

## LIABILITY WITHOUT FAULT AND LIABILITY WITHOUT LIMIT

In two major respects, we feel that proposed section 19—in particular subsection (e)—is not reasonable, at least when applied to the barge and towing industry. This subsection would impose upon an owner or operator of a vessel the duty, subject only to an exception for “acts of God,” to remove oil discharged by the vessel into navigable waters. If he fails to remove the oil, the Secretary may remove the oil and charge the owner or operator the cost.

1. *Liability without fault.*—The first of AWO’s difficulties with subsection 19(e) is this: subject to the “act of God” exception, the subsection would impose liability without regard to fault on the part of the owner or operator. The logic of excusing liability in one type of instance where the owner or operator is without fault, but retaining it in others, is difficult to understand. If a vessel is wrecked by an unforeseeable storm, there will be no liability. On the other hand, if it strikes an uncharted reef, or if—to put the contrast most plainly—it is wrecked in a collision in which the other vessel was wholly at fault, it will be subject to the liability.

To hold a vessel owner liable where he is not in the least at fault, or indeed where the loss is the fault of another, is a radical departure from the most basic principles of our law, and from our basic notions of fairplay. If experience had shown that, except for acts of God, oil discharges do not occur unless the owner or operator is negligent, this feature of the provision might be justified as a rough way of putting liability where the fault is. But this is not so. Particularly in the more confined and crowded circumstances or harbors and inland waterways, experience teaches that spills are frequently the fault of other vessels, or shore-based dockworkers or stevedores, or the result of unavoidable hazards, such as uncharted shoals, or wrecks. There are hazards, not the least of which is the hazard of the negligent acts of others, that an owner or operator cannot avoid by the exercise of the highest care. To impose liability for an event that the owner or operator is powerless to foresee or prevent does not conform to one’s ordinary sense of justice.

It also seems somewhat odd that the criminal penalty, imposed by subsection (d) should require proof of willful violation of the prohibitions against discharge and that the \$10 thousand civil penalty of subsection (d) should be subject to the exceptions of emergency, unavoidable accident, collision, or stranding, but what could be a liability running to many thousands of dollars for removal of discharged oil is to be imposed without regard to fault.

The American Petroleum Institute has suggested, as a substitute for absolute liability, a rebuttable presumption of negligence in the event of an oil discharge. If this were merely to shift to the vessel owner or operator the burden of going forward with the evidence, it would be certainly more acceptable than the imposition of liability without fault. And it may be appropriate for oceangoing tankers exposed to the dangers of the high seas. Such a vessel may disappear, leaving no evidence to establish whether the sinking was due to negligence or unavoidable accident, or an act of God. There may be no witnesses to the discharge at all or only the master and crew of the