum titled "Guidance Implementing Executive Order 13771, titled 'Reducing Regulation and Controlling Regulatory Costs'" (April 5, 2017). A regulatory analysis (RA) follows.

As was the case with the BOEM rulemaking increasing the limits of liability for offshore facilities, this final rule is an update to the limit of liability for vessels, deepwater ports, and onshore facilities under OPA 90.[8] This rule does not increase the regulatory burden on regulated entities when measured in constant or real dollars. This final rule

[8] Documents from the BOEM rulemaking are available at *https://www.regulations.gov* by entering "BOEM-2017-0048" in the search field and following the website's instructions.

simply maintains the value of the limit of liability set by OPA 90 by updating the limit of liability for inflation, as required by OPA 90 in 33 U.S.C. 2704(d)(4).

Regulatory Cost

This final rule increases the limits of liability under OPA 90 for vessels, deepwater ports, and onshore facilities by 6.1 percent. The Coast Guard does not expect Certificate of Financial Responsibility guarantor insurance premiums for vessels to increase as a result of this rule. This final rule will only affect vessels, deepwater ports, and onshore facilities that have an OPA 90 incident that exceeds their existing limit of liability. The Coast Guard estimates that this final rule will affect, at most, three vessels per year. We estimate that the rule could also affect one deepwater port and one onshore facility over a 10-year period. In such a case, the maximum amount of additional liability will represent a maintenance of the value of the limits of liability set by OPA 90.

Regulatory Benefit

This rulemaking ensures that the OPA 90 limits of liability keep pace with inflation as required by OPA 90 (33 U.S.C. 2704(d)(4)). This final rule requires responsible parties to internalize inflation, thereby benefitting the public, because the appropriate amount of removal costs and damages are borne by the responsible party. The liability risk will not shift from the responsible party to the public and the Fund. This helps preserve the "polluter pays" principle as intended by Congress and preserves the Fund for its other authorized uses. Absent CPI adjustments, a responsible party gains an advantage not intended by OPA 90. Without inflation incorporated into the determination of the applicable limit of liability, the responsible party ultimately pays a reduced percentage of the total incident costs. Hence, this final rule ensures that the limits of liability are adjusted according to inflation and remain constant over time.

B. Small Entities

Under the Regulatory Flexibility Act, 5 U.S.C. 601-612, we have considered whether this rule will have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Regulatory Flexibility Act does not apply when notice and comment rulemaking is not required. This rule is not preceded by a notice of proposed rulemaking (NPRM). Therefore, it is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). Furthermore, this rulemaking is statutorily mandated. Pursuant to established procedure in 33 CFR 138.240 (a), an NPRM is unnecessary. Therefore, the Coast Guard has determined that a Regulatory Flexibility Analysis does not apply to this rulemaking.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, we offer to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small

Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

D. Collection of Information

The Paperwork Reduction Act of 1995, (44 U.S.C. 3501-3520) requires that the Coast Guard consider the impact of paperwork and other information collection burdens imposed on the public. The Coast Guard had determined that there is no new requirement for information collection associated with this final rule.

E. Federalism

A rule has implications for federalism under Executive Order 13132 (Federalism) if it has a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under Executive Order 13132 and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

This final rule makes necessary adjustments to the OPA 90 limits of liability to reflect significant increases in the CPI. Nothing in this final rule affects the preservation of State authorities under 33 U.S.C. 2718, including the authority of any State to impose additional liability or financial responsibility requirements with respect to discharges of oil within such State. Therefore, this final rule has no implications for federalism.

The Coast Guard recognizes the key role that State and local governments may have in making regulatory determinations. Additionally, for rules with federalism implications and preemptive effect, Executive Order 13132 specifically directs agencies to consult with State and local governments during the rulemaking process. The Coast Guard invites anyone who believes this rule has implications for federalism under Executive Order 13132 to contact the person listed in the **FOR FURTHER INFORMATION** section of this preamble.

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531-1538, requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100 million (adjusted for inflation) or more in any one year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

H. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988 (Civil Justice Reform), to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

K. Energy Effects

We have analyzed this final rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This final rule is categorically excluded under paragraph L53 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. Paragraph L53 pertains to congressionally mandated regulations designed to improve or protect the environment. This rule adjusts the limits of liability for vessels, deepwater ports, and onshore facilities to reflect significant increases in the CPI using the methodology established in 33 CFR 138.40(a) and mandated by statute. The Coast Guard certifies this rule will not have significant environmental impacts.

List of Subjects in 33 CFR Part 138

Hazardous materials transportation, Insurance, Oil pollution, Reporting and recordkeeping requirements, Surety bonds, Vessels, Water pollution control.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 138 as follows:

PART 138—FINANCIAL RESPONSIBILITY FOR WATER POLLUTION (VESSELS) AND OPA 90 LIMITS OF LIABILITY (VESSELS, DEEPWATER PORTS AND ONSHORE FACILITIES)

1. The authority citation for part 138 continues to read as follows:

Authority: 33 U.S.C. 2704, 2716, 2716a; 42 U.S.C. 9608, 9609; 6 U.S.C. 552; E.O. 12580, Sec. 7(b), 3 CFR, 1987 Comp., p. 193; E.O. 12777, Secs. 4 and 5, 3 CFR, 1991 Comp., p. 351, as amended by E.O. 13286, Sec. 89, 3 CFR, 2004 Comp., p. 166, and by E.O. 13638, Sec. 1, 3 CFR, 2014 Comp., p.227; Department of Homeland Security Delegation Nos. 0170.1 and 5110, Revision 01. Section 138.30 also issued under the authority of 46 U.S.C. 2103 and 14302.

Subpart B—OPA 90 Limits of Liability (Vessels, Deepwater Ports and Onshore Facilities)

§ 138.230 [Amended]

2. Amend § 138.230 as follows:

a. In paragraph (a)(1)(i), remove the text "$3,500 per gross ton or $25,845,600" and add, in its place, the text "$3,700 per gross ton or $27,422,200";

b. In paragraph (a)(1)(ii), remove the text "$2,200 per gross ton or $18,796,800" and add, in its place, the text "$2,300 per gross ton or $19,943,400";

c. In paragraph (a)(1)(iii), remove the text "$3,500 per gross ton or $7,048,800" and add, in its place, the text "$3,700 per gross ton or $7,478,800";

d. In paragraph (a)(1)(iv), remove the text "$2,200 per gross ton or $4,699,200" and add, in its place, the text "$2,300 per gross ton or $4,985,900";

e. In paragraph (a)(2), remove the text "$1,100 per gross ton or $939,800" and add, in its place, the text "$1,200 per gross ton or $997,100";

f. In paragraph (b)(1) remove the text "$633,850,000" and add, in its place, the text "$672,514,900";

g. In paragraph (b)(2)(i), remove the text "$96,366,000" and add, in its place, the text "$102,245,000"; and

h. In paragraph (c), remove the text "$633,850,000" and add, in its place, the text

"$672,514,900".

Dated: July 22, 2019.

THOMAS G. ALLAN,
Assistant Commandant for Resources,
United States Coast Guard.

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