August 1992

TO ALL MEMBERS OF CLASS 3 -
PROTECTION AND INDEMNITY

Britannia

The Britannia Steam Ship
Insurance Association Limited

United States Oil Pollution Act 1990 (OPA 90) - Update

There are four areas of OPA 90 which are of particular relevance and concern to the Association. This circular is intended to bring Members up to date with the current situation regarding **Federal** regulations in each of these areas.

Certificates of Financial Responsibility (COFR)

The period for comment on the Notice of Proposed Rulemaking (NPRM) for COFR expired in February 1992. In its comments the International Group of P&I Clubs (the Group) made it clear that the long held position of the Group, that they would not be able to provide the COFR required under OPA 90, remained unchanged. Other groups of insurers have also declined to provide COFR and it seems that few, if any, shipowners will be able to meet the "self insurance" provisions set out in the NPRM. The United States Coast Guard (USCG) are therefore aware that the regulations proposed in the NPRM are probably unworkable in practice in their present form. So far alternative arrangements have not been found.

Currently shipowners are able to trade to the USA if they have a USCG Certificate on board issued under the old Federal Clean Water Act which provides evidence of financial responsibility for up to USD 150 per gross ton in respect of Federal clean-up costs only. The Association continues to provide evidence of insurance to back these certificates and the Managers do not anticipate any change in this position in the near future.

Members are reminded that the COFR regulations apply to **all** ships (not only tankers) of 300 g.t. or more trading to the USA.

Contingency Plans

The Association issued a circular on this subject in February 1992. Since that time there have been some significant developments. First, the Managers held a **seminar** in the USA in June involving correspondents from all the major ports in the US. These correspondents were chosen with specific reference to oil spills and are not necessarily the same as those listed in our list of correspondents. A list of the selected "oil spill correspondents" is attached and it will be noted that all are lawyers. Law firms have been selected because, in the opinion of the Managers, non-lawyers are not equipped to handle the complications of a major oil spill as it is essential for the Member concerned to be legally represented as soon as possible after a spill has occurred.

[Managers' note: The current list of oil spill correspondents is found in the Association's List of Correspondents published annually.]

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Arrangements have been made for all oil spills to be referred immediately to the relevant oil spill correspondent who will in future be included and identified in the Association's list of correspondents.

In addition, the Association has made arrangements for a substantial non-maritime law firm to provide nationwide back-up to the oil spill correspondent who is unlikely to have either the necessary resources or particular expertise to deal with all the complexities introduced into handling a major oil spill by OPA 90. This back-up is particularly needed in the following areas: (i) provision of qualified personnel to augment at short notice the resources available to the local correspondent; (ii) environmental law issues; (iii) the resources and expertise to manage massive multi-state litigation; (iv) a central co-ordinating role for the production of legal documentation. The Association has taken this action in order to be able to continue using the specialist and often small firms who have served its Members so well over the years.

The second development is that the USCG have issued a **NPRM for Vessel Response Plans (VRP).** In theory the USCG are obliged under OPA 90 to issue final regulations on this subject before 18th August 1992. All **tanker owners** must submit plans which comply with the regulations before 18th February 1993 in order to continue trading to the USA. The Group will be submitting comments to the USCG on the NPRM before the deadline of 3rd August 1992. It is not clear at this stage to what extent the USCG will alter the NPRM before publishing the final regulations. Unfortunately the probability that the USCG will be unable to publish final Regulations on 18th August 1992 **does not** alter the obligation of tanker owners to file VRP before 18th February 1993. It is the Managers' view that the regulations as set out in the NPRM will prove difficult if not impossible for many shipowners to comply with. The principal reasons for this are:

1. The VRP is not confined to shipboard response. It includes detailed requirements for a full shore based clean-up plan for each geographic region where the ship may trade. It may be extremely difficult for shipowners to acquire the knowledge or information necessary to produce such plans and to enter into contracts with several tiers of authorised contractors none of which are yet known.

2. Each shipowner/operator must nominate a "qualified individual" based in the USA with unconditional written authority to implement the VRP for the owner, including unlimited financial commitment for clean-up and claims settlement. Not only does this pose the problem of finding a suitable individual willing to accept the considerable personal risk involved, but it may well be outside the power of many companies to give the required authority to any individual.

3. Each shipowner must identify the organisational structure which will be used to manage response actions including finance. It is not clear how shipowners will be able to provide such an organisation.

4. The USCG have published **and propose to enforce** the VRP regulations before the updated National Contingency Plan (NCP), Area Contingency Plans (ACP) or Facility Contingency Plans have been published despite the fact that the VRP is required to be consistent with the NCP and applicable ACP.

5. The NPRM appears to shift the responsibility for control of the response to major oil spills placed on the USCG under OPA 90 onto the owner/operator, who is unlikely to be able to fulfil that responsibility and lacks the authority to do so.

It should be noted that for both legal and practical reasons the Association will not be able to provide assistance in the production or filing of VRP; furthermore, the Association's oil spill correspondents will only be able to provide legal assistance on behalf of Members and not contingency plan or clean-up management.

The Association will provide further explanation and advice when the final Regulations are known and it is hoped to be able to give clear guidelines as to what is required of owners/operators, in particular as to the areas which fall outside the cover provided by the Association.

Current Recommendations

We recommend that **all** ships (not only tankers) should carry a sensible shipboard plan along the lines recommended by the International Tanker Owners Pollution Federation, which are consistent with the IMO guidelines. In those States with additional requirements a local agent will be able to recommend the steps which are currently necessary for compliance.

There are a number of organisations which hold themselves out as able to offer a full contingency plan service; at present we do not believe that any are capable of putting a tanker owner/operator in a position to comply with the regulations in the NPRM. In any event we recommend that no commitments or contingency plan contracts are entered into, other than those necessary at State level, until the content of the final Federal Regulations is known.

Natural Resource Damage Assessment (NRDA)

NOAA (the Federal government agent charged with primary development of the NRDA Regulations) has produced an ANPRM on this aspect of OPA 90. The approach proposed in the ANPRM applies to all oil spilt from any ship. This ANPRM has been very heavily criticised and if the final Regulations reflect the position as set forth in the ANPRM the following will result:

1. Owners/operators will be liable for the full costs of restoring damaged natural resources following an oil spill;

2. Owners/operators will also be liable for any environmental ''damage" caused by the oil spill. It is likely that this will be calculated using formulae based on the quantity of oil spilt, the type of oil spilt and the area in which it is spilt together with a priced shopping list of animals and organisms either found to have been killed or deemed to have been killed;

3. In addition a valuation will be made of "loss" before the area is "fully" restored. It is proposed to achieve this by means of a contingent valuation. Essentially this is a poll of individuals in the USA in which they are asked to put a value on the area resources in their affected and unaffected states. The difference multiplied by the number of concerned individuals in the USA represents the lost "value".

Notwithstanding that these ideas suffer from a number of legal, economic and scientific defects, the "monetary" values which result are likely to be both very large and extremely difficult to challenge, despite being of doubtful validity. This causes the Association considerable concern; the Group in its comments on the proposed NRDA regulations has expressed similar concern.

Members will be kept informed of developments in this sensitive area.

Federal Fund

Members will be aware that OPA 90 proposes the establishment of a Federal fund of up to USD 1 billion financed by a levy on oil shipped into US ports. Initial proposed regulations for the administration of this Fund have not yet been published, but the indications are that the USCG regard it at best as a means of providing short term finance only and will seek to recover in full from the owner/operator any monies disbursed from the Fund. The Fund is therefore unlikely to provide any benefit or relief to shipowners.

State Legislation

Members should also be aware that many of the coastal States have their own legislation pending, or in force, which covers the matters mentioned above. At present only Alaska has COFR and VRP regulations which appear to be in a form that many tanker owners/operators cannot comply with.

Charter Parties and Contracts

Members are reminded that they should exercise extreme caution in negotiating Charter Parties or other contracts insofar as the Member may be required to comply with any requirements for COFR or VRP for future trading to the USA.

There is currently no Federal requirement for shorebased contingency plans. Members are therefore advised to wait for the final regulations before entering into any commitments in this area.

We will keep Members informed of developments.