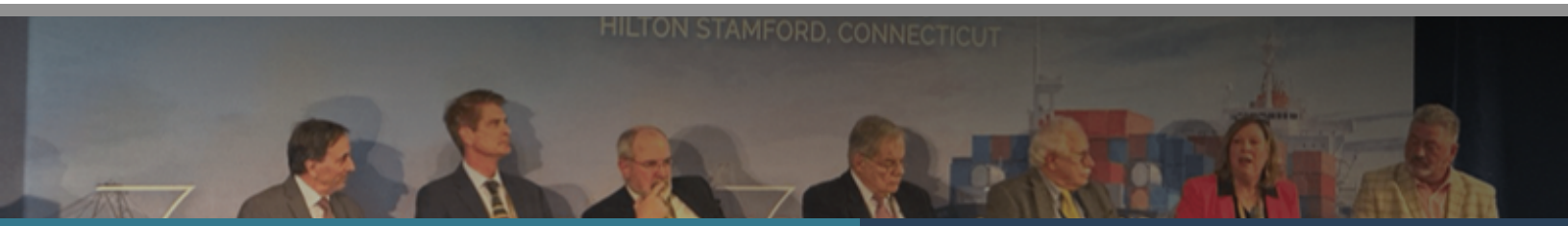
OPA 90 FORUM

NEWSLETTER
FEBRUARY 2026



Chairman's Corner

Welcome to the OPA 90 Forum Newsletter!

FEBRUARY 2026

Greetings!

This edition of the OPA 90 Forum Newsletter reflects the continued evolution - and growing complexity of our regulatory, operational, and risk landscape. The articles featured here each address different facets of that challenge; from emerging fuels and cybersecurity to landmark legal decisions and hard-earned lessons from marine casualties.

We begin with "Lessons from the Grande Costa d'Avorio Casualty", which examines the U.S. Coast Guard's findings following the tragic vessel fire at the Port of Newark. The article underscores a critical takeaway for our community: shore-based firefighters are indispensable partners in port response, but shipboard fires demand early activation of Vessel Response Plans and timely integration of Salvage and Marine Firefighting (SMFF) expertise. The loss of two firefighters is a sobering reminder that marine-specific risks require marine-specific knowledge and coordination.

Legal clarity - or the lack of it is the focus of Alfred Kuffler's two-part analysis of the M/V Margara. In Part 1, the First Circuit's decision reshapes how "substantial threat of discharge" must be proven when OPA 90 damages are at issue, with significant implications for responsible parties, SMFF activation, and access to the Oil Spill Liability Trust Fund. Part 2 continues the voyage, navigating the unresolved and consequential question of what it means for natural resources to be "belonging to, managed by, or controlled by" the United States. Together, these articles highlight how judicial interpretation continues to define the contours of OPA 90 liability. EPA's Hazardous Substance Facility Response Plan (FRP) rule remains a source of uncertainty. John Carroll's article provides practical guidance on what facilities should -- and should not be doing now as EPA considers extensions and potential revisions. The advice is pragmatic: understand applicability, assess inventories, and be prepared, but avoid rushing ahead of still-developing guidance.

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Finally, our Alternative Fuel discussion continues. Our technical committee's Nuclear use article explores nuclear energy's reemergence in the maritime space. From naval propulsion to modern Small Modular Reactors, the article offers a timely look at how decarbonization ambitions may intersect with regulatory, safety, and response planning realities.

Taken together, these articles reinforce a central theme: preparedness under OPA 90 requires continuous learning, early engagement, and thoughtful integration of expertise across disciplines. That is the dialogue the OPA 90 Forum exists to support.

Best regards,
Doug Martin

Lessons from the Grande Costa d'Avorio Casualty: Shore-Based Firefighters and SMFF Integration under OPA 90

On July 5, 2023, a fire broke out aboard the roll-on/roll-off vessel M/V Grande Costa d'Avorio while alongside at the Port of Newark, New Jersey. The fire originated on a vehicle deck and rapidly escalated within the vessel's enclosed spaces during cargo operations. Shore-based municipal firefighters responded and boarded the vessel to conduct interior firefighting operations. During these efforts, firefighters entered the car decks to directly attack the fire. As conditions deteriorated, the result was the deaths of two firefighters and multiple injuries. The incident prompted a comprehensive U.S. Coast Guard (USCG) investigation into both the casualty and the emergency response.

A central issue identified was the delay in activating the vessel's OPA 90–contracted Salvage and Marine Firefighting (SMFF) provider. Although an approved SMFF resource was identified in the Vessel Response Plan (VRP), early response actions relied primarily on shore-based municipal firefighting resources.

The Coast Guard found that shore-based firefighters, while highly skilled in land-based structural firefighting, were exposed to unquantified and escalating marine-specific hazards. These included deteriorating structural integrity, increasing free-surface effects from firefighting water, and the absence of early, informed vessel stability assessments. The delayed integration of SMFF expertise limited the ability to fully evaluate vessel survivability and responder risk as conditions worsened.

Importantly, the USCG did not characterize shore-based firefighters as inappropriate responders. Rather, the investigation emphasized that shipboard firefighting is fundamentally different from shoreside operations and requires early incorporation of specialized marine firefighting and salvage expertise. The Coast Guard recommended clearer role definition, improved coordination, and timely SMFF activation to ensure that shore-based resources operate within a unified command structure informed by marine-specific risk analysis.

From an OPA 90 Forum perspective, the lessons from this casualty are clear. Shore-based firefighters remain an essential component of port emergency response, but they should not be expected to operate independently of SMFF professionals. Vessel fires demand early VRP activation, prompt engagement of contracted SMFF resources, and prior familiarity between municipal responders and marine firefighting experts. Joint planning and integration are not optional—they are critical to firefighter safety, effective casualty management, and fulfillment of OPA 90's intent to place specialized marine expertise at the forefront of vessel emergency response in U.S. waters.

The M/V Margara Makes Legal History as She Comes Free of the Strand - Part 1

(2025 WL 2985314 (1st Cir. 2025)

Alfred J. Kuffler[1]

The double-hull loaded tanker Margara began her legal voyage when she grounded on a coral reef about three miles off the Puerto Rican coast. No oil was spilled, but the grounding damaged the reef.

Recently, the federal First Circuit Court of Appeals rendered the first appellate decision holding that a party trying to recover "damages" under OPA 90 must prove the statutory condition precedent to liability, i.e. that the incident created a "substantial threat of a discharge" by a preponderance of the evidence and cannot rely on the Federal On-Scene Coordinator's (FOSC's) administrative decision that such circumstances existed. The court also outlined the proof required to demonstrate that the damaged natural resources were those "belonging to, managed by, controlled by, or appertaining to the United States" an element necessary to establish the federal government's right to bring the claim.

The voyage proceeded arcanely between the Scylla and Charybdis set by the rules of statutory construction.

Part 1 will discuss "substantial threat" and Part 2 "belonging to, managed by….".

Substantial Threat

At the outset, the determination of whether a "substantial threat" exists has profound consequences. Such a finding activates the entire OPA 90 apparatus, including the financial guarantees of both the Certificate of Financial Responsibility (COFR), the Salvage and Marine Firefighting (SMFF) regulations, availability of the Oil Spill Liability Trust Fund to pay claims, and recovery of economic losses, including lost profits by parties who have also not suffered physical injury to their property. (think ships delayed when a waterway is closed)

The District Court upheld the FOSC's finding of a "substantial threat," stating that the administrative decision was reversible only if the vessel proved that the Coast Guard's ruling which made the spiller liable for the natural resource damages met the Administrative Procedure Act's standard of "arbitrary and capricious." This rule means that the finding finds no support in the facts or on the law. The vessel argued that because the government based its claim on the section in OPA 90 making the spiller liable for such damages, the FOSC's ruling was irrelevant; rather, the standard was a "preponderance of evidence," meaning that the threat was "more probable than not." A much higher bar for the government to surmount and a far easier burden for the vessel.

The appeals court agreed with the vessel, reversed the trial court and sent the case back for a preponderance of the evidence determination. The court reasoned that although Congress had delegated to the FOSC the authority to effect removal of a discharge of oil and prevent or mitigate a substantial threat, this delegation did not include the right to make such a decision covering liability for resource damages.

What is the prospective effect of this decision? OPA 90 defines separately "removal costs" and "damages" for which the designated Responsible Party is liable. It is the difference in the way the statute treats the FOSC's authority that produced the favorable result for the vessel. Going forward, then, when OPA damages are at issue, the Margara decision should set the standard of proof. But when the government seeks to recover removal costs, the Administrative Procedures Act "arbitrary and capricious" rule will likely apply.

See Part 2 of Margara analysis (next) re "belonging to, managed by".

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The M/V Margara Makes Legal History as She Comes Free of the Strand - Part 2

2025 WL 2985314 (1st Cir 2025)

Alfred J. Kuffler[1]

The double-hull loaded tanker Margara began her legal voyage when she grounded on a coral reef about three miles off the Puerto Rican coast. No oil was spilled, but the grounding damaged the reef.

Part 1 discussed "substantial threat," and Part 2 will cover "belonging to, managed by…" language continuing exploration of that lawyer's delight-threading the narrowest of channels in the effort to define what Congress intended by the wording it chose.

"**Belonging to"**

The court first rejected the vessel's argument that because the damaged reef was within the Puerto Rican waters, the Commonwealth, under an agreement with the federal government had exclusive "control" of these resources. Absent similar agreements with other states, this holding should have no effect beyond matters involving Puerto Rico.

However, the court then focused on the government's argument that OPA 90's language presented alternative theories regarding the entitlement to bring the claim, thus allowing the debate to consider "management and control" as the critical wording. The court rejected the government's first argument that because NOAA (National Oceanic Atmospheric Administration) is the federal resource trustee, appointed under OPA 90, it had shown the USA's "management and control."

The government then argued that a myriad of statutes gave it regulatory authority, thus satisfying OPA 90's requirement for establishing entitlement to bring the claim. But the court narrowly rejected this position based on the scanty trial court record, distinguishing between regulatory authority and exercising actual control. While recognizing that the cited statutes imposed on the government certain duties, the court found the evidentiary record devoid of any evidence or argument addressing the performance of those duties.

Importantly, while pointing out the foregoing shortcomings in the record, the court did not define "management and control," leaving this threshold question to the lower court, and thus a possible return voyage to the appellate court.

This decision, leaving the definition of "management and control" open, poses risks all around. For the industry, a broad definition with minimal proof required will allow the government to robustly pursue these claims. For the government, a requirement that substantial proof must be offered will make it more difficult to pursue these claims. Perhaps, because of the risks, particularly to the government, as is the result in many such instances, the court will simply leave the definition to a case-by-case presentation of evidence, weighing in each instance whether the proof is sufficient.

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Navigating EPA's Hazardous Substance FRP Rule: Where Things Stand and What Facilities Should Do Now

By John K. Carroll III, Managing Director – Compliance Services, Witt O'Brien's

The Environmental Protection Agency's (EPA) Clean Water Act (CWA) Hazardous Substance (HS) Facility Response Plan (FRP) Worst Case Discharge (WCD) rule remains one of the most challenging regulatory developments for facilities subject to the Oil Pollution Act of 1990 (OPA90). Since the rule was finalized, regulated entities have struggled with uncertainty around applicability, compliance expectations, and practical implementation.

Having worked closely on this issue since the proposed rule stage—including presenting alongside EPA and contributing to the American Petroleum Institute's formal comments— it is clear that the rule's core challenges persist. These include limited written guidance, requirements that appear misaligned with EPA's stated intent, and the lack of established tools for required modeling and calculations. As a result, many facilities remain unsure how to proceed.

There are, however, signs of potential relief. According to an American Public Power Association article published in June 2025, the EPA is expected to issue a notice extending the current compliance deadline—possibly by up to 5 years. This extension may be issued through an Interim Final Rule, becoming effective immediately upon publication. If the full extension is granted, the current compliance deadline of June 1, 2027, could move to 2032.

EPA is also expected to release an Advance Notice of Proposed Rulemaking to solicit stakeholder feedback on possible revisions. Topics under consideration include clarifying key definitions, increasing the applicability threshold from 1,000 to 10,000 times the reportable quantity, refining the one-half-mile screening criterion, and adjusting worst-case discharge modeling requirements.

Additional revisions under review may include changes to the substantial harm certification, removal of references to environmental justice and climate change, updates to exemptions for certain oil-regulated substances and wastewater, and clarification regarding the treatment of chemical intermediates and byproducts. Broader FRP planning requirements may also be revisited.

As of late November 2025, these actions were still pending approval from the Office of Management and Budget, but further developments are expected in the near term.

With so much still unresolved, what should companies be doing now? At this point, the best advice this practitioner can offer is:

1. Run a query of your safety data sheets (SDSs) against the list of 296 regulated hazardous substances.

2. For any SDSs that contain regulated substances, determine the aggregate quantity stored onsite and calculate whether the amount exceeds the applicable RQ multiplier.

3. Only after completing that analysis should you review the exceptions and exemptions under §118.8 to determine whether any substances or activities may be excluded.

4. Once you have finalized what is regulated and what is not, hold steady until early 2026, when the EPA is expected to provide additional guidance on compliance. The EPA is still developing several significant components of the rule, including guidance on the planning model, updates to the National Preparedness for Response Exercise Program (PREP), identification of Spill Response Organizations (SROs), and other critical implementation elements. Ideally, these areas will be more transparent by mid-2026.

Alternative Fuel of the Quarter: Nuclear Energy

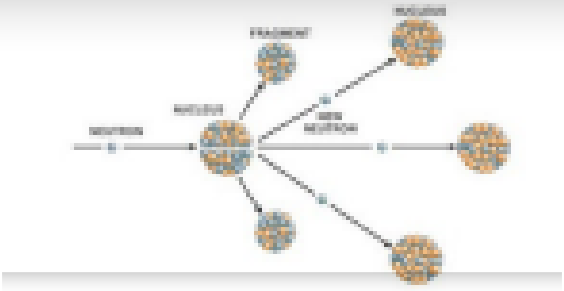
Nuclear fission is the process by which the nucleus of an atom splits into two or more smaller nuclei and other particles. These particles can include neutrons, alpha particles (helium nuclei), beta particles (electrons), and gamma rays (particles of light, or photons). Fission was discovered in 1938 by Otto Hahn, Lise Meitner, and Fritz Strassmann by bombarding elements with neutrons. It was soon realized that neutrons released by a fissioning nucleus could, under the correct conditions, induce fissions, or a nuclear reaction, in nearby nuclei; thus, initiating a self-sustaining chain reaction. Today's nuclear power plants use the resultant heat to boil water and drive steam turbines to make power/electricity.

Notwithstanding the military nature of the first nuclear reactors, there was strong optimism within the 1940-50's that nuclear power could provide inexpensive and endless energy. About 100-Kw of electricity was generated for the first time by a nuclear reactor in 1951, at the EBR-I experimental station near Arco, Idaho.

The U. S. Navy was first to develop practical nuclear power with the S1W reactor for propelling submarines and aircraft carriers. The first nuclear-powered submarine, USS NAUTILUS, put to sea in 1954; ultimately, the Navy produced over 230 nuclear-powered vessels. The S1W reactor was a pressurized water reactor (PWR); the design was chosen because it was simpler, more compact, and easier to operate compared to alternative designs. This decision would result in the PWR being the reactor of choice also for power generation; thus, having a lasting impact on the civilian electricity market.

Less than a year after the launch of the NAUTILUS, as part of the Atoms for Peace initiative, President Eisenhower announced the development of a nuclear-powered merchant ship, the NS SAVANNAH. Put to sea in August of 1962, SAVANNAH had a PWR similar to that of the NAUTILUS, the key difference being that SAVANNAH used 4% enriched uranium for fuel. Of the 9-years of service, 6-years were spent as a cargo vessel, generating over $12,000,000 in revenue. In 1971, the Maritime Administration concluded that there was nothing more to be gained from investing in the SAVANNAH project, and the vessel was decommissioned.

In the 60's and 70's, other experimental nuclear-powered vessels were constructed. The German OTTO HAN and the Japanese MUTSU proved successful, but had their reactor systems deactivated due to operating costs. Current projects like HD Hyundai's 15,000-TEU, 24-knot, nuclear-powered containership (HD KSOE) anticipate utilizing Small Modular Reactors (SMRs) to help advance maritime decarbonization. The concept SMRs have a power capacity of up to 300-MW(e) per unit. Prefabricated



units of SMRs can be manufactured and then shipped and installed on site, making them more affordable to build; even utilizing low-enriched fuel, the projected refueling interval is every 3 to 7-years; comparable to vessel docking intervals. The vessel concept incorporates a supercritical CO2-based power generation system, which can provide higher thermal efficiency and a reduced equipment footprint. The design has received Approval in Principle (AiP) by DnV.

In addition to the SMR design, other revolutionary designs are being considered for marine application. The Xe-100 is a high-temperature gas-cooled reactor. This groundbreaking reactor operates continuously and can withstand temperatures exceeding 7500 Celsius. Central to the Xe-100 is a multitude of fuel pebbles, each resembling a billiards ball in size. These pebbles are meticulously embedded with 18,000-'trisoparticles', where each particle contains a minute uranium kernel enveloped by three carbon layers, ensuring that over 99% of byproducts are contained. This ingenious fuel arrangement leads to significantly reduced external containment, as the trisofuel itself acts as a containment vessel. The reactor system employs a process wherein fuel pebbles are gravity-fed and continuously rotated through the core, enabling uninterrupted operation. Helium circulates within the core, absorbing immense quantities of heat without undergoing radioactivity.

Classification societies and international regulatory bodies are maneuvering smartly to examine designs. In addition to DnV's AiP of the HD KOSE container ship, ABS has also granted an AiP to Hyundai Heavy Industries for their floating SMR-powered module concept. India's Bhabha Atomic Research Center (BARC) is developing two-SMR designs of 55-MWe and 200- MWe capacities. Within the last month, the US Coast Guard has stood up the Maritime Nuclear Policy Division. The Division will serve as the Coast Guard's central contact to develop and implement policies governing the safe and secure integration of nuclear technology into the Marine Transportation System.